Written Testimony of Andrew C. Mergen,
Emmett Environmental Law & Policy Clinic, Harvard Law School, Cambridge, Massachusetts
Before the U.S. House of Representatives, Committee on Natural Resources,
July 22, 2025
Hearing on "Permitting Purgatory: Restoring Common Sense to NEPA Reviews"

Thank you, Chairman Westerman, and Ranking Member Huffman, for the opportunity to testify today. My name is Andrew Mergen. I am the Emmett Visiting Assistant Clinical Professor of Law at Harvard Law School where I serve as the faculty director of the Emmett Environmental Law and Policy Clinic. I do not testify on behalf of Harvard Law School and the views I express are my views and do not necessarily reflect the views of my institutions. My testimony today reflects my own research as well as my experience with the National Environmental Policy Act (NEPA). Prior to law school, I worked for the Bureau of Land Management (BLM) in the Lander Field Office in Wyoming. Lander was my first exposure to NEPA, and it was there I learned how NEPA reviews are conducted on the ground and how the NEPA process relates to other environmental laws as well as the statutory mission of BLM. In Lander, I saw how diligently agency staff worked on NEPA documents and how important adequate staffing and resources were to the effective management of public lands.

Upon graduating from law school, I joined, through the Honors Program, the Environment & Natural Resources Division of the United States Department of Justice (DOJ). As an attorney at DOJ, I read hundreds of NEPA documents and defended in court many challenges to a wide variety of agency activities and infrastructure projects. I defended a NEPA challenge to Navy Training operations[1] as well as challenges to the Atlantic Coast Pipeline[2] and the Dakota Access Pipeline.[3] Although I have firsthand knowledge of the delays that projects can suffer because of environmental litigation, it is my opinion that NEPA does not warrant further amendment. To the contrary, the statute's reputation as a source of delay is exaggerated and recent developments will facilitate prompt NEPA compliance. Moreover, the statute has long promoted an engaged citizenship whose comments have ensured that the environmental harms associated with certain actions are avoided and/or mitigated -- all without delay or frustrating project goals. Combined with an agile, trained, and fully equipped work force, NEPA is poised to function as Congress intends to "maintain conditions under which man and nature can exist in productive harmony."[4]

[1] Winter v. NRDC, 555 U.S. 766 (2008).
[2] United States Forest Service v. Cowpasture River Assoc., 590 U.S. 604 (2020).
[3] Standing Rock Sioux v. U.S. Army Corps of Engineers, 985 F.3d 1032 (D.C. Cir. 2021).
[4] 42 U.S.C. 4331(a).

I. NEPA 2025: Developments in NEPA Law make further legislative efforts unnecessary.

NEPA legislative reform at this juncture is premature. Recent legislative and judicial developments, including The Fiscal Responsibility Act of 2023,[5] the 2025 budget reconciliation bill,[6] and the Supreme Court's decision in *Seven County Infrastructure Coalition v. Eagle County*,[7] have already notably altered NEPA's implementation. Although these changes were intended to address frustrations with NEPA these reforms have not been in place long enough to understand their effect, but they will undoubtedly promote efficiencies. Further legislative efforts are therefore currently unnecessary.

A. The Fiscal Responsibility Act of 2023

The Fiscal Responsibility Act of 2023 (FRA) marked the first significant amendment of NEPA since its enactment.[8] Among other changes, this amendment created timelines for environmental review; instituted page limits for the required documents; established a lead agency role to centralize decision making; allowed project sponsors to prepare environmental review documents; and expanded agency authority to create categorical exclusions.[9] These reforms reflected years of work by Congress to improve NEPA and were the culmination of multiple legislative efforts.[10] Notably, some agencies only recently announced their rules implementing the FRA NEPA provisions[11] while others are still working through the rulemaking procedures. As a result, the full effect of the FRA on federal permitting remains unclear.

