April 24, 2018

Dear Chairman Bishop, Ranking Member Grijalva, and Committee Members:

We, the undersigned 118 law professors, understand that the House Committee on Natural Resources is holding a hearing on April 26, 2018, titled "The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare," and write to express our views about NEPA and NEPA litigation. Contrary to the premise implied by the title of the hearing, we believe that NEPA continues to serve its important purpose of informing government decisionmakers and the public about the environmental consequences of federal actions. We also believe that litigation under the statute, on the whole, continues to appropriately hold federal agencies accountable for their legal obligations. In this letter, we focus our comments on data about NEPA compliance and litigation, which, in our view, do not support claims that NEPA imposes undue burdens on federal agencies or the private parties seeking regulatory permissions from them.

There is little evidence that litigation under NEPA is out of control or that NEPA processes are unnecessarily protracted. To the contrary, environmental reviews and procedures conducted under NEPA are typically circumscribed and rarely challenged in court. Roughly 99% of the many thousands of federal actions with potentially significant environmental impacts are covered either by "categorical exclusions" (CEs) to NEPA procedures or by "environmental assessments" (EAs), which take days to months, respectively, to complete. By contrast, detailed environmental impact statements (EISs) now consistently number below 200 annually across the entire federal government. The volume of litigation under NEPA is also low: fewer than 100 NEPA cases are filed in district court annually, about half of which involve challenges to EISs. A small fraction of environmental reviews under NEPA therefore either require detailed EISs or are subject to judicial challenges. And, as NEPA programs have matured, federal agencies have become more proficient at identifying the actions that require the highest level of analysis. This is reflected both in the number of EISs prepared nationally, which has been falling, and the increased use of CEs. That the time required to prepare an EIS has increased over the last decade or so also reflects federal agencies' increasing proficiency with administering the statute; as federal agencies have increased the threshold for preparing an EIS, on average, the magnitude and complexity of the environmental impacts associated with the federal actions covered by EISs have increased proportionately.

Moreover, neither the number of NEPA cases filed annually nor their outcomes suggests that NEPA litigation is out of step with litigation in other areas of administrative law, and NEPA litigation is not unusually protracted as compared to other administrative law litigation in federal courts. Evidence also indicates that NEPA litigation is grounded in legitimate claims, rather than being used principally as a strategic device to delay projects opposed by litigants without regard to likely success on the merits. This is reflected in the observation that environmental organizations prevail in NEPA litigation at rates that equal or substantially exceed success rates in administrative law challenges generally.

This letter addresses the following key points:

- A small percentage (1%) of federal actions require an environmental impact statement; most are covered by categorical exclusions or environmental assessments.
- The small subset of actions that require an EIS represent significant decisions, which warrant being subject to NEPA analyses and public review processes.
- While EISs take several years to complete, the examples raised by critics of NEPA are often extreme outliers that are not representative of NEPA processes generally.
- Neither the number of NEPA cases filed annually, which is low and consistent across time, nor the outcomes of these cases suggest that NEPA litigation is being abused or used for the sole purpose of strategic delay.
- For most federal agencies, a NEPA lawsuit is a rare event and claims that NEPA poses a significant burden have little basis in fact.

We discuss each of these points in further detail below. In the aggregate, they demonstrate that criticisms of NEPA are not supported by the available evidence on environmental review processes and litigation. While opponents of NEPA may identify isolated cases of particularly prolonged NEPA review or litigation, data do not support claims that systemic problems exist requiring legislative attention.

I. The Role of EISs

As we will discuss, available data indicate that federal agencies require preparation of an EIS for a small fraction of federal actions and that these EISs are disproportionately prepared by a few agencies. In other words, most agencies implement NEPA with relative ease and most federal projects are reviewed quickly and at low cost.

