
NATURAL RESOURCES JOURNAL

Volume 21
Issue 2 *Spring 1981*

Spring 1981

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NEPA LITIGATION IN THE 1970s: A DELUGE OR A DRIBBLE?

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The National Environmental Policy Act of 1969 (NEPA)[1] has been the *bête noir* of many interest groups, bureaucrats, and congressmen for over ten years. Following environmentalists' early successes enjoining such projects as the Trans-Alaska pipeline and the leasing of Outer Continental Shelf oil and gas resources, some congressmen were wont to complain about "itinerant intervenors who go around the country . . . meddling in problems" and "little pestiferous suits . . . hamstringing" federal programs.[2] Delays from lawsuits have prompted proposals to limit litigation opportunities and suggestions for regulatory reforms such as creation of a federal Energy Mobilization Board.[3] Concern also has been voiced about the demands NEPA lawsuits make on judicial resources.[4]

This article examines several facets of litigation under NEPA during the 1970s. It briefly describes congressional expectations regarding lawsuits and then focuses on numbers of cases, characteristics of plaintiffs and defendants, and factors prompting aggrieved parties to seek judicial relief. NEPA cases are also compared to other civil cases as a measure of NEPA's impact on the federal courts. This article concludes with speculation on the future of NEPA litigation under the Reagan administration.

NEPA'S REQUIREMENTS FOR ENVIRONMENTAL IMPACT STATEMENTS

Section 101 of NEPA establishes a national policy for the environment, and section 102 establishes procedures agencies must follow to

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1. 42 U.S.C. § § 4321-4347 (1976 & Supp. II 1978).

2. *Cited in* R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT 191, 206 (1976).

3. *See, e.g.*, S. 1308 & H.R. 4985, 96th Cong., 1st Sess. (1979) (pertaining to an Energy Mobilization Board).

4. *See* R. LIROFF, *supra* note 2, at 204. Chief Justice Burger has commented numerous times on the overburdening of courts by litigation of many kinds.

accomplish the lofty aims of section 101.[5] The most noteworthy (or perhaps, infamous) provision of NEPA is section 102(2)(c), which requires agencies to prepare environmental impact statements (EIS) for all major federal actions significantly affecting the quality of the human environment.[6]

Over 10,000 statements have been prepared since NEPA took effect on January 1, 1970.[7] These have covered a wide range of actions, from licensing a branch bank in Woodstock, Vermont, to leasing millions of acres of Outer Continental Shelf lands off the Atlantic, Pacific, Gulf, and Alaskan coasts. Likewise, litigation has focused on a broad range of federal endeavors, from construction of an incinerator for a federal building to issuance of licenses for construction and operation of nuclear power plants.

NEPA can be considered the Magna Carta of the environmental movement, not only because it establishes a broad national environmental policy, but because it is a great equalizer in the hands of skilled litigants. By litigating questions on whether an environmental impact statement should be prepared for a proposed action, whether the impact statement prepared for an action is legally sufficient, and whether actions described in environmental impact statements comply with the national environmental policy, environmentalists can delay projects and create publicity on questionable public expenditures. NEPA also has been used by business and industry groups to further their objectives.

Although there is considerable controversy over the merits of impact statements as tools to enhance environmental quality, NEPA has spawned production of environmental impact statements at the state level.[8] Antitrust, energy, inflation, and other impact statement spinoffs also can be found at the federal level.[9] When Congress considered impact statements in other policy arenas, however, it usually made clear its intention that requirements for these statements were not intended to provide grounds for private action in the federal courts.[10]

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5. 42 U.S.C. § § 4331-4332 (1976 & Supp. II 1978).

6. *Id.* § 4332(2)(c) (1976).

7. *See* 9 (EPA) 102 MONITOR 62 (Oct. 1979); 9 (EPA) 102 MONITOR 82 (Feb. 1979).

8. For discussion of state environmental impact statement requirements, see Pearlman, *State Environmental Policy Acts: Local Decision Making and Land Use Planning*, 43 J. AM. INST. PLANNERS 42 (1977).

9. *See, e.g.*, 15 U.S.C. § 16(b)-(h) (1976) (providing for competitive impact statements describing the impact on competition of settlements in anti-trust suits).

10. *See, e.g.*, SENATE COMM. ON COMMERCE, ENERGY POLICY ACT OF 1973, S. REP. NO. 114, 93d Cong., 1st Sess. (1973).

