

1990

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### Recommended Citation

Twelker, Eric (1990) "Twenty Years of NEPA: From Decisionmaker's Aid to Decisionmaker's Dread," *Land & Water Law Review*. Vol. 25 : Iss. 1 , pp. 119 - 132.

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University of Wyoming  
College of Law

# LAND AND WATER LAW REVIEW

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VOLUME XXV

1990

NUMBER 1

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## TWENTY YEARS OF NEPA: FROM DECISIONMAKER'S AID TO DECISIONMAKER'S DREAD

*Eric Twelker\**

### I. INTRODUCTION

Twenty years after the birth of the National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> the courts are still in the process of defining this tremendously important and far-reaching statute. The impact of the uncertainty can be devastating for anyone who wants to accomplish something that involves federal agency approval. For those who wish to stop the federal government permitting process, the uncertainty serves their agenda.

The environmentalist perspective was conveyed by an attorney from the Sierra Club at a recent talk on *Conner v. Burford*<sup>2</sup>—a case where NEPA litigation has clouded the title to 711 oil and gas leases for almost nine years. According to the attorney, the federal land management agencies do not understand NEPA, but this state of affairs is just fine. The Sierra Club lawyer hoped that the agencies would not soon figure out NEPA, because when they did, the ability of environmental groups to stop activities on the federal lands would be diminished.<sup>3</sup>

It is unreasonable to assume that Congress intended this uncertainty, yet it is hardly unique. In his recent book, Jeremy Rabkin describes how interest group litigation has brought all types of administrative programs under judicial control.<sup>4</sup> Judges—who as administrators are at best diletantes—direct and set priorities for major government programs based on

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\*Eric Twelker is counsel to Denver, Colorado, based Mountain States Legal Foundation and is a private practitioner of public land law.

1. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (1982 & Supp. V 1988)).

2. 848 F.2d 1441 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1121 (1989).

3. Address of Karin Sheldon to the Colorado Bar Association Mineral Law Section, May 6, 1988.

4. J. RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989).

narrow legalisms presented by advocate groups. As Rabkin points out, the Constitution directs that these programs are to be administered by the executive branch. The ultimate result of this judicial interference is administrative programs that are extremely inefficient or are counterproductive to their intended ends.<sup>5</sup>

NEPA has fallen into this same mold. Litigation and the resulting court rulings have taken NEPA from a decision-making tool to be used by executive branch managers and made it into a formal and legalistic set of procedures to be overseen by courts and litigation by advocacy groups. It has evolved into a statute which provides our nation relatively little benefit at a very high cost, and serves special interests who have the money to litigate and get their way.

This article will briefly describe the original intent behind NEPA, how it has been interpreted by the courts, and how it is being used in the administrative agencies. It does not address the details of NEPA's technical legal interpretation. Instead, the article addresses the serious problems that have developed in administration of federal agency programs because of the courts' interpretation of NEPA. Ultimately, I hope this article will help point the way to a more rational federal environmental process.

## II. NEPA AS AN AID TO AGENCY DECISIONMAKING

Originally, NEPA was not intended to be a vehicle for litigation and consequent court direction of agency actions. The original thought behind the statute was a good one. The sponsors of the Act intended to create an internal agency process which would inform federal decisionmakers of the environmental impacts of federal actions. The federal agencies would use the information produced by the NEPA process as an aid in decisionmaking. The thought was that once responsible decisionmakers were informed of the environmental consequences, they would use their discretion to adjust their actions accordingly.<sup>6</sup>

The original drafters of the Act did not discuss, and probably did not intend, a process that would be closely reviewed and enforced by the courts.<sup>7</sup> The part of the statute on which the courts have focused, the environmental impact statement (EIS) requirement, was added almost as an afterthought in a Senate committee.<sup>8</sup> Yet the courts have given the exact legal definition of those few words requiring an EIS for all "major federal actions significantly affecting the quality of the human environment"<sup>9</sup> a major importance to federal administrators.

5. *Id.*

6. See 40 C.F.R. § 1500.1(c) (1988) (NEPA's purpose is to foster better decision-making). Requirement of "full and fair discussion," and public participation do not relieve the agency of the authority to make the decision. *Id.* Both are merely intended to inform decision-makers. See *infra* note 10 and accompanying text.