The vast majority of agency actions subject to NEPA review do not involve preparation of an EIS. The non-partisan Government Accountability Office (GAO) estimates that roughly 94% of NEPA decisions fall under CEs,[1] about 5% are covered by EAs, and less than 1% are reviewed under EISs.[2] If one includes draft, supplemental, and final NEPA documents government-wide, this translates to the preparation of an average of roughly 137,750 CEs, 6,820

1. The GAO noted, however, that "CEs are likely underrepresented in their totals because agency systems do not track certain categories of CEs considered 'routine' activities." U.S. Government Accountability Office, GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* 8-9 (April 2014).

2. *Id*. at 8. These estimates are imperfect, because federal agencies typically do not record the number of CEs or EAs they issue, despite the fact that most agency compliance with NEPA is covered by them. *Id.* With respect to particular agencies, the GAO found, for example, "Department of Energy (DOE) reported that 95 percent of its 9,060 NEPA analyses from fiscal year 2008 to fiscal year 2012 were CEs, 2.6 percent were EAs, and 2.4 percent were EISs or supplement analyses." *Id*. Similarly, the FHWA also reported that 96% of FHWA-approved projects in 2009 "involve[d] no significant environmental impacts and, hence, require limited documentation, analysis, or review under NEPA". *Id*; *cf*. LINDA LUTHER, CONG. RESEARCH SERV., R42479, THE ROLE OF THE ENVIRONMENTAL REVIEW PROCESS IN FEDERALLY FUNDED HIGHWAY PROJECTS: BACKGROUND AND ISSUES FOR CONGRESS 5 (2012).

EAs, and about 435 EISs annually for the period 2008 through 2015.[3] For the period 2008 through 2015, EPA data reveal that the actual number of EISs issued each year is consistent with the GAO's estimate, averaging 224 draft and 211 final EISs per year, but the number of final EISs declined over this period from a high of 277 in 2008 to about 170 by 2016.[4]

A relatively small number of federal agencies account for most of the environmental reviews. Only five federal agencies issue more than 10 final EISs per year and most issue fewer than 5 if they issue any at all.[5] According to EPA and CEQ data for the period 1998 through 2015, four federal agencies issued more than 50% of the EISs published nationally: on average for 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%.[6] The EPA data also reveal that thirty-six other federal agencies issued at least one EIS per year over the period 2012 through 2015, with the National Park Service (NPS) and the U.S. Fish and Wildlife Service (FWS) accounting for another 10% of the EISs issued, and the Federal Energy Regulatory Commission (FERC) rising in prominence starting in 2015 when it began issuing roughly the same number of EISs each year as the FWS (roughly 7 annually).[7]

Cost and timing data for NEPA analyses are difficult to obtain, but available evidence does not support the view that NEPA systematically imposes unreasonable burdens on federal agencies or regulated entities.[8] In 2003, a NEPA task force report "estimated that an EIS typically cost [sic] from $250,000 to $2 million," whereas "an EA typically costs from $5,000 to $200,000."[9] The National Association of Environmental Professionals (NAEP) collects data on the time it takes for EISs to be completed. In a report covering the time period 2000 through 2012, it found that the average preparation time was 4.6 years in 2012 and that EIS preparation times had increased on

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3 GAO, *supra* note 1, at 9 (the calculation is based on an extrapolation from the percentages for each NEPA process using the number of EISs issued by federal agencies in 2011). For further comparison, CEQ was required to collect and issue a report on NEPA compliance in 2009. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1609(c), 123 Stat. 115, 304 (2009); NAT'L ENVTL. POLICY ACT, AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 & NEPA, https://ceq.doe.gov/ceq-reports/recovery_act_reports.html.

4. EPA data were downloaded from the EIS Database for the period January 1, 2012 through December 31, 2015, which is available at: https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search. *See also* NAEP, ANNUAL NEPA REPORT 2016 OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PRACTICE 4-5 (2017). These results are roughly consistent with other work finding that EPA reported 253 (standard deviation of twenty-six) EISs annually during the period 1987 through 2006. Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement*, 10 ENVTL. PRAC. 164, 171 (2008).