CONGRESSIONAL EXPECTATIONS REGARDING LITIGATION UNDER NEPA[11]

In the recorded legislative history, there is only one reference to NEPA's implications for judicial review.[12] This reference is to a deleted provision stating every citizen's "fundamental and inalienable right to a healthful environment."[13] During conference committee deliberations, one senator expressed concern over the law's breadth, but no specific reference was made to the judicial implications of the EIS requirement.[14] Senator Henry Jackson of Washington, principal sponsor of the law, recognized that litigation might result, but did not anticipate the volume of litigation that ensued.[15]

One reason for limited discussion of judicial review stems from the genesis of the requirement for environmental impact analysis. Senator Jackson had devoted little effort to developing a legislative record on the provision in his early version of NEPA which called for development of findings of environmental impact. Perhaps he believed that little work on this point was necessary since environmental findings appeared to be management tools, largely internal to the federal bureaucracy. When the findings provision was changed to a statement provision late in NEPA's legislative history, many of its requirements remained unspecified; for example, impacts to be evaluated, alternatives to be discussed, and timing of statement preparation. The change to a statement obligation had considerable impact on judicial review; it established a unique document whose scope of review by the courts never had been defined.[16]

The relative youthfulness of the environmental law movement was another reason for congressional inattention to judicial review. In 1969, environmental lawyers had not become a significant force in administrative politics. Annual reports of the U.S. Attorney General

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11. This section draws heavily from R. LIROFF, *supra* note 2, at 31-35, and the sources cited therein.

12. *See* discussion in "Statement of the Managers on the Part of the House," appended to CONFERENCE REPORT ON S. 1075, H.R. REP. NO. 765, 91st Cong., 1st Sess. (1969).

13. *See* SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. REP. NO. 296, 91st Cong., 1st Sess. (1969).

14. This observation is based on comments by congressional staff interviewed by the author in fall, 1971. Interviewees included Daniel Dreyfus, Ned Everett, Frank Potter, Jr., William Van Ness, Jr., and an aide to Representative Wayne Aspinall.

15. *Id.*

16. One writer commented that the change from "findings" to "statement" probably tended to enlarge the scope of judicial review. *See* Note, *Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline,* 81 YALE L.J. 1592, 1594 n.13 (1972).

and environmental groups, and litigation data for highway projects, all indicate that few environmental cases had been decided prior to 1969.[17] Institutional indicators also reflect the infancy of environmental law. It was not until 1970 and 1971, for example, that two environmental law journals and two environmental law reporting services were founded.[18] Public interest environmental law groups were also a recent phenomenon. For all these reasons, Congress' limited concern for NEPA's impact on the courts is understandable.

LITIGATION UNDER NEPA–THE AVAILABLE DATA

The Council on Environmental Quality (CEQ), established by Title II of NEPA, gathers information on NEPA-based litigation.[19] In August 1971, CEQ began compiling the data on a bimonthly basis. Figure I is a summary of the unpublished CEQ figures for the period August 1, 1971 to February 1, 1973.[20] CEQ began compiling data following the landmark decision in *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission* in July, 1971.[21] In this case, the D.C. Circuit Court of Appeals held that the AEC's regulations for implementing NEPA violated the statute's requirements.[22] The court observed that the commission had offered only a "crabbed" interpretation of its responsibilities under NEPA and that it was the judiciary's responsibility to see that congressional intent was not lost in the hallways of the bureaucracy.[23] Although environmentalists had obtained a preliminary injunction against the Trans-Alaska pipeline in April, 1970,[24] and found supportive language in a district court opinion challenging a Corps of Engineers' dam project in February 1971,[25] the *Calvert Cliffs'* decision finally convinced environmental groups and others that the judiciary would take NEPA seriously.[26]

Bimonthly figures from August 1971 to February 1973 do not show a consistent upward or downward trend in number of lawsuits

17. *See* figures in R. LIROFF, *supra* note 2, at 32-34.

18. The journals are *Ecology Law Quarterly* and *Environmental Affairs* and the law reporting services are *Environment Reporter* and *Environmental Law Reporter.*

19. 42 U.S.C. § § 4342, 4344 (1976).

20. No readily available data indicate how many suits under NEPA were initiated prior to August 1, 1971, and it is not wise to extrapolate back.

21. Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 942 (1972).

22. *Id.* at 1112.

23. *Id.* at 1111, 1117.