7. D. MANDELKER, NEPA LAW AND LITIGATION § 2.04 (1988).

8. *Id.*

9. 42 U.S.C. § 4332(2)(C) (1982).

While the courts have taken the right to precisely define the terms of the Act away from the agencies, they have upheld the original congressional intent in another respect. The courts at least give lip service to the notion that the EIS requirement of NEPA is merely procedural. The Supreme Court found that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."<sup>10</sup> In essence, NEPA's intent is to inform—and thereby aid—agency decisionmakers about the environmental consequences of a proposed federal action, not dictate the final outcome of a decision.

In addition to the EIS requirement, NEPA contains a non-binding policy that recognizes environmental protection.<sup>11</sup> This is similar to other non-binding and judicially toothless policies that recognize minerals, energy, agriculture, and other interests.<sup>12</sup>

The potential obtrusiveness of the formalistic bureaucratic process was the subject of discussion during the drafting of the Act. The House version of the bill did not have an EIS requirement, but created the Council on Environmental Quality (CEQ), which was to study and report on the effects of federal actions on the environment.<sup>13</sup> The conference committee adopted the Senate's EIS requirement along with the creation of the CEQ, but expressed concern that the process should not be unduly burdensome.<sup>14</sup>

A mere internal agency process informing decisionmakers about the environment was not what everyone had in mind. A significant segment of the more radical environmental community wanted a law with teeth in it. They wanted the courts to be able to review the substance of agency decisions that had an impact on the environment and strike down those decisions where a judge could be convinced that the impact was excessive.<sup>15</sup> This was not to be.

Nevertheless, as explained below, the environmentalists got much of what they wanted by using the procedural requirements of NEPA in combination with the judicial review provisions of the Administrative Procedure Act<sup>16</sup> and the preliminary injunction rules of Rule 65 of the Federal Rules of Civil Procedure. The courts have said that they will not "flyspeck" the environmental reports. The reality is that by

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10. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); see also *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1846 (1989); 40 C.F.R. § 1500.1(b) (1988).

11. 42 U.S.C. § 4331 (1982).

12. See *Vermont Yankee*, 435 U.S. at 558 (contrasting "goals for nation" with legally enforceable procedural requirements); see also Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1982) (declaring federal policy to foster and encourage mineral development).

13. H.R. REP. NO. 91-378, 91st Cong., 1st Sess., reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS 2751.

14. H.R. CONF. REP. NO. 91-765, 91st Cong., 1st Sess., reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS 2767, 2769.

15. See Hart-McGovern Bill, S. 1032, 92d Cong., 1st Sess. (1971); J. SAX, DEFENDING THE ENVIRONMENT (1970) (courts should decide the merits of environmental disputes).

16. 5 U.S.C. §§ 702-706 (1988).

taking upon themselves the right to define the NEPA process, they have ignored NEPA's purpose as an administrative decision-making aid and flyspecked the procedure. Procedural legalisms have dictated outcome. As a result, the courts have given environmentalists much of what they wanted—the ability to stop development projects.<sup>17</sup> These environmentalist gains have come at a very high cost to the nation.

### III. HOW NEPA HAS FAILED IN THE COURTS

#### A. *How NEPA Got Its Judicial Teeth*

In the years immediately after NEPA's passage, the courts began to review agencies' decisions on how to comply with NEPA. They interpreted the few words of the EIS requirement into a "common law of NEPA."<sup>18</sup> Later, in 1978, the CEQ promulgated regulations that essentially codified the preexisting case law and CEQ guidelines.<sup>19</sup> Since that time the regulations have been given deference—albeit inconsistently—in the courts.<sup>20</sup>

Because NEPA mandates only procedure, the focus of judicial review of NEPA compliance is not harm to the environment, but whether the procedures required under NEPA have been followed.<sup>21</sup> Among the disputes that have occupied the courts are the timing of an EIS, the scope of an EIS, agency discretion not to prepare an EIS, public participation in the EIS process, and the "adequacy" of an EIS.<sup>22</sup>

The courts have given real teeth to NEPA by holding that failure to comply with NEPA's procedures either constitutes *per se* irreparable injury or raises a presumption of irreparable injury sufficient to justify an injunction until the agency has complied with NEPA.<sup>23</sup> The only necessary showing was a probable procedural violation.<sup>24</sup> This meant that a court could enjoin an action for years while a new deci-

17. See Pollock, *Reimaging NEPA: Choices for Environmentalists*, 8 HARV. ENVTL. L. REV. 359, 392-95 (1985) (because NEPA review is primarily procedural, rather than substantive, the effect of NEPA will be primarily delay).