B. 2025 Budget Reconciliation Bill

Similarly, the recently passed 2025 budget reconciliation bill included the NEPA "pay to play" provision, which was intended to further ease access to streamlined permitting for project sponsors.[12] It allows sponsors to pay a fee and thereby guarantee expedited review of their environmental assessment. Environmental impact statements (EIS) will be completed in one year under this schema while environmental assessments (EAs) are expected to take 180 days.[13] Proponents argued that this amendment will increase the efficiency of the permitting process, but this bill was signed into law mere weeks ago and it's therefore not yet known if it will achieve this end.[14]

---

[5] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10 (2023).
[6] Pub. L. No. 119-21, 139 Stat. XX (2025).
[7] *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. ___ (2025).
[8] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5.
[9] *Id.*
[10] e.g., BUILDER Act of 2021, H.R. 2515, 117th Cong. (2021); NEPA State Assignment Expansion Act, H.R. 4336, 117th Cong. (2021).
[11] e.g., U.S. Dep't of Energy, Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29676 (July 3, 2025); Fed. Energy Regulatory Comm'n, *Removal of References to the Council on Environmental Quality's Rescinded Regulations*, 90 Fed. Reg. 29423 (July 3, 2025).
[12] Pub. L. No. 119-21, § 60026.
[13] *Id.*
[14] e.g., S. Comm. on Env't & Pub. Works, *Chairman Capito Supports Passage of Republican Reconciliation Bill* (July 1, 2025), https://www.epw.senate.gov/public/index.cfm/2025/7/chairman-capito-supports-passage-of-

C. Seven County Infrastructure Coalition v. Eagle County, Colorado

Finally, three key aspects of the Supreme Court's recent decision in *Seven County Infrastructure Coalition v. Eagle County* will alter NEPA by limiting judicial review and narrowing the scope of environmental analysis. First, the Court emphasized that "when determining whether an agency's EIS complied with NEPA, a court should afford substantial deference to the agency."[15] This deference restricts the scope of future judicial review of NEPA. Second, the Court limited the need to consider effects that are "separate in time or place" and those that are "initiated… by third parties."[16] By constraining the breadth of effects that must be considered during environmental review, proponents of the Court's stance argue that federal agencies will be able to hasten such review.[17] Finally, the court emphasized that "NEPA is a procedural cross-check, not a substantive roadblock,"[18] and as such, "[e]ven if an EIS falls short in some respects, that deficiency may not necessarily require a court to vacate the agency's ultimate approval of a project."[19] This language clarifies that judges are not obligated to impose injunctions when NEPA is violated, which has previously been illustrated in cases like the high-profile conflict over the Dakota Access Pipeline, where the D.C. Circuit ultimately denied injunctive relief against the pipeline.[20] As demonstrated in the *Standing Rock* case, the principle the Court articulated will allow judges the flexibility to enjoin projects only when the violations of NEPA truly justify such relief.

Once again, these are recent changes, and their full effects on EIS scoping and the pace of judicial review are yet unknown. Until the impact of these reforms is more completely understood, additional legislative work on NEPA will not be able to accurately target any extant deficiencies in the policy.

II. NEPA is Rarely the Source of Permitting Delay

Environmental law is notoriously complex. There are many reasons for this complexity but, as Professor Richard Lazarus has observed, the dominant reasons are, first, that the workings of the ecosystem itself are complicated and, second, that the highly industrialized economy, whose activities environmental law targets is complicated.[21] At the same time, while environmental law is complicated, NEPA is a deceptively simple statute. NEPA is a "look before you leap" statute that requires that the decisionmaker and the public be informed of the environmental consequences of an action. The statute is

---

republican-reconciliation-bill ("Included in this bill are provisions I worked to craft through the EPW Committee that will… create more efficiency for infrastructure investments into our communities.").

[15] *Seven County*, slip op. at 9.

[16] *Id.* at 15.

[17] e.g., WilmerHale, *Supreme Court Decision in Seven County Advances Permitting Reform* (June 9, 2025), https://www.wilmerhale.com/en/insights/client-alerts/20250609-supreme-court-decision-in-seven-county-advances-permitting-reform ("These holdings have the potential to enable federal agencies to conduct more focused and timely environmental analyses under NEPA.").

[18] *Seven County*, slip op. at 2.

[19] *Id.* at 14.

[20] *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1050 (D.C. Cir. 2021).