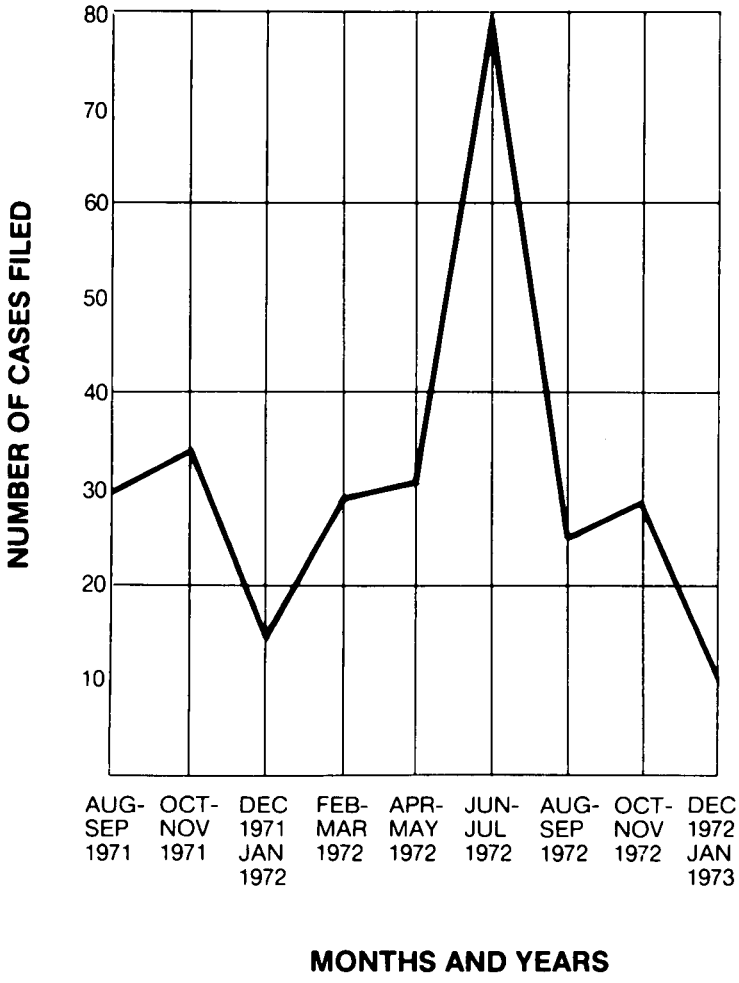
24. Wilderness Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).

25. Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1971).

26. *See generally* F. ANDERSON, NEPA IN THE COURTS (1973).

FIGURE I

Bimonthly Totals—NEPA-Based Lawsuits Filed in Federal Courts



Source: Council on Environmental Quality, Unpublished Data

filed. Decreases in the December-January period every year can be attributed to the holiday season. The enormous rise in litigation in mid-1972 illustrates industry's use of NEPA. In mid-1972, EPA formally approved or disapproved state implementation plans required by the Clean Air Act Amendments of 1970.[27] These EPA actions were challenged by industry and environmentalists alike, but for opposite reasons.[28] Industry contended that EPA was required to prepare an environmental impact statement on each of its approval actions. The legal issue was cloudy, however, and the courts ultimately decided such statements were not necessary to approve state implementation plans.[29] Nevertheless, the upswing in NEPA litigation in mid-1972 suggests that industry was prepared to use NEPA to defend itself against environmentally protective actions taken by EPA under more specific environmental statutes.

An agency by agency analysis of the CEQ figures further indicates industry's extensive use of NEPA against EPA. The Department of Transportation, EPA, and the Corps of Engineers were the most frequent defendants in NEPA lawsuits.[30] Environmental and community groups were the most frequent plaintiffs in actions against the Department of Transportation and the Corps, whereas industries were the principal plaintiffs in litigation against EPA.[31]

The first publicly available data on NEPA litigation were published in March 1976 by CEQ, in a six-year review of NEPA.[32] The data were gathered through a survey of federal agencies, and highlighted in a news release accompanying the CEQ review. This emphasis suggests the council was anxious to dispel the myth that an overwhelming number of NEPA lawsuits had been filed. As of June 30, 1975, 654 cases had been initiated alleging a NEPA issue. Three hundred sixty-three cases (55.5 percent) argued that an EIS was required when one had not been prepared. To place this number in perspec-

27. Plan preparation was required by Section 110 of the 1970 amendments, Pub. L. No. 91-604, 84 Stat. 1676, formerly codified at 42 U.S.C. § 1857c-5 (1976). The Act was amended substantially in 1977, by Pub. L. No. 95-95, 91 Stat. 685, and recodified. The revised Section 110 is recodified at 42 U.S.C. § 7410 (Supp. II 1978).