5 The five agencies are USFS (~40/year), BLM (~20/year), USACE (~15/year), FHWA (~13/year), and NPS (~10/year).

6. GAO, *supra* note 1, at 11; EPA EIS database, *supra* note 4.

7. The U.S. Navy, Nuclear Regulatory Commission, Federal Transit Administration, Bureau of Reclamation, National Oceanic & Atmospheric Administration, and Department of Energy each accounted for between 2% and 3% of the EISs issued from 2012 through 2015 according to the EPA data. EPA EIS database, *supra* note 4.

8. GAO, *supra* note 1, at 12.

9. *Id.* at 13–14. DOE collects some of the most detailed information on costs. For the period 2003 through 2012, it found that the median cost of an EIS was $1.4 million and the average $6.6 million, with costs ranging from a low of $60,000 to a high of $85 million; it also estimated that the median cost of an EA is $65,000, with a range from $3,000 to $1.2 million. *Id.* at 13.

average at a rate of thirty-four days per year.[10] The average preparation time for an EIS rose by a further 11% to 5.1 years by 2016.[11] In another survey covering twenty years (1987–2006), the average time for agencies to prepare an EIS was 3.4 years, with a standard deviation of 2.7 years.[12] This study also found significant differences among federal agencies, with the FHWA and USACE having mean preparation times that were 1.9 and 1.26 times longer, respectively, than the average for other federal agencies.[13] Differences therefore exist in preparation times for EISs both within and among federal agencies.[14]

The modest increase observed in the average time required to complete an EIS has occurred coincident with a 39% decrease in the number of EISs prepared. These opposite trends suggest that agencies have increasingly relied upon EAs to address projects that are less-controversial or have fewer impacts, and that the remaining pool of projects reviewed under an EIS are more complicated and require comparatively more analysis. The drop in the number of EISs completed in a year is consistent with the shift away from EISs.[15] Overall, the data do not support a conclusion that NEPA compliance has, on average, become significantly more burdensome.

II. NEPA Litigation

Data related to NEPA litigation, like that on NEPA compliance, do not evidence an increasing or unreasonable delay for federal projects. In particular, plaintiffs, on average, are more likely to succeed in NEPA litigation than in other administrative law litigation, which is inconsistent with the claim that plaintiffs use NEPA strategically to delay or impede projects without evaluating the soundness of their claims.

A recent study examined NEPA litigation over a 15-year period encompassing the George W. Bush and Barack Obama Administrations.[16] Just as completion of EISs is dominated by a few agencies, so too is NEPA litigation. About three-quarters of district and circuit court cases with NEPA claims were filed against five agencies, each of which either manages federal lands or has

10. NAEP, ANNUAL NEPA REPORT 2012 OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PRACTICE 11–14 (2013), https://ceq.doe.gov/docs/get-involved/NAEP_2012_NEPA_Annual_Report.pdf. Less information is available on EAs. According to a 2013 DOE report, the average completion time for an EA issued by DOE was thirteen months; by contrast, the average for the USFS was about nineteen months in 2012. GAO, *supra* note 7, at 15–16. Even less information is collected on CEs, but rough estimates exist that range from typical times of 1–2 days within DOE to 177 days within the USFS. *Id.* at 16.

11. NAEP, *supra* note 3, at 12-15.

12. Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement*, 10 ENVTL. PRAC. 164, 167 (2008).

13. The average for other federal agencies (excluding the USFS which was slightly lower) was 2.9 years (standard deviation of two years), whereas the average for the FHWA was 5.5 years (standard deviation of 3.2 years) and the average for USACE was 3.7 years (standard deviation of 2.4 years). *Id.*