[21] R. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2D ED.) 25 (2023).

procedural. It does not require that an agency make the best decision for the environment, but it does compel informed decision-making and, notably, it has historically applied to many agency decisions. [22]

Because NEPA applies to a wide range of agency decisions it serves as a platform for a wide range of litigation. And because NEPA applies to a wide range of federal activities it also shoulders the bulk of the blame for permitting delays. But, according to the Congressional Research Service, "[m]ost agencies use NEPA as an umbrella statute—that is, a framework to coordinate or demonstrate compliance with any studies, reviews, or consultations required by any other environmental laws."[23] Ironically, this coordinating role can lead NEPA to be blamed for project delays when the procedures necessary to comply with other laws were in fact to blame.[24]

But often, as several recent studies suggest, the coordinating framework provided by NEPA facilitates decision making.[25] Environmental reviews are designed to expose preventable environmental impacts through effective redesign or engineering that avoids, reduces, or mitigates impacts.[26] By exposing avoidable impacts, NEPA procedures can reduce project development times and costs by identifying mitigation options before a project is implemented. A study for the Transportation Research Board emphasized this role of NEPA procedures: "[s]pending more monies during planning and design will reduce the time and cost required for construction by avoiding unforeseen conditions, reducing to a minimum design errors and omissions, and developing schemes that will support the most efficient approach to construction."[27] The focus on NEPA procedures in isolation ignores the time-saving gains that are often achieved at other stages of the development process.

---

[22] Some of the discussion in this section is drawn from an article I co-authored, David E. Adelman et al. *Dispelling the Myths of Permitting Reform and Identifying Effective Pathways Forward*, 55 ELR 10038 (Jan/Feb 2025); https://www.eli.org/sites/default/files/files-pdf/55.DispellingTheMyths.pdf.

[23] CONGRESSIONAL RESEARCH SERVICE, RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): BACKGROUND AND IMPLEMENTATION 1 (2011).

[24] *Id*.; *see also* John C. Ruple et al., *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, 46 COLUM. J. ENV'T L. 273, 317-22 (2022) (exploring this dynamic with the National Forest Management Act).

[25] John C. Ruple et al., *Does NEPA Help or Harm ESA Critical Habitat Designations? An Assessment of Over 600 Critical Habitat Rules*, 46 ECOLOGY L.Q. 829, 842 (2019) (finding that critical habitat designations subject to NEPA review were completed an average of 93 days faster than those that were not subject to NEPA review).

[26] Mark C. Capone & John C. Ruple, *NEPA and the Energy Policy Act of 2005 Statutory Categorical Exclusions: What Are the Environmental Costs of Expedited Oil and Gas Development?*, 18 VT. J. ENV'T L. 371, 391-93 (2017) (finding that oil and gas wells that utilized a statutory categorical exclusion (CE) rather than a more rigorous environmental analysis had significantly greater environmental impacts, in part because piecemeal approvals led to inefficient well-pad and road construction).

[27] LINDA LUTHER, CONGRESSIONAL RESEARCH SERVICE, R42479, THE ROLE OF THE ENVIRONMENTAL REVIEW PROCESS IN FEDERALLY FUNDED HIGHWAY PROJECTS: BACKGROUND AND ISSUES FOR CONGRESS 36 (2012) (citing H. RANDOLPH THOMAS & RALPH D. ELLIS, NATIONAL RESEARCH COUNCIL, AVOIDING DELAYS DURING THE CONSTRUCTION PHASE OF HIGHWAY PROJECTS (2001) (NCHRP 20-24)).

Prior permitting reform efforts have targeted other federal environmental statutes, such as the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), and Clean Water Act (CWA) wetland protections under §404, and lumped them together with NEPA as major barriers to rapid deployment of renewables and other green infrastructure.[28] This lumping fails to appreciate the practical differences between these statutes. NEPA and the NHPA, for example, are purely procedural; others, like the ESA, have both substantive and procedural requirements. These statutes are categorically different and present fundamentally different regulatory challenges.

The debate over permitting reform presumes that deregulation is a global solution. Yet, "permitting" covers an extraordinarily broad range of infrastructure and resource development projects that are constructed in divergent geographic and legal settings. For example, the regulatory programs (local, state, and federal) applicable to a large solar project on private land in Texas are very different than those for a copper mine on public land in Arizona. The nature and severity of environmental impacts, and the degree to which they can be mitigated, differ in magnitude and type, as does the jurisdiction of federal environmental laws.