28. For a summary, see Comment, *Litigation Under the Clean Air Act*, 3 ENVT'L L. RPTR. 10007 (1973).

29. For further discussion of NEPA's applicability to EPA, see Liroff, *Impact Statement Preparation by the Environmental Protection Agency*, in DECISION MAKING IN THE ENVIRONMENTAL PROTECTION AGENCY–SELECTED WORKING PAPERS 286 (1977).

30. *See* Court and Administrative Proceedings Arising Under the National Environmental Policy Act, at 2 (memorandum to CEQ Chairman Russell Train from CEQ General Counsel Timothy Atkeson, March 22, 1973).

31. *Id.*

32. U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS: AN ANALYSIS OF SIX YEARS' EXPERIENCE BY SEVENTY FEDERAL AGENCIES 31-34 (1976).

tive, CEQ noted that in fiscal year 1975 alone, agencies assessed the environmental effects of 30,000 administrative actions to determine whether their effects were so significant as to require preparation of environmental impact statements.

Most of the remaining 291 cases challenged the adequacy of statements that had been prepared. CEQ contrasted this figure with the 6,000 environmental impact statements drafted during the six-year period and noted that approximately five percent of the impact statements were challenged in court. Action on 332 cases was completed by June 30, 1975. Sixty completed cases and 63 pending cases involved temporary injunctions.[33] Approximately one-third of the cases were dismissed at the trial court level.[34]

The Corps of Engineers, Department of Transportation, and Department of Housing and Urban Development (HUD) were subject to NEPA litigation most often. EPA had 24 cases completed or pending against it. Since this figure for EPA was lower than in CEQ's earlier compilation, it appears that CEQ deleted the early lawsuits challenging EPA's actions under the Clean Air Act.

CEQ reprinted these data in its 1976 annual report, and updated them in subsequent annual reports.[35] The 1978 update reported 938 NEPA cases filed through December 31, 1977.[36] The number of cases filed rose steadily each year, to a high of 189 in 1974, but dropped to 119 in 1976.[37] One hundred eight cases were reported for 1977, but this did not include an estimated 10-12 cases involving EPA.[38] One hundred fourteen cases were filed in 1978 and 139 in 1979.[39]

CEQ's data indicate that lawsuits have concentrated on several federal agencies. Through 1977, the Departments of Transportation (including the Federal Highway Administration), Defense (including the Corps of Engineers), Interior, Housing and Urban Development, and

33. *Id.* at 32.

34. *Id.* CEQ's survey form appeared to distinguish pre-trial dismissals from post-trial decisions favoring agencies, so these dismissals probably occurred before, rather than after, a trial on the merits.

35. *See* U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY–1976 (1976) [hereinafter cited as EQ 1976]; U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY–1977 (1977) [hereinafter cited as EQ 1977]; U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY–1978 (1978) [hereinafter cited as EQ 1978]; U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY–1979 (1979) [hereinafter cited as EQ 1979]; U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY–1980 (1980) [hereinafter cited as EQ 1980].

36. EQ 1978, *supra* note 35, at 407.

37. *Id.*

38. Estimate from interview with CEQ Counsel Foster Knight, January 15, 1980.

39. EQ 1980, *supra* note 35, at 383; EQ 1979, *supra* note 35, at 588.

Agriculture (including the Forest Service) were the defendants in 83 percent of all NEPA cases.[40] The Departments of Transportation, Defense, Interior, Housing and Urban Development, and EPA, accounted for 69 percent of the cases in 1978.[41] In 1979, 73 percent of the cases involved the Departments of Transportation, Housing and Urban Development, Interior, Agriculture, and Defense.[42]

The 23 NEPA cases in 1979 against the Department of Housing and Urban Development nearly doubled the cases reported against HUD in 1978.[43] This increase was attributable to litigation contesting HUD approvals for low and moderate income housing projects and for projects under the Urban Development Action Grant and Community Development Block Grant Programs.[44] Virtually all the litigants against HUD alleged that the department had failed to prepare the required environmental impact statements.[45]

It appears that the federal government has had considerable success defending itself in NEPA litigation. For example, in its 1978 update, CEQ briefly summarized results of 584 completed cases.[46] Nearly half (296) were decided on their legal merits, and of these, 221 (75 percent) favored government agencies. In the 75 cases decided for plaintiffs, 56 ordered preparation of an impact statement; in 15 an impact statement was found inadequate. Of the remaining completed cases, 170 were dismissed for settlement or other reasons.