18. See *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., concurring in part, dissenting in part).

19. See 40 C.F.R. §§ 1500-1508 (1988) (present CEQ regulations).

20. See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1980) (CEQ given substantial judicial deference). The Ninth Circuit recently took a position contrary to the CEQ regulations on worst case analysis, but was overruled by the Supreme Court which reiterated the rule of *Andrus*. *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1846-49 (1989).

21. *Vermont Yankee*, 435 U.S. at 558.

22. D. MANDELKER, *supra* note 7 at § 1.05.

23. See Note, *Preliminary Injunctions as Relief for Substantial Procedural Violations of Environmental Statutes: AMOCO Production Co. v. Village of Gambell*, 4 AKRON L. REV. 105 (1987) (reviews law prior to *Village of Gambell*). By the traditional test a preliminary injunction will be granted on a showing of irreparable injury, likelihood of success on the merits, a balance of harm favoring the movant, and the public interest favors the injunction. 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2948 (1973).

24. See, e.g., *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (substantial procedural NEPA violation sufficient to justify preliminary injunction).

sion was made, even though the new decision would not likely be any different from the old one.

In 1987, the Supreme Court eroded this position in *AMOCO Production Co. v. Village of Gambell*.<sup>25</sup> The Court held the similar procedural requirements under the Alaska National Interest Lands Conservation Act (ANILCA) did not create any special presumptions of injury for the purposes of a preliminary injunction. Moreover, the courts should look to the underlying purposes of the procedural statute to see if they are being advanced by the injunction.<sup>26</sup> Despite this ruling, there is no indication that the clout of NEPA in the courts has abated. Agency decisions can still remain tied up in court for years.

Moreover, environmental litigation is given other special preferences in court. The bond requirements that traditionally apply in preliminary injunction cases have not been applied in environmental cases. Even though environmental groups have budgets in the tens of millions of dollars and their opponents may be family ranchers or small businesses, the courts have uniformly found that "public interest" considerations allow waiver of significant bonds.<sup>27</sup>

### B. The Deciding Factor in NEPA Cases

Ostensibly, the deciding factor in NEPA cases is whether the agency followed NEPA procedure as defined by past judicial decisions. This presents two problems. First, judicial precedent on many aspects of NEPA is insufficient for the agencies to be able to guess how a court would rule. Second, each NEPA situation involves a unique and complex factual situation which tends to complicate review by a judge who must rely on briefs of parties and will spend relatively few hours trying to understand the case.

In this author's experience with NEPA in the courts, the decisions have turned more on the inclinations of the judges than any other factor. This observation seems to apply both to decisions upholding the agencies and those ruling against the agencies. Needless to say, in this situation, forum shopping has become an important consideration.

The Supreme Court bears the responsibility for this sordid state of affairs. The Court's decisions reflect a recognition that only agencies can rationally apply NEPA, yet the substance of the Court's decisions has left the power in the hands of the judiciary. The small number of Supreme Court cases limiting judicial power are no counterbalance to the numerous lower court decisions advancing judicial power.<sup>28</sup>

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25. 107 S. Ct. 1396 (1987).

26. *Id.* at 1403-04.

27. See *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. 167, 169 (D.D.C. 1971) (more than nominal bond would frustrate the purpose of NEPA), *aff'd on other grounds*, 458 F.2d 827 (D.C. Cir. 1972).

28. See, e.g., *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1121 (1989); *infra* notes 37 to 56 and accompanying text.