Broadly speaking, the relative importance of federal versus state and local laws is often determined by whether a project is located on federal or private land—if the former, federal laws control; if the latter, state, and local laws are often most important. Thus, federal environmental reviews and permits are nearly unavoidable for most copper mines in Arizona, but most solar projects in Texas do not require either. In other words, the nature and setting of a project are critical to whether and how federal laws will apply. And infrastructure projects routinely fail for reason having nothing to do with NEPA.

Consider the story told in Amy Gamerman's recent book, *The Crazies: The Cattlemen, The Wind Prospector & War Out West* (2025). Gamerman, a reporter for the Wall Street Journal, recounts an epic tale of a private landowner seeking to develop wind power on his *private* property but in the end the landowner is unable to move forward with his project. The project is stymied by local opposition but not by NEPA or some other federal environmental law. Likewise, a paper by Professor David Adelman of the

[28] *See*, *e.g.*, Nikki Chiappa, *NEPA Nightmares: Tales From the Litigation Doom Loop*, BREAKTHROUGH INST. (Aug. 28, 2024), https://thebreakthrough.org/journal/no-20-spring-2024/nepa-nightmares (arguing that the "National Environmental Protection [sic] Act" is a "major source of delay" but discussing a project implicating both NEPA and CWA §404); Nikki Chiappa & Elizabeth McCarthy, *NEPA Nightmares II: The North Sky River Wind Energy Project*, BREAKTHROUGH INST. (Sept. 11, 2024), https://www.breakthroughjournal.org/p/nepa-nightmares-ii-the-north-sky?utm_source=publication-search (same, but discussing a project implicating both NEPA and the ESA, as well as several state statutes).

University of Texas Law School has shown that localized factors result in delays in green energy and that streamlining mechanisms as opposed to permitting reform can address these concerns.[29]

Even when NEPA is directly implemented it rarely causes significant delays. NEPA applies broadly—to all "major Federal actions significantly affecting the quality of the human environment."[30] However, the rigor of the analysis and disclosures required depend on the significance of a project's impacts.[31] Only projects with significant impacts require rigorous review under an EIS.[32] Empirical studies have long found that EISs are required in only about 1% of the federal actions subject to NEPA.[33] The number of EISs issued annually has also fallen for decades, from more than 2,000 in the 1970s, to roughly 600 in the 1990s, to fewer than 200 in the 2020s.[34]

All other federal actions are subject to less burdensome reviews.[35] If a project does not have significant impacts, an environmental assessment (EA) and accompanying "finding of no significant impact" (FONSI) will suffice.[36] Developers often alter projects (or adopt mitigation measures) to reduce impacts below the level of significance that would require an EIS.[37] Categorical exclusions (CEs), the other streamlined process, exempt general "categories of actions which do not individually or cumulatively have a significant effect on the environment."[38]

When a CE is applicable, the review process is limited to a cursory analysis to ensure that a project fits within the defined exclusion and that no "extraordinary circumstances" exist that could cause significant impacts.[39] Thousands of CEs have been promulgated under agency regulations across the

---

[29] David E. Adelman, *Permitting Reform's False Choice*, 51 ECOLOGY L.Q. 129 (2024).
[30] 42 U.S.C. §4332(2)(C).
[31] *Id*. §4336(b); 40 C.F.R. §1501.3 (2022).
[32] 40 C.F.R. §1502.1 (2022).
[33] GOVERNMENT ACCOUNTABILITY OFFICE (GAO), GAO-14-370,NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 8 (2014) 8-9 (estimating that 94% of federal actions were under CEs and about 5% require an environmental assessment (EA)); *see also* COUNCIL ON ENVIRONMENTAL QUALITY (CEQ), THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 19 (1997) (estimating that the number of EAs prepared annually was closer to 50,000).
[34] Adelman, *supra* note 27, at 139.
[35] 40 C.F.R. §1501.5 (describing EAs, which are required for projects that are not likely to have significant effects or where the significance is unknown); *id*. §1501.4 (describing CEs). Recent amendments to NEPA, adopted through the Fiscal Responsibility Act, incorporated these two practices (EAs and CEs) directly into the statute. 42 U.S.C. §106(b).
[36] 40 C.F.R. §1508.9 (1978).
[37] Daniel R. Mandelker, *New Directions in Environmental Law: The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH U. J. L. & POL'Y 293, 298 (2010).
[38] 40 C.F.R. §1508.4 (1978).
[39] *Id*.