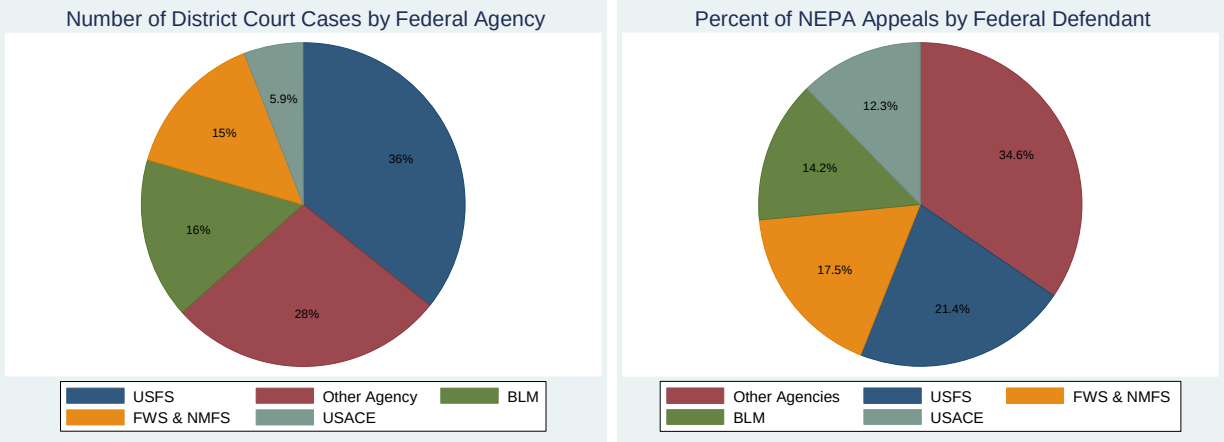
14. The FHWA is an outlier among federal agencies (completing less than 10% of its EISs in two years or less), while the USFS managed to prepare more than half of its EISs in two years or less. *Id.* at 169.

15. NAEP, *supra* note 3, at 12-15.

16. David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 ARIZ. ST. L.J. 1 (forthcoming 2018). The study centers on two samples consisting of 498 district court cases and 334 circuit court cases but also includes auto-coded analysis of the full populations of 1,572 district court and 656 circuit court cases litigated between 2001 and 2015.

principal authority over protecting natural resources.[17] Two federal agencies, the USFS and BLM, accounted for more than 50% of the district court cases. Notably absent from this list are agencies that fund or permit major infrastructure projects, such as the FHWA, and agencies with authority over major federal facilities, such as the Department of Defense (DOD) and the DOE.

Figure 1: Number of NEPA Cases by Federal Defendant 2001–15



While this pattern is driven in part by the large geographic scale and environmental sensitivity of the public lands each agency manages, along with the large share of EISs prepared by those agencies, the decisions of these agencies still appear more likely to be the subject of NEPA litigation than decisions by other agencies. Many federal agencies routinely undertake or oversee actions with large environmental impacts and yet are rarely subject to lawsuits, notably agencies such as DOE, the Department of Defense, and the FHWA.[18] Table 1 below provides a measure of the observed imbalance by comparing the percentage of the total number of EISs issued nationally by agencies against the percentage of the total number of NEPA suits with EIS-related claims filed against them. Table 1 below shows that for all but the BLM, the relative litigation rates were much higher for the land management and natural resource conservation agencies. Conversely, the litigation rates for agencies that oversee major infrastructure projects were substantially below average for all but FERC, which was essentially at the mean for agencies completing a significant number of EISs. Accordingly, in both absolute and relative terms, NEPA compliance and litigation are focused on federal land management and protection of endangered species, as opposed to major construction or infrastructure projects.

The focus of NEPA litigation on a small subset of federal agencies is mirrored in the geographic distribution of cases across federal circuits. Most federal land is located in western states, suggesting that on this basis alone one would expect cases to be filed disproportionately in the Ninth and Tenth Circuits, which together encompass 99% of BLM land, 85% of USFS land,

17. The five federal agencies are the USFS, BLM, FWS, National Marine Fisheries Service (NMFS), and USACE.

18. Only the FHWA accounted for more than 5% of the district court cases filed, and it accounted for just about 6% if cases involving other agencies within DOT are included.

and 91% of NPS land.[19] Two-thirds of the district court cases were filed in either the Ninth or Tenth Circuits and 12% were filed in the D.C. Circuit.[20] The distribution of appeals across the federal circuits largely matches the district court filings.[21] At the state level, two-thirds of the cases were filed in just ten states,[22] and just four states (California, Montana, Oregon, Arizona) and the District of Columbia accounted for half of the cases. Only two states of the top ten, Florida and New York, were eastern states and each has distinctive characteristics—Florida has many endangered species and wetlands (including the Everglades),[23] and New York has significant wetlands. The D.C. Circuit is unique because plaintiffs can use it as an alternative venue to the circuit in which a federal action is located because most federal agencies are based in D.C.