In its annual reports for the last several years, CEQ has provided data on federal actions halted by NEPA-based injunctions, and on the length of the resulting delays. For example, Table I, from CEQ's annual report for 1978, indicates that 92 federal actions were delayed for over one year by NEPA-related injunctions. In the annual reports for 1979 and 1980, delays were reported as averages by type of project halted. The length of the average injunction was 7.8 months in 1978 and 7 months in 1979. See Tables II and III.

CEQ was particularly sensitive, in its annual report for 1979, to allegations that NEPA lawsuits were confounding the nation's energy problems. A separate chart was published showing the 103 lawsuits challenging energy projects.[47] Of the 103 lawsuits between 1970 and 1978, challenging nine categories of energy projects, only 17 had re-

40. EQ 1978, *supra* note 35, at 407-08. The agencies are listed in order, from most- to least-sued.
41. EQ 1979, *supra* note 35, at 588.
42. EQ 1980, *supra* note 35, at 383.
43. *Id.*
44. *Id.*
45. *Id.*
46. EQ 1978, *supra* note 35, at 408.
47. EQ 1979, *supra* note 35, at 590.

TABLE I

DELAYS IN FEDERAL ACTIONS RESULTING FROM INJUNCTIONS ISSUED UNDER NEPA, 1970-1977

Reason	*Number of actions*
Delay because of NEPA-related injunction	
Up to 3 months	37
3 to 6 months	21
6 to 12 months	23
Over 12 months	92
Length not indicated	29
Total	202
Permanently halted by NEPA-related injunction	0
Delayed by non-NEPA-related injunction	27
No injunction issued	709
Total cases	938

Source: U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY–1978, 409 (1978).

TABLE II

LENGTH OF INJUNCTIONS IN NEPA LITIGATION, BY PROJECT TYPE, 1978

Type of Federal Action or Project	*Numbers of NEPA Lawsuits Filed in 1978*	*Cases Resulting in Injunctions (average duration)*
Projects affecting wetlands and water bodies	16	4 (8 months)
Water and sewage treatment projects	14	none
Highway and road construction	12	1 (12 months)
Policies, programs, plans, regulations, and standards	10	1 (3 months)
Subsidized housing	9	1 (6 months)
Energy projects	9	2 (8 months)
Mass transit	8	1 (2 months)
Actions involving public lands (other than energy and water)	8	none
Military activities	8	1 (12 months)
Air transportation activities	7	1 (12 months)
Wildlife-related	5	none
Actions affecting historic sites	5	2 (5 months)
Miscellaneous actions	10	1 (10 months)
Total	121*	15 (7.8 months)

*Exceeds total of 114 lawsuits filed in 1978 because some cases involved two types or categories of federal actions.

Source: U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY–1979, 589 (1979).

TABLE III

LENGTH OF INJUNCTIONS IN NEPA LITIGATION, BY PROJECT TYPE, 1979

Type of Federal Action or Project	*Number of suits filed (139)*	*Cases resulting in Injunctions (average duration)*
Highway and road construction	16	2 (6 months)
Actions involving public lands (other than energy and water)	15	2 (4.5 months)
Mass transit	13	0
Energy projects	13	1 (5.5 months)
Water and sewage treatment projects	10	0
Subsidized housing	10	0
Policies, programs, plans, regulations, and standards	10	1 (3 months)
Projects affecting wetlands and water bodies	9	1 (12 months)
Air transportation activities	9	0
Wildlife-related activities	9	2 (12 months)
Urban renewal-development actions	8	1 (3 months)
Actions affecting historic sites	8	0
Subsidized commercial/industrial projects	7	1 (12 months)
Actions involving toxic substances–pesticides	2	0
Military activities	2	1 (3 months)
Miscellaneous	13	0
Total	154 *	12 (7 months)

*Total exceeds 139 because some cases involved two or more categories of action.