The few NEPA cases the Court has heard have tended to take authority away from the courts and give it to the agencies. For example, in *Kleppe v. Sierra Club*, the Court gave the agencies the discretion to determine when a "proposal" for a federal action was in place.<sup>29</sup> More recently, in *Robertston v. Methow Valley Citizens Council*, the Court struck down the Ninth Circuit's imposition of a "worst case requirement."<sup>30</sup> In *Marsh v. Oregon Natural Resources Council*, the Court found that the agency had the discretion not to supplement an EIS where it believed that new data submitted by environmental groups were not substantive.<sup>31</sup>

Nevertheless, if NEPA is going to be defined in a way that eliminates the uncertainty, then the Supreme Court must go much further. Numerous fundamental questions remain. They include the issue of how much deference a court should give an agency's determination on the threshold decision of whether to do an EIS.<sup>32</sup> Another question is whether a court may order an EIS that does not aid decisionmakers.<sup>33</sup> In addition, the court needs to answer numerous questions regarding scope of EISs and when a court may order programmatic and cumulative EISs.

NEPA's interpretation in the courts, and especially the Supreme Court, is hindered by another factor. When environmental groups sue because of an alleged failure of NEPA procedure, it is most often industry that pays, not the government.<sup>34</sup> Yet it is the government that is responsible for NEPA compliance<sup>35</sup> and for the defense against a non-compliance claim in court. But when the government loses, it is merely embarrassed; on the other hand, industry is likely to lose millions of dollars. In cases such as *Conner v. Burford*<sup>36</sup> this may color how the government argues its case.

### C. The Example of *Conner v. Burford*

The recent case of *Conner v. Burford* illustrates how NEPA has evolved into a mere procedural requirement that only incidentally serves as an aid to federal decisionmaking. For almost nine years of litigation in *Conner*, the courts and environmental groups have succeeded in stopping development on 711 oil and gas leases in a particularly promising area of Montana.<sup>37</sup> The threat to the leases will remain

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29. *Kleppe*, 427 U.S. at 408-15 (1976).

30. 109 S.Ct. 1835, 1847-49 (1989).

31. 109 S.Ct. 1851, 1958-61 (1989).

32. See *Gee v. Boyd*, 471 U.S. 1058 (1985) (White, J., dissenting, from denial of *cert.*) (describing the split in circuits on whether arbitrary and capricious standard should apply to NEPA threshold question).

33. See, e.g., *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Park County Resource Council v. United States Dep't of Agric.*, 817 F.2d 609, 622 (10th Cir. 1987) (conflict on consideration of informativeness).

34. See, e.g., *Conner*, 848 F.2d 1441 (711 oil and gas leases enjoined).

35. 42 U.S.C. § 4332(2)(C) (1982).

36. 848 F.2d 1441 (9th Cir., 1988), *cert. denied*, 109 S. Ct. 1121 (1989).

37. *Id.* at 1443.

until a court-ordered EIS is produced, perhaps years from now. Despite the extraordinarily long dispute and process, everyone involved knows what the EIS will—or at least can—contain.

The *Conner* case started in 1981 when the Bureau of Land Management (BLM) issued 711 oil and gas leases in the Flathead and Gallatin National Forests.<sup>38</sup> The leases addressed by the court were located on lands that had been released from wilderness study by the Forest Service.<sup>39</sup> The lease issuance decision was accompanied by an environmental assessment (EA) which described the general impacts of development but concluded that issuance of leases was merely an entry into the records of the BLM that had no impact on the environment. According to this decision, future impacting actions would require their own permits, and site specific NEPA review—including possible EISs—would be conducted at that time.<sup>40</sup>

After the BLM issued the leases, James R. Conner and the National Wildlife Federation sued and claimed that an EIS was due before the leases could be issued.<sup>41</sup> Conner and the Wildlife Federation argued that lease issuance constituted an irretrievable commitment of resources and that an EIS taking into consideration full field development on the leases was required. The land management agencies argued that they did not know if, when, or where development could occur. Without site specific information on what environmental values were at stake, they could not produce a meaningful EIS.<sup>42</sup> In essence, the federal administrator told the court that the EIS requested by the plaintiff would not be an aid to its decision-making process.

The federal district court in Montana declined to address the land manager's argument and, agreeing with Conner and the Wildlife Federation, set aside the decision issuing the leases.<sup>43</sup> The Ninth Circuit Court of Appeals affirmed the district court decision that an EIS was due before a normal lease could be issued. But it found that if the agency issued leases—which the court described as first rights of refusal—where the future right to develop was contingent on decisions after future NEPA studies, then it could postpone the EIS.<sup>44</sup>

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38. *Id.* at 1443-44.