federal government.[40] For the streamlined EA and CE processes, the average completion times are estimated to be one to 1.5 years, and one to two days to half a year, respectively.[41]

Finally, NEPA litigation is not often the cause of delay in the construction of infrastructure. To be sure, high-profile "impact" litigation has been a staple of environmental advocacy since the 1960s, and it has recently overshadowed the debate over permitting reform. Many of the most celebrated environmental victories have involved lawsuits to delay or stop the construction or operation of major facilities, infrastructure, and resource extraction projects.[42] Notable examples include the famous "snail darter" cases against the Tellico Dam in Tennessee,[43] the landmark "spotted owl" litigation that shut down logging in the Pacific Northwest,[44] and climate litigation against fossil fuel infrastructure.[45]

It is therefore no surprise that proponents of permitting reform believe that NEPA, and other "look before you leap" statutes must be weakened if infrastructure projects are to proceed without delay.[46] And their warnings are not merely speculative, as the notorious Cape Wind example demonstrates.[47] Recent

---

[40] CEQ, *Categorical Exclusions*, https://ceq.doe.gov/nepa-practice/categorical-exclusions.html (last visited Dec. 5, 2024) (providing a link to download a central database of CEs organized by agency and available in an excel spreadsheet). Other CEs are created by statute. The Healthy Forests Restoration Act, 16 U.S.C. §6554(d)(1), and the Energy Policy Act, 42 U.S.C. §15942, for example, both created statutory exemptions, and Congress is frequently urged to create others. One downside to this approach is that Congress may lack the expertise to say with certainty that the excluded action is without environmental significance—the appropriate standard for issuance of a CE. Regulatory CEs, by contrast, are intended to reflect the issuing agency's real-world expertise.

[41] CEQ, *supra* note 28, at 19 (these numbers include draft, revised, supplemental, and final EISs).

[42] Ezra Klein, *Government Is Flailing, in Part Because Liberals Hobbled It*, N.Y. TIMES (Mar. 13, 2022), https://www.nytimes.com/2022/03/13/opinion/berkeley-enrollment-climate-crisis.html; Klein, *supra* note 3 (using the history of environmental activism to argue that there is "an entire branch of liberalism . . . dedicated to criticizing and then suing and restraining government").

[43] Zygmunt J.B. Plater, *Endangered Species Act Lessons Over 30 Years, and the Legacy of the Snail Darter, a Small Fish in a Pork Barrel*, 34 ENV'T L. 289, 293-94 (2004) (describing the snail darter case as an "extraordinary legal marker . . . in the development of . . . environmental law").

[44] William H. Rodgers Jr., *The Most Creative Moments in the History of Environmental Law: "The Whats,"* 2000 U. ILL. L. REV. 1, 21-22 (2000) (quoting the lead attorney's characterization of the case as "unprecedented in its geographic scope, diversity of legal theories, political controversy, and effective ecological impact").

[45] James W. Coleman, *Pipelines & Power-Lines: Building the Energy Transport*, 80 OHIO ST. L.J. 263, 279-80 (2019) (describing the litigation against gas and oil pipelines under several environmental laws); Michael Grunwald, *Inside the War on Coal*, POLITICO (May 26, 2015), https://www.politico.com/agenda/story/2015/05/inside-war-on-coal-000002/ (describing the Sierra Club's litigation campaign, which was largely funded by Michael Bloomberg).

[46] *See*, *e.g.*, NIKKI CHIAPPA ET AL., BREAKTHROUGH INSTITUTE, UNDERSTANDING NEPA LITIGATION: A SYSTEMATIC REVIEW OF RECENT NEPA-RELATED APPELLATE COURT CASES 2 (2024) (asserting 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").