Source: U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY–1980, 384 (1980).

sulted in injunctions. Thirty of the 103 involved nuclear power plants, and approximately half of all the cases involved energy projects for which a federal agency had failed to prepare an environmental impact statement. Based on these figures, CEQ suggested that NEPA litigation and preliminary injunctions have not presented a significant obstacle to the development of energy projects.[48]

CEQ had also analyzed the types of plaintiffs bringing NEPA actions.[49] Business and industry were plaintiffs in 15 percent of the cases reported through 1977, and in 19 percent of the cases reported in 1978 and in 1979. State governments were plaintiffs in eight percent of the cases through 1977, nine percent in 1978, and six percent in 1979. Local governments were plaintiffs in 12 percent of the cases through 1977, 19 percent in 1978, and ten percent in 1979.

Yearly comparisons of legal actions by environmental groups are

48. *Id.*

49. EQ 1980, *supra* note 35, at 384; EQ 1979, *supra* note 35, at 589; EQ 1978, *supra* note 35, at 408.

somewhat more problematic because of changes CEQ made in its reporting of data in its annual reports.[50] Through 1977, CEQ reported that citizen and environmental groups were plaintiffs in 67 percent of the cases. In 1978, citizen and environmental groups were plaintiffs in 45 percent of the cases. For 1979, CEQ refined its reporting to distinguish environmental groups from other citizen groups. CEQ reported that in 1979, environmental groups were the plaintiffs in only 20 percent of the cases. Citizen groups and individuals were plaintiffs in another 20 percent, and directly affected property owners and residents were plaintiffs in 17.5 percent of the cases.

It appears from the above that litigation by environmental groups, as a percentage of all NEPA litigation, has been dropping, and that by 1979, it was about equal to NEPA litigation initiated by business and industry.

FACTORS INFLUENCING THE VOLUME OF LITIGATION UNDER NEPA

Numerous factors influence the volume of litigation under NEPA. While NEPA does not contain specific language on judicial review, the presumption in favor of review and the trend towards liberal standing requirements have lowered the threshold standard litigators must cross.[51] Moreover, when environmental groups seek to enjoin multimillion dollar projects, courts rarely impose onerous equity bonds. Prospective litigants may delay a government project without bearing a burden much heavier than attorney fees and court costs.[52] On the other hand, the expense of a lawsuit and the courts' disdain for frivolous litigation discourages abuse of the litigation opportunities afforded by NEPA.

Resource availability is another factor influencing the volume of litigation. The budgets of major environmental law groups grew considerably in the 1970s.[53] As the decade closed, however, environmental groups found their economic health threatened. The Ford Foundation announced that it would end the sustained support it had offered for nearly ten years.[54] Court-awarded attorney fees could not be substituted for the Ford support, for the U.S. Supreme Court had made clear in the Trans-Alaska pipeline case in 1975 that

50. EQ 1980, *supra* note 35, at 384; EQ 1979, *supra* note 35, at 589; EQ 1978, *supra* note 35, at 408.

51. *See* R. LIROFF, *supra* note 2, at 157-60.

52. *Id.* at 149-53.

53. *See* White, *Who's Who in the Environmental Movement*, 8 NAT'L J. 63 (1976).

54. *See* Singer, *Liberal Public Interest Law Firms Face Budgetary, Ideological Challenges*, 11 NAT'L J. 2053 (1979).

fee recoveries in NEPA litigation would be quite difficult.[55] Growth in the field of environmental law during the 1970s forced environmental groups to choose their lawsuits carefully, and allocate resources among NEPA and non-NEPA actions.[56] Also, following changes in the statutory rules governing lobbying by tax exempt organizations, many of the national environmental groups found that limited resources were better used to influence policy during its formative state in Congress.[57]

Several years ago, environmental groups' enthusiasm for NEPA litigation was tempered when appellate courts indicated substantive provisions of Section 101 of NEPA would not be used to reverse agency decisions that seemed, to the environmentalists, arbitrary and capricious.[58] The Supreme Court's narrow reading of NEPA also discouraged environmentalist litigation. For example, in *Kleppe v. Sierra Club,* the Court stated that NEPA "clearly states" when an impact statement is required, and it rejected an appellate court-devised balancing test which provided some intelligent guidance to agencies concerning when preparation of an impact statement should be timed.[59] The Court seemed to ignore the numerous court decisions devoted to clarifying the meaning of NEPA's opaque language, and this Court's attitude discouraged major environmental groups from bringing NEPA-based lawsuits.[60]

Since NEPA applies to a broad range of federal actions, the volume of litigation under it is significantly influenced by the "not on my block you don't" syndrome.[61] NEPA has been employed by local environmental and community groups across the country to bar mass transit and housing construction in neighborhoods and highways cutting through local parks. In short, the volume of litigation under NEPA is a function of the number of actions proposed by federal

55. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

56. Since NEPA's enactment, major legislation has been passed governing a host of environmental matters. *See, e.g.,* the Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. § § 2601-2629 (1976 & Supp. III 1979)).