39. *Id.* at 1445 n.11.

40. *Id.* at 1443-44.

41. *Id.* at 1444.

42. *Id.* at 1450-51.

43. Whether the court set aside the leases is still a matter of debate. While the Ninth Circuit ruled that the leases were not invalidated, there is no doubt that an agency decision after the EIS could invalidate the leases. *Id.* at 1447 n.16. Moreover, after the *Conner* decision, the Sierra Club argued in opposition to *certiorari* in *Bob Marshall Alliance v. Hodell*, 852 F.2d 1223 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989), that an identical order from the same district court invalidated the leases.

44. *Conner*, 848 F.2d at 1448. The industry has vigorously opposed no surface occupancy (NSO) leases because future exploration expenditures would be subjected to loss in the event of adverse decision to proceed with development. Also, the continued opportunity for political action by opponents of development can be costly and divisive.

The court based its ruling on a technical construction of NEPA which requires that an EIS is to be done early in the federal decision-making process, prior to a judicially-determined “irretrievable commitment of resources.”<sup>45</sup> The court alluded to the quality of the land and the possible scope of development—with 711 leases there was at least a possibility of significant development. There can be no question that as a narrow judicial determination of the words “significance” and “irretrievable commitment of resources,” the decision was defensible. However, the court declined to go outside the narrow legalisms. It did not address how the EIS it ordered might aid the decisionmakers.

While *Conner* was on appeal to the Ninth Circuit, the Tenth Circuit Court of Appeals considered a similar lease issuance situation in *Park County Resource Council v. United States Department of Agriculture*.<sup>46</sup> In contrast to the *Conner* court, the Tenth Circuit considered the land manager’s argument that a meaningful EIS was not possible prior to exploration. On this basis, it found that there was not enough information available at the lease issuance stage to produce an EIS that would aid agency decisionmakers. The court concluded that an EIS would describe potential future actions so speculative that NEPA would be trivialized and the ultimate goal of NEPA as an aid to decision-making would be harmed.<sup>47</sup> Because the EIS demanded by the Park County Resource Counsel would not fulfill the purpose of NEPA, it was not required.<sup>48</sup>

The *Park County* court also considered the total availability of agency resources. It reasoned that since the Interior Department completed only 115 EISs in 1984, a year in which it issued 5,478 oil and gas leases, the financial and practical constraints of rational land management would preclude the production of an EIS of doubtful usefulness.<sup>49</sup> This judicial deference to the practicalities of executive branch management is unusual if not unique in NEPA cases.

The Justice Department chose not to seek to resolve the apparent conflict between *Park County* and *Conner* in the Supreme Court. It argued—unconvincingly, in the view of industry attorneys—that the distinction between the two cases was based on fact, not different interpretations of NEPA. For example, one former government lawyer argued in this journal that the decision turned on a finding of fact that standard federal leases had “independent utility” in Wyoming, but the same law and lease contract did not have “independent utility” in Montana.<sup>50</sup>

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45. *Id.* at 1449.

46. 817 F.2d 609 (10th Cir. 1987).

47. *Id.* at 622-24.

48. *Id.*

49. *Id.* at 623.

50. Mansfield, *Through the Forest of the Onshore Oil and Gas Leasing Controversy Toward a Paradigm of Meaningful NEPA Compliance*, 24 LAND & WATER L. REV. 85, 122 (1989). The correctness or incorrectness of Mansfield’s arguments are outside the scope of this paper. Suffice it to say, they are technical and not so unreasonable as to preclude judicial consideration.

The arguments presented in the government's opposition to *certiorari* centered on the words used in the introductions of the circuit courts' opinions.<sup>51</sup> The Ninth Circuit Court had called the *Conner* land outstanding and rugged wilderness, even though it had been released from wilderness study.<sup>52</sup> On the other hand, the Tenth Circuit called the *Park County* land "nothing special" even though the well at issue was drilled using extremely expensive and rarely used helicopter mobilization.<sup>53</sup> The net result is that NEPA has remained confused and the legalistic *Conner* decision seems to be gaining acceptance by the agencies.<sup>54</sup>

The implications of the Solicitor General's decision not to seek *certiorari* in *Conner* are frightening. Does the application of NEPA really turn on how a court of appeals chooses to describe land in an introduction to an opinion? Or does it turn on whether a circuit court makes a "finding of fact" of "independent utility" based on identical lease documents and laws? If it does, then there is no predicting the outcome of NEPA cases. It is no wonder that the personal proclivities of judges are given the greatest consideration in NEPA cases.