[47] Public Emps. for Env't Resp. v. Hopper, 827 F.3d 1077, 1090 (D.C. Cir. 2016) (vacating Cape Wind Project's EIS and incidental take statement).

litigation against lithium mines in Nevada and the SunZia interstate transmission line in the Southwest provide further support for this narrative.[48]

But notably, these cases occurred before the NEPA amendments enacted by Congress in the FRA and before Supreme Court's decision in *Seven County Infrastructure Coalition v. Eagle County.* And even before these significant developments many large infrastructure projects were able to avoid litigation delays. During my time at DOJ, I supervised litigation involving challenges to airport infrastructure. Airport infrastructure projects are always controversial because of the noise impacts to surrounding communities. Experience finds that such litigation is rarely a significant source of project delay. Representative cases involving projects at Dallas Fort Worth International Airport, Seattle-Tacoma International Airport, Albuquerque International Airport, and Los Angeles International Airport all ultimately proceeded without court-ordered delay.[49] Permit reform advocates tend to overlook this experience when they claim that federal permitting offers powerful legal hooks for would-be litigants to delay or halt projects. In practice, many large infrastructure projects do not become mired or delayed in litigation.[50]

What accounts for these seemingly incongruous outcomes? In part, this success reflects the efficacy of agencies' permitting processes, which result in material changes to projects that both mitigate their harmful effects and make them difficult targets for lawsuits. A well-funded and well-trained set of permitting specialists can make an enormous difference to permitting programs.

Well-funded agencies can and do effectively address public concerns and objections. Concerns about airport projects, for example, are driven by noise impacts. Building on decades of experience and expertise, The Federal Aviation Administration (FAA) has a standardized procedure for assessing noise levels and mitigating them.[51] The FAA has also developed effective measures for supporting local

---

[48] Alana Semuels, *Is Your Electric Car Worth the Extinction of a Species?*, TIME (Apr. 27, 2023), https://time.com/6274915/lithium-mining-us-tiehms-buckwheat/; Scott Sonner, *9th Circuit Denies Bid by Environmentalists and Tribes to Block Nevada Lithium Mine*, AP NEWS (July 17, 2023), https://apnews.com/article/nevada-thacker-pass-lithium-mine-4ad772a6940eb8edd507b50a179202f2.

[49] *See* City of Grapevine, Tex. v. Department of Transp., 17 F.3d 1502 (D.C. Cir. 1994) (Dallas-Fort Worth); City of Normandy Park v. Port of Seattle, 165 F.3d 35 (9th Cir. 1998) (Sea-Tac); Airport Neighbors of All. v. U.S. Dep't of Transp., 90 F.3d 426 (10th Cir. 1996) (Albuquerque); Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569 (9th Cir. 1998) (LAX).

[50] *See*, *e.g.*, LUTHER, *supra* note 25, at 27 (noting that despite the concern about environmental litigation delaying transportation projects, the actual rate of lawsuits filed annually against the Federal Highway Administration was low); John C. Ruple & Kayla Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 ENV'T L. 479 (2020) (finding that only a small percentage—roughly 1 out of 450—NEPA decisions are challenged through litigation).

[51] Andrew Mergen, *The Changing Nature of Airport Environmental Litigation*, 18 AIR & SPACE LAW. 1 (2004).

participation.[52] The legitimacy of these agency processes carries dividends in federal court. Judges reviewing agency permits and environmental reviews for major infrastructure projects are often reticent to fly speck agency decisions and reasoning.[53] They are also aware that transportation infrastructure serves the public and should not be subject to a heckler's veto.[54] In short, courts are reluctant to intercede where the agency has considered public comments.

III. Federal Agencies Can Promote Sound NEPA through Public Comment, Capacity, Computing and Technology but the Regulatory Confusion Must End.

While, as noted above, recent actions by Congress should expedite permitting, the Trump Administration's dismantling of the existing regulatory regime is certain to delay permitting, create interagency friction, and increase litigation risk.

In February, the Council on Environmental Quality (CEQ), which administers NEPA, published an interim final rule rescinding its prior rules implementing NEPA.[55] And earlier this month a slate of federal agencies issued a mishmash of regulations and guidelines that varied widely.[56] The problem with discordant agency policies for project proponents is that complicated activities like mines and pipelines are likely to need approvals from multiple agencies. The CEQ centralized regulations ensured that agency regimes were not at cross-purposes. Moreover, regulations as opposed to guidelines are likely to earn more respect from courts, but some agencies now prefer to rely on guidance which courts will treat more skeptically. A regulatory hodgepodge will create litigation risk. As the Congressional Research Service recently observed "[l]itigation based on inconsistent NEPA implementation was one of the reasons CEQ cited for originally implementing regulations instead of guidance."[57] Finally, all the recent regulatory regimes reduce public participation in a manner that departs from settled law and practice. This too creates litigation risk and deprives the government of important information.