Table 1: Comparison by Agency of Percent EISs vs. Percent EISs Litigated[24]

AGENCY	EPA-EIS	LITIGATION RATES	MULTIPLE
BLM	11.6	11.44	1.0
DOD	5.4	3	0.6
DOE	2.7	1.91	0.7
FERC	3.3	3.54	1.1
FHWA	8.2	2.18	0.3
FWS	3.9	7.08	1.8
NMFS	1.4	7.36	5.3
OTHER AGENCIES	32.1	28.34	0.9
USACE	9.6	4.36	0.5
USFS	21.7	30.79	1.4

Little evidence exists that environmental plaintiffs,[25] whether national or local organizations, are using NEPA for purely strategic reasons divorced from the strength of their legal claims to hold up government action. If environmental plaintiffs were filing cases without regard to the

19. The percentages for each circuit are as follows: the Ninth Circuit encompasses 72% of BLM land, 64% of USFS land, and 84% of NPS land; the Tenth Circuit encompasses 27% of BLM land, 22% of USFS land, and 7% of NPS land. CAROL HARDY VINCENT ET. AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 9–11, 21 (2017), https://fas.org/sgp/crs/misc/R42346.pdf.

20. The distribution of cases across federal circuits was similar in our sample study: Ninth Circuit—51%, Other Circuits—27%, D.C. Circuit—12%; Sixth Circuit—3%; and the Tenth Circuit—7%.

21. The appeal rate in the Tenth Circuit was almost twice that of other circuits, as it accounted for 12% of the appeals but just 6.7% of the district court cases. Statistically, the small absolute number of appeals in the Tenth Circuit, just thirty-nine in total, may foreclose ruling out random variation.

22. The states are: Arizona, California, Colorado, District of Columbia, Florida, Idaho, Montana, New York, Oregon, and Washington. Only Colorado, Florida, and New York are outside the Ninth or D.C. Circuits.

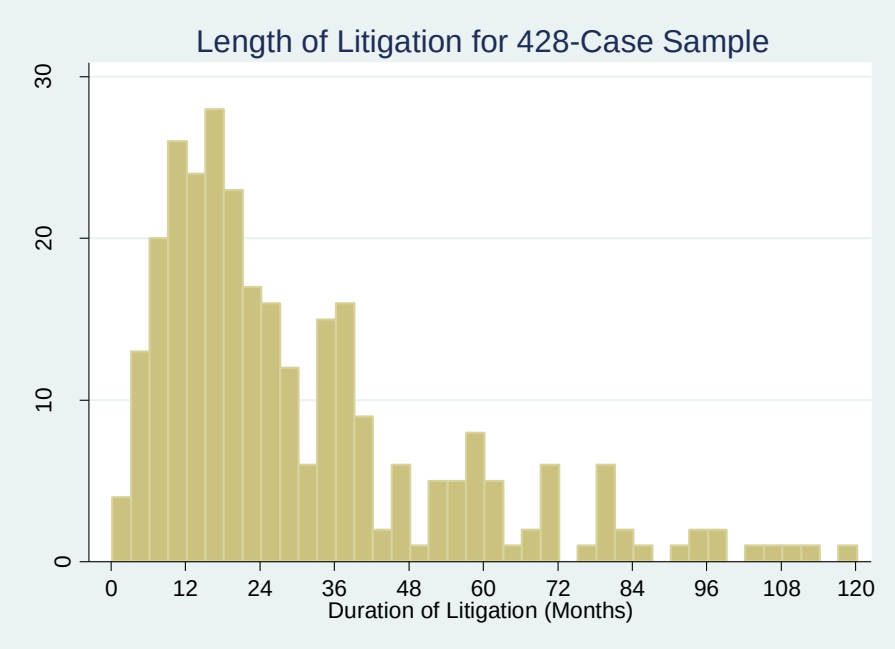
23. Florida also ranks 15th nationally with regard to the percentage (13.0) of federal land in the state. *See* FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, *supra* note 19, at 7.