Meanwhile, the title to the 711 leases in *Conner* remains in doubt, as it has since 1981. Only after the EIS is done and a new decision on lease issuance is made will the lessees know whether they have a lease or a first right of refusal.<sup>55</sup> If that EIS is a boiler-plate document as suggested by the Tenth Circuit in *Park County*,<sup>56</sup> then the public will not benefit from this lengthy procedure. Only the special interest groups who are unconditionally opposed to leasing will have gained.

#### D. What Can Be Done

NEPA was intended to serve as an informative aid in the agency decision-making process. The courts should rule in such a way as to ensure that NEPA is used as a rational device to serve this end. If an agency says that an environmental report would be useless, then there is little point for a judge who has considered the matter for only a few hours to say otherwise. They should look to NEPA's purposes as a tool for federal administrators when ruling on NEPA's technical points. This is what the Tenth Circuit did in *Park County*<sup>57</sup> and what the Supreme Court did in *Village of Gambell*.<sup>58</sup> If a ruling does not serve NEPA's purpose as an agency decision-making aid, then it should not be made.

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51. *Id.* Both cases were decided on summary judgement and had no formal district court findings of fact on quality of the land.

52. 848 F.2d at 1445 n.11.

53. Personal communication with Brad Penn, Marathon Oil Co. (1987).

54. See 54 Fed. Reg. 3326-3339 (1989) (to be codified at 36 C.F.R. §§ 211, 228, 261) (proposed January 23, 1989).

55. See *supra* notes 43 to 44 and accompanying text.

56. See *supra* notes 46 to 48 and accompanying text.

57. 817 F.2d at 623.

58. 107 S. Ct. at 1403.

Furthermore, the courts should not consecrate environmental lawsuits. Very often environmental suits serve no higher purpose than any other suit. Where suits are brought to further the fund-raising or publicity ends of environmental groups, they are less deserving of respect than normal suits. Normal rules of bonding and injury should apply.

In addition, the federal agencies must not continue to refuse to seek resolution of important NEPA questions. The Justice Department should seek *certiorari* at every opportunity where an interpretation of NEPA remains in doubt. It should defend the authority of the executive branch to administer and define NEPA compliance. Court-forced NEPA compliance has not worked and therefore should be challenged at every opportunity.

A more effective solution would be to completely exclude such disputes from the courts. If the executive branch decisionmakers say that an EIS would be of no use, then their decision should be respected. Environmental groups have ample time and resources to seek redress in election of the president or by seeking congressional oversight.

#### IV. HOW NEPA HAS FAILED IN THE AGENCIES

##### A. Agency Decisionmaking and NEPA

In the management of private lands and the decisions on private development projects, the emphasis is on efficiency. A developer decides what it wants to do, then tries to accomplish its objectives in as efficient a manner as possible. That is not to say that the environment does not come into play. As is evidenced by modern office campuses, there are numerous examples of well-designed and aesthetically pleasing private developments.

Occasionally, a project is even scrapped because of environmental problems. But the reality of the decision-making process is that most environmental impact is obvious before the project gets off the ground. After all, the designers of almost every project can look to completed projects to see examples of impact. The emphasis is on doing as good a job as possible.

Federal decisionmaking under NEPA has many similarities and some costly differences. The legalistic evolution of NEPA has created a fiction that detailed environmental studies are required after completion of a detailed project "proposal," but before a final go/no-go decision. But the reality is the same as for private projects. The bulk of the impact is obvious from the beginning based on experience with other projects. Most often the political obstacles—such as environmental group opposition—are also obvious.

In reality, the agency or the deciding officers in the agency decide on the final action. They then set about making a case for their decision in the NEPA documents, either an EIS or an EA. Because there

are so many court challenges under NEPA, and because the courts have taken a legalistic approach to defining its terms, the case they make is one for court. An EIS is likely to address things that are not particularly relevant to the project and have more to do with what they think will be addressed in future legal proceedings.