---

[52] Communities Against Runway Expansion, Inc. v. Federal Aviation Admin., 355 F.3d 678, 690 (D.C. Cir. 2004) (noting fair consideration given to local interests).
[53] *See*, *e.g.*, City of Olmstead Falls, Ohio v. Federal Aviation Admin., 292 F.3d 261, 273 (D.C. Cir. 2002).
[54] *See* State of N.C. v. Federal Aviation Admin., 957 F.2d 1125, 1134 (4th Cir. 1992) (explaining that the heckler's veto plays no role in the review of NEPA analyses).

[55] Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (Feb 25, 2025).
[56] https://legal-planet.org/2025/07/07/adding-more-confusion-to-nepa-implementation/
[57] Congressional Research Service, IF12960, Council on Environmental Quality Rescinds NEPA Regulations: Legal and Policy Considerations (2025), https://www.congress.gov/crs_external_products/IF/PDF/IF12960/IF12960.1.pdf. See also, John C. Ruple, Justin Pidot, and Jamie Pleune, *The Trump Administration's Self-Inflicted Problem: Why Repealing CEQ Regulations Will Delay Infrastructure and Energy Development*, *Forthcoming* 55 ELR July/August 2025.

Regulatory measures coming from the Department of the Interior are particularly alarming. In early May, the Department of the Interior released its "alternative arrangements" for NEPA implementation when approving leases and plans of operations for energy projects, invoking President Trump's declaration of a national energy emergency.[58] Those procedures prescribe completion of EAs within 14 days, with no opportunity for public comment. They prescribe that EISs for energy projects that are major federal actions with significant impacts must be completed within 28 days, with no draft EIS for public review and no opportunity for public comment except for a 10-day period offered concurrently with the 28-day document preparation period, (apparently to comply with NEPA §107(c)).[59]

So-called "alternative arrangements" have been part of CEQ's regulatory framework, but they have largely been deployed to address circumstances arising from natural and manmade disasters, disease, pestilence, and military operations.[60] To expand alternative arrangements in this manner is to invite litigation since reviewing courts are quick to disregard departures from past agency practice.[61] Moreover, the curtailment and/or elimination of public participation runs afoul of the 2023 amendments to NEPA 107(g)(3) which contemplates agency interdisciplinary EISs processes extending up to two years, and EAs up to a year, underscoring a commitment to public engagement.

The Trump Administration's efforts to limit public participation is ill-conceived not just as a matter of law but as a matter of policy. The opportunity for public comment and participation historically provided in the NEPA process leads to better and more informed decision making. When the BLM or the Forest Service is taking an action that may affect ranchers with grazing allotments on the same land managed by these agencies it is important to hear from these stakeholders not just out of fairness but also because they may know things that the agency does not. In addition, many projects on public lands implicate the interests of federally recognized Indian Tribes. Consultation with these communities is a hallmark of our government-to-government relationship with the Tribes. Certain projects, like transportation and energy infrastructure, have the potential to impact both wealthy and economically disadvantaged communities. Rigorous public participation processes ensure that the wealthy and connected don't run roughshod over

---

[58] alternative-arrangements-nepa-during-national-energy-emergency-2025-04-23-signed_1.pdff; https://www.eli.org/vibrant-environment-blog/goodbye-public-participation.

[59] NEPA 107(c) provides that: "Each notice of intent to prepare an environmental impact statement under section 102 shall include a request for public comment on alternatives or impacts and on relevant information, studies, or analyses with respect to the proposed agency action."

[60] Emergencies and the National Environmental Policy Act Guidance, 85 Fed. Reg. 60137 (9/24/2020); https://ceq.doe.gov/docs/nepa-practice/Alternative_Arrangements_Chart_051419.pdf

[61] The Supreme Court has recently explained that it is considered, and consistent Executive Branch practice that is entitled to respect. Loper Bright Enterprises v. Raimondo, 603 U. S. 369, 394 (2024); see also Bondi v. VanDerStok, 604 U. S. ___, ___–___ (2025) (slip op., at 20– 21).

rural, poor and other disadvantaged communities. It also ensures that decision makers are apprised of the cumulative impacts that can cause socioeconomically vulnerable populations to have greater exposure to environmental threats.