24. The EIS data are taken from the EPA EIS database that covers 2012–2016. *Environmental Impact Statement (EIS) Database*, EPA, https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search (last visited Jan. 26, 2018).

25. Plaintiffs were divided into five broad classes: local environmental organizations; national environmental organizations; other non-governmental organizations; businesses and business associations; and cities, counties, states, and tribes. "National environmental organizations" were defined narrowly to include a small number of high-profile environmental organizations (e.g., Sierra Club, Natural Resources Defense Council, National Wildlife Federation, Center for Biological Diversity) to identify the organizations that litigated a large share of NEPA cases.

merits of their claims, we would expect them to prevail less often than other plaintiffs. Yet, they won substantially more often than other plaintiffs filing cases under NEPA at the district court level (35% versus 16%, respectively) and on appeal (27% versus 14%). In the broader context of judicial review, the success rates of environmental organizations in NEPA lawsuits were similar to the averages for challenges to agency action in a wide range of empirical studies;[26] moreover, they were substantially higher than the global averages during the George W. Bush Administration.[27] These findings, along with the roughly proportional share of appeals by environmental organizations (i.e., rates comparable to other plaintiffs), provide strong evidence that NEPA litigation is grounded on legitimate claims. In sum, neither the number of cases filed annually nor their outcomes suggests that NEPA litigation is being abused or used for the sole purpose of strategic delay.

Figure 2: Duration of NEPA Litigation in District Courts



26. *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767–68 (2008) (reporting data on administrative review cases involving EPA indicating that agencies prevailed on average 72% of administrative challenges on appeal); Richard J. Pierce & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 515 (2011) (observing that "[c]ourts at all levels of the federal judiciary uphold agency actions in about 70% of cases" irrespective of the standard of review that they apply); Richard J. Pierce, *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 84–85 (2011) (synthesizing the results of numerous empirical studies of judicial review and finding that agencies prevail in 64%–81% of the cases at the circuit level). A recent study finds that success rates in adjudicated cases in federal courts fell from 70% in 1985 to 33% in 2009. Alexandra D. Lahav & Peter Siegelman, The Curious Incident of the Falling Win Rate 1, (July 7, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993423.

27. During the Bush Administration environmental organizations prevailed in 45% and other plaintiffs in 20% of the cases; during the Obama Administration, they prevailed in 24% and 13%, respectively, of the cases. On appeal during the Bush Administration, environmental organizations prevailed in 35% of the cases and other plaintiffs prevailed in 16%, whereas during the Obama Administration, success rates converged to 17% and 15%, respectively.

By the standards of federal administrative litigation,[28] the duration of NEPA litigation is roughly comparable to or shorter than that of administrative law cases generally (see Figure 2). The median duration of a NEPA case was less than two years (twenty-three months), and 75% of the cases were resolved within 3.2 years (thirty-nine months). Moreover, for the subset of cases in which the federal government prevailed, the median duration was just 1.5 years and 75% of the cases were resolved within three years (thirty-six months).[29] The existing data therefore provide no basis for claims that NEPA litigation is unduly protracted.