The fear of litigation has caused agencies to react by doing more and more costly studies. The size of EISs has ballooned from thin booklets to multi-volume studies. Recent experience has shown that when environmental groups threaten to sue, a common reaction is to do an EIS where an EA might have been considered sufficient otherwise. Where EAs are deemed adequate, they may run a hundred pages or more.

The EISs and EAs that are produced under NEPA are of incidental usefulness in efficient administration. Much of the documentation has the quality of boiler-plate. This is understandable, since like contract boiler-plate, it is designed to patch up possible weakness in future court cases. As the Tenth Circuit noted in *Park County*, the addition of material of questionable usefulness makes NEPA documents harder to use and more intimidating.<sup>59</sup>

The preordained decisionmaking in contravention of NEPA's legal fiction has angered environmentalists and public land users alike. The party against whom a decision is made sees the EIS or EA as a smoke screen to cover up an illegal or political decision. This has led to numerous court battles.

Another way that NEPA fails within the agencies is by giving a forum to low level staff members who have personal or political reasons for wanting a decision to be made a certain way. This can be especially potent for those who oppose a project. For example, staff members can exaggerate the impact of certain aspects of the project, ignore mitigation measures that are available, or add expensive and unnecessary mitigation measures in an attempt to make a project uneconomic.<sup>60</sup>

If the managers of the project choose not to use information in these situations, then lower level staff members can leak it to sympathetic newspapers with devastating political effect. Whether the obstructive material is used in the EIS or not, it will most likely be part of future litigation attacking the decision.

### *B. The Example of Two Forks*

A classic example of how NEPA does not work at the agency level is provided by the proposed Two Forks Dam project near Denver, Colorado. The dam, which was to be located in a canyon near Denver,

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59. 817 F.2d at 623.

60. See, e.g., Norman G. Lavery, 96 I.B.L.A. 294 (1987) (the trial in this case revealed BLM wilderness personnel ignored mitigation measures to deny a mining plan).

had been part of the long-term water development plan of the City of Denver for sixty years. Recently, growth in the suburbs has resulted in increased purchase of agricultural water rights and a drying up of surrounding farmlands. The City decided to go ahead with the project. Immediately, environmentalists objected that it would flood a stretch of the South Platte canyon and a particularly good fishing area.<sup>61</sup>

The EIS for the dam cost almost \$40 million to complete, yet the bulk of the cost seems to have been attributable to a study of minimal usefulness in the decision-making process. Both supporters and opponents of the dam criticized the EIS as being seriously flawed. Unquestionably, both camps had their minds made up long before the EIS was completed. There is no indication that the EIS has changed even one mind on the wisdom of building or not building the dam. Certainly, it has not been an aid to the decision-making process.

The real process for approving or disapproving the project was a political one. The environmental groups opposing the dam have taken their case to Washington where they made rejection of the dam a litmus test for the new Bush Administration's environmental policies. EPA director William Reilly has announced that he will veto the project—presumably after his staff comes up with the reasons.<sup>62</sup> Those reasons apparently do not involve the EIS. On the other hand, the pro-dam forces have responded with their own political campaign.

Meanwhile, the leaks to the press from disgruntled lower level agency employees who claim that their particular data or analysis was not properly considered in the EIS have come in a steady stream. The leaks have served in the emotional political battles, but have done little to enlighten the public. The leaks have also suggested improprieties that could be brought forth in future litigation on the EIS.

Environmental groups threatened to sue to set aside the EIS before it hit the streets. And there is little doubt that they will make good on their threat in the unlikely event that the political battle fails. The odds are good that we have not yet finished paying the NEPA bill for Two Forks. The question is, what purpose did NEPA and the taxpayers' \$40 million serve?

The super-expensive environmental studies have done little, if anything, to truly aid decisionmakers. No doubt, some could argue that the \$40 million EIS served as an informative aid to the decisionmakers, and thus served NEPA's purpose. However, when one considers that the decision was made on the basis of the fact that the canyon would be filled with water, almost all of the \$40 million must be considered

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61. For a chronology of the dispute, see Rocky Mountain News, Aug. 30, 1989, at 7.

