

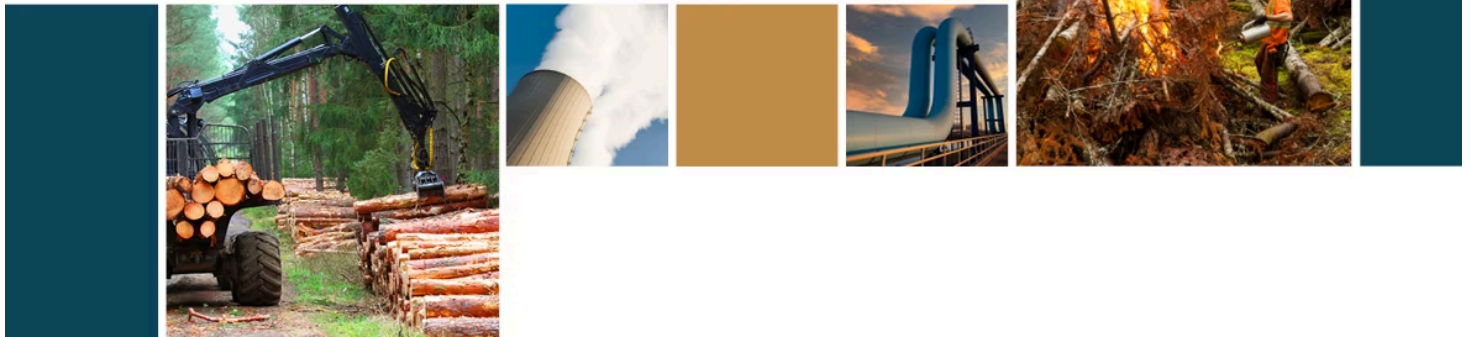
Understanding NEPA Litigation

A Systematic Review of Recent NEPA-Related Appellate Court Cases

UNDERSTANDING NEPA LITIGATION

A SYSTEMATIC REVIEW
OF RECENT NEPA-RELATED
APPELLATE COURT CASES

BREAKTHROUGH
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Executive Summary

Ongoing permitting reform debates in Washington, DC, have mostly orbited around the National Environmental Policy Act (NEPA). A procedural environmental regulatory “umbrella law,” NEPA creates significant and complex requirements for all major infrastructure projects and federal activities affecting the environment.

impact statement (EIS) or an environmental assessment (EA). Alternatively, simpler projects can be afforded a categorical exclusion (CE) which fast-tracks the review process. After permits are granted through these review mechanisms, they may be challenged in the judicial system. The courts then have the authority to reaffirm, bolster, or otherwise improve the project plan to prevent or limit environmental damage. Of course, lawsuits to challenge EISs, EAs, and CEs necessarily extend project timelines. Particularly in the wake of the Infrastructure Investment and Jobs Act (2021), the Inflation Reduction Act (2022), and the CHIPS and Science Act (2022), federal policymakers and policy advocates have drawn increased attention to the regulatory burden and delay imposed by this judicial review.

However, the NEPA litigation debate has suffered from a deficit of empirical evidence. Our analysis helps fill this knowledge gap, documenting and sorting hundreds of NEPA litigation cases to assess trends, patterns, and impacts on various types of major infrastructure projects.

Breakthrough Institute analysts, in collaboration with legal experts at Holland & Knight, compiled and analyzed 387 NEPA cases brought to the U.S. appellate court system over the 2013-2022 period and categorized them by project type, environmental review, length of judicial review, federal agency, and plaintiff. Our results indicate that NEPA litigation overwhelmingly functions as a form of delay, as most cases take years before courts ultimately rule in favor of the defending federal agency.

As Congress deliberates reforms to NEPA, it is essential that policymakers recognize the degree to which the legal status quo prioritizes procedure over outcomes. To enable more effective environmental review, reforms should minimize the potential for extended, unproductive legal battles while still promoting the fair assessment of environmental impacts.

Key findings:

- Between 2013 and 2022, circuit courts heard approximately 39 NEPA appeals cases per year, a 56% increase over the rate from [2001 to 2015](#).
- Agencies won about 80% of the 2013-2022 appeals cases, 11% more per year than from [2001 to 2004](#), 8% more than from [2001 to 2008](#), and 4% less than from [2009 to 2015](#). The rate at which agencies' reviews are upheld is high, meaning these environmental reviews are seldom change as a result of litigation.

appellate level. Of these appealed cases, 84% were closed less than six years after the contested permit was published, and 39% were closed in less than three.

- Among the challenges, 42% contested environmental impact statements, and 36% contested environmental assessments. Agencies won about 80% of challenges to both.
- NGOs instigated 72% of the total challenges. Of those, just 10 organizations initiated 35% and had a success rate of just 26%, merely 6% higher than the average for all types of plaintiffs.
- Only 2.8% of NEPA litigations pertained to agency assessment of environmental justice issues.
- Public lands management projects were the most common subject of litigation (37%), the greatest share of which (47%) challenged forest management projects. Just 10 groups filed 67% of the challenges to forest management projects and collectively won only 23% of those cases, adding 3.7 years on average to the process of implementing the 77% of projects on cases they lost.
- Energy projects were the second most common subject of litigation (29%). Litigation delayed fossil fuel and clean energy project implementation by 3.9 years on average, despite the fact that agencies won 71% of those challenges. NGOs filed 74% of energy cases, with just 10 organizations responsible for 48% of challenges.

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