III. Conclusion

Evidence about the implementation of NEPA and NEPA litigation negates the common criticisms of the statute. The vast majority of agencies' decisions that have the potential to significantly impact the environment require only perfunctory review under CEs or relatively streamlined reviews under EAs; in comparison, the number of EISs prepared is modest and has been gradually declining over the last decade.[30] The number of cases filed under NEPA has remained relatively constant, with about 100 cases filed in district courts annually (about 35% of which settle) and roughly twenty-five appeals. Given that the number of federal actions potentially subject to NEPA is roughly 100,000 or so annually,[31] litigation rates are exceedingly low; even among actions requiring EISs, which pose the greatest potential threats to the environment, on average just 20% are challenged.[32]

These numbers represent national averages and refute claims that NEPA systemically causes chronic delays and promotes obstructionist litigation. The national statistics do, however, obscure the variable nature of NEPA litigation. For most federal agencies, a NEPA lawsuit is a rare event and claims that NEPA poses a significant burden to them have little basis in fact. A subset of federal land and natural resource management agencies accounts for three-quarters of the NEPA cases filed. Even for these agencies, though, the majority of the EISs they prepare are not

28. *See* Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269, 1289 (2005) (finding that the average duration of a federal civil case from filing to trial increased from 19.5 to 22.5 months between 1998 and 2003); Jessica Kier, *Raising the Bar: How Will the New Federal Rules of Civil Procedure Affect Your Required Level of Competency?*, 39 J. LEGAL PROF. 103, 105 (2014) (reporting that the median duration for securities class-action lawsuits was three and a half years); Kathryn Moss et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 307 (2005) ("Between 1990 and 1998, the percentage of general federal civil rights cases resolved within two years increased from 82 percent to 88 percent . . . .").

29. For cases in which the federal government wins, 50% of the cases are resolved within about 1.5 years; 75% resolved within three years; 90% of the cases are resolved within five years. For cases in which the plaintiff prevails on at least one claim, 50% of the cases are resolved within 2.5 years; 75% resolved within about 4.3 years; and 90% of the cases are resolved within 6.2 years.

30. *See* Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 348 (2004) (characterizing the number of federal actions each year that trigger EIS preparation duties "a vanishingly small number given the scale and scope of federal operations").

31. Federal agencies annually conduct hundreds of EISs, tens of thousands of abbreviated environmental assessments, and hundreds of thousands of routine determinations that environmental impacts of a proposed action are insignificant. *See NEPA Litigation: CEQ Reports*, COUNCIL ENVTL. QUALITY, https://ceq.doe.gov/ceq-reports/litigation.html (last visited Jan. 24, 2018).

32. *See* J. CLARENCE DAVIES & JAN MAZUREK, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM 163 (2014) ("The *percentage* of EISs challenged in court has remained relatively stable, . . . fluctuating between 15 and 20 percent of all EISs filed.").

the subject of litigation; the USFS is most likely to face NEPA litigation but only about 25% of EISs issued by the USFS are challenged. Similarly, for the FWS and NMFS, while the litigation rates are higher, the total number of EISs is low (averaging just eight and three EISs per year, respectively). Thus, in absolute terms, the burden from NEPA for either of these agencies is not likely to be significant.

The low frequency and implied selectivity of NEPA litigation are reflected in the relative success of environmental plaintiffs. Environmental organizations prevailed at consistently higher rates than other plaintiffs filing NEPA actions, and their success in court was comparable to or substantially exceeded that of plaintiffs generally in administrative law challenges. By these benchmarks, the merits of NEPA challenges filed by environmental plaintiffs are inconsistent with claims that NEPA suits are routinely filed merely to hold up agency action and lack legitimate legal grounds. The high success rates of environmental plaintiffs, who prevailed in about 45% of their cases during the George W. Bush Administration, is further evidence countering the charge that environmentalists used NEPA for purely strategic objectives.

In this letter, we have examined the available information on implementation of NEPA and litigation arising out of various agencies' NEPA compliance. The data refute critics' claims that a systemic crisis exists with respect to either NEPA implementation or litigation. Instead, they reveal that federal agencies in the vast majority of covered actions engage in streamlined environmental reviews relying on either a CE or EA, and that NEPA litigation is rare. In this light, we do not believe that there are grounds for claims that NEPA has been "weaponized" or that environmental organizations are misusing the statute.

Sincerely,

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