62. *Id.* Reilly announced that he would veto the project on March 24, 1989, and a preliminary list of reasons was released on August 29, 1989. The primary reason for the veto was that the canyon would be filled with water. This piece of information could have been determined for significantly less than \$40 million. Not surprisingly, Two Forks proponents called the decision political. *Id.*

wasted. The tremendous misallocation of resources will ultimately hurt our nation's efforts to foster better environmental decisionmaking.

There are other dams in Colorado Front Range canyons, so it is not a difficult task for the agencies or the public to understand the environmental impact. The citizens and the agencies ultimately used that information to make a political decision not to build the dam.<sup>63</sup> The losers will have the right to redress in the political system as the framers of the Constitution intended.<sup>64</sup> The judicially bloated NEPA process has largely been bypassed.

### *C. What Can Be Done*

The public must be made aware that NEPA is often a waste of the taxpayer's money. The agencies have been derelict in pointing this out. But the individuals who are paid to prepare NEPA reports are not really damaged by the waste. From the view of professional administrators, it is not enough to say that judicial mandates are being followed. The public has a right to demand effective and efficient administration. The agencies should let the public know that judicial mandates are expensive and are not helping efficient agency decisionmaking.

Environmental groups that oppose development have an interest in raising costs. The money spent on NEPA compliance helps to create issues such as below-cost timber sales that have advanced the environmental agenda. It raises the cost of development and makes some projects uneconomic. The public cannot look to them to make administration more efficient.

The problem is that the judicially defined NEPA decisionmaking process that has evolved over the past twenty years does not match the real world decision-making process. Where decisions are political and impacts are obvious, there is no point in performing useless multi-million dollar environmental studies.

The Forest Service and BLM land use planning processes could be, and are in some present cases, a better environmental review process.<sup>65</sup> The planning process identifies environmental conflicts early on and uses a quasi-political process to resolve them. Nevertheless, plans will not take the place of the present cumbersome NEPA and permitting processes without statutory changes. Also, as the planning process matures, it is likely to face more and more litigation and judicial directives that will turn it into an impractical legalistic process. The problem is more fundamental and will not be solved until the courts lessen their role.

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63. While this decision is not final at the time of this writing, it is not expected to change.

64. As a holder of private property rights impacted by a federal decision, Denver also has a constitutional right to recourse in the courts.

65. See 16 U.S.C. § 1604 (1988); 36 C.F.R. § 219 (1988) (Forest Service planning); 43 U.S.C. § 1712 (1982); 43 C.F.R. § 1600 (1988) (BLM planning).

## V. CONCLUSION

Over the past twenty years, continuous litigation has caused NEPA to evolve into a highly legalistic set of agency procedures. That legalism has turned federal administrative agencies into indecisive managers whose staff members may use the legalism to try to undercut good decisions. A significant share of the hundreds of millions of dollars being spent every year on NEPA studies is not being directed to useful environmental study, but is instead directed to building strong cases against anticipated environmental group litigation. Litigation has made NEPA into a decision-maker's dread.

The result is that the NEPA process is out of touch with rational and efficient business and political decision-making processes. NEPA has evolved from a decision-making aid to a bureaucratic process that only incidentally aids agency decisionmaking. The courts have forced federal administrators to produce environmental studies that the administrators think are useless.

In rationalizing this state of affairs, it is not enough to say that the "law," as defined by the courts, is being followed. If the law forces us to conclusions that are nonsense, then that nonsense must be attributed to Congress and ultimately the people. This is unreasonable. Moreover, nonsensical laws are damaging to the nation's fisc and morale.

The disputes litigated under NEPA are at base political disputes. The questions of whether a dam should be built or oil and gas fields developed should be answered by Congress and the president. Nevertheless, the courts using NEPA at the behest of environmental group litigants have turned the focus to legalistic procedural considerations. Ultimately, this has not been good for the environment or efficient government.

After twenty years of experience with NEPA, a process has evolved which is far from what Congress intended. It should be clear to all that it does not work. The solution can lie with Congress or the courts. Congress should look at an alternative that recognizes the political and business realities of our world. The courts should recognize that their interference has been counterproductive and return environmental decisionmaking to the executive branch.