An important recent paper by University of Arizona researchers shows how public participation has informed and substantively altered agency NEPA decision making.[62] The paper poses two questions central to our understanding of the statute. First, does public participation impact the outcomes of environmental reviews? And second, are the changes driven by participation substantive?[63] In the authors' eyes, these questions drive at "NEPA's fundamental hypothesis about the value of public comment."[64] Although much of the previous scholarship on this topic centers on the procedural effectiveness of participation,[65] examining whether agencies comply with procedural requirements when soliciting comment, this article seeks to understand the substantive effectiveness, that is whether comments meaningfully alter the proposals.[66] In this way, the paper empirically addresses critics who argue that public participation under NEPA is not worth the time and cost.[67]

The paper concludes that public participation significantly and substantively alters agency EISs. From the 108 EISs that they studied, 64% were changed based on public comment.[68] This proportion was similar across agencies.[69] In 45 of the EISs in their sample, agencies modified their mitigation plan, and in 21 EISs, the agency chose a new preferred alternative. In every one of these instances, the agency cited public comments as the reason for the alteration.[70] Not only did participation drive change, but it drove *substantive* change. The change was identified as substantive in 62% of the cases where public participation modified the final EIS.[71] Although the authors acknowledge that public comment could, at

---

[62] Ashley Stava et al., *Quantifying the Substantive Influence of Public Comment on United States Federal Environmental Decisions under NEPA*, 20 ENV'TL. RES. LETT. 074028 (2025), https://doi.org/10.1088/1748-9326/addee5.

[63] *Id.* at 3.
[64] *Id.*
[65] *Id.* at 2 (citing John Loomis & Marissa Dziedzic, Evaluating EIA Systems' Effectiveness: A State of the Art, 68 ENV'T IMPACT ASSESSMENT REV. 29 (2018).)
[66] *Id.*
[67] *Id.* at 6 (citing Diane Katz, *Time to Repeal the Obsolete National Environmental Policy Act (NEPA)*, Heritage Found. Backgrounder No. 3303 (Feb. 5, 2018), https://www.heritage.org/government-regulation/report/time-repeal-the-obsolete-national-environmental-policy-act-nepa; and Mark Funkhouser, *The Failure and the Promise of Public Participation*, *Governing* (Jan. 5, 2014), https://www.governing.com/gov-institute/on-leadership/col-failure-promise-public-participation-government.html.)
[68] *Id.* at 3.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 4.

times, be a pretextual justification for alterations,[72] they conclude that these results "provide support for the notion that public comments can substantively affect agency decisions."[73]

The Arizona study shows that the public can help guide agency decision making to the "productive harmony" the statute intends. Agency resources are also crucial to obtaining that harmony. Several studies have shown that the most common causes of delay were functional and external to the NEPA analysis. Those were: (1) agency capacity, which includes both staff availability and appropriate expertise; (2) delays attributable to the operator including waiting for information, changed plans of operation, and shifting priorities; and (3) compliance with other laws, which includes coordination with other permitting authorities.[74] The Trump Administration's massive reduction in agency personnel will be a source of delay going forward if not addressed.

In addition to a trained work force, technology is important. Geographic Information System (GIS) systems as well as AI can and should be leveraged in the service of greater permitting efficiency. And it goes without saying that these tools should be available to all projects and not depend on the kind of project at issue.[75] Likewise permitting "dashboards" are helpful but tools also require investment in development and training. The current staff cuts to the federal government, however, put the effective use of technology at risk.

Conclusion

NEPA has never been the sole or even a primary cause for substantial delay in the implementation of most agency decisions. And notably the NEPA landscape has changed substantially in the last two years. Developments in Congress and the Supreme Court will expedite permitting if the statute is implemented in a considered and systematic way by the Executive Branch. Congress should ensure that the agencies have the personnel and tools necessary to implement NEPA in an efficient way and in a manner that involves meaningful participation from the American public.

---

[72] *Id.* at 6 ("An agency may decide to modify a project in a fashion that is consistent with public comment for additional reasons and point to the public comment as justification in the final EIS.").
[73] *Id.*
[74] John C. Ruple, Jamie Pleune & Erik Heiny, Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation, 46 COLUM. J. ENVT'L L. 273, 304 (2022).
[75] Zach Colman & Josh Siegel, *"Final Nail'. Trump Administration memo could strike fatal blow to wind and solar*, POLITICO (7/17/2025).