57. *See Environmental Benefits of the Tax Reform Act,* 6 ENVT'L L. RPTR. 10253 (1976).

58. *See* Trubek & Gillen, *Environmental Defense, II: Examining the Limits of Interest Group Advocacy in Complex Disputes,* in PUBLIC INTEREST LAW 195 (B. Weisbrod ed. 1978).

59. Kleppe v. Sierra Club, 427 U.S. 390 (1976).

60. For a strong statement of this environmental group view, see Hoffman, *The Club, The Cause, and The Courts,* 62 SIERRA CLUB BULL. 41, 45 (Feb. 1977). *See also* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

61. *See* O'Hare, *Not on My Block You Don't: Facility Siting and the Strategic Importance of Compensation,* 25 PUB. POLICY 407 (1977).

agencies and the ability of community groups to organize and resist these actions.

NEPA litigation also is affected by the number of federal actions that have an impact on industry. Even though industries have an economic interest to protect, demonstration of an adverse environmental interest as well can create standing to sue under NEPA.[62] Individual industries and trade associations take advantage of this opportunity to delay government actions unfavorable to them.[63] Moreover, new types of public interest groups identified with corporate interests have emerged to litigate in support of free enterprise and limited government. These groups, reports the *Wall Street Journal*, are "out to tame environmental extremists and rabid regulators."[64] The regulators referred to probably include the many litigators from environmental organizations who moved to key positions in the Carter Administration in 1977.[65] The new litigation groups use NEPA to further their view of the public interest and are not likely to suffer from lack of resources.[66]

PLACING NEPA LITIGATION IN PERSPECTIVE

Since 1970, the number of NEPA-based lawsuits filed has never exceeded 189 in any year. To put this volume of litigation in perspective, it is useful to examine the total number of new civil filings in the federal district courts each year.[67] For example, in fiscal year 1970, 87,321 civil cases were filed in U.S. district courts;[68] in fiscal year 1977, 130,567 civil cases were filed.[69] Therefore, the number of NEPA cases relative to all new civil cases is quite small, and NEPA litigation has not followed the upward trend of all civil litigation.

It is not likely that NEPA lawsuits have an impact on judicial calendars disproportionate to their absolute number. For example, of

62. *See, e.g.*, National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

63. For example, National Airlines used NEPA to delay a Civil Aeronautics Board proceeding so as to thwart competition. The delay was worth millions of dollars to National. *See* Burger, *Miami-Los Angeles and NEPA: The Use of the National Environmental Policy Act of 1969 as an Anticompetitive Weapon*, 42 J. AIR L. & COM. 529 (1976).

64. *See* Schmitt, *Alternative Public-Interest Law Firms Spring Up With Nader et Al. As Target*, Wall St. J., Aug. 21, 1979, at 14, col. 3.

65. For example, the Natural Resources Defense Council's David Hawkins became the EPA assistant administrator responsible for implementing the Clean Air Act.

66. *See* Singer, *supra* note 54.

67. Some NEPA lawsuits, such as Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972), are filed directly in the Circuit Courts of Appeal, rather than in the district courts, but in the context of this discussion this fact is not important.

68. *See* Demkovich, *The Clogged Federal Courts—Who Are the Culprits?*, 10 NAT'L J. 222, 225 (1978).

69. *Id.*

the 56 civil suits terminated in the year ending June 30, 1977, and consuming more than 20 trial days, none dealt with NEPA.[70]

The lawsuits filed under all existing environmental laws represent only a small volume of the new civil filings in federal courts. A 1972 federal study concluded that cases identified as environmental represented less than seven-tenths of one percent of the total cases pending in the federal courts.[71] The number of federal environmental laws has increased since 1972, but because of dramatic increases in non-environmental filings, the proportion of environmental lawsuits to all cases filed should not have risen.

Most NEPA lawsuits probably are less complex than most litigation challenges to EPA's proposed regulations. By February 1973, more than 100 lawsuits had been filed under the Clean Air Act, many of which challenged EPA's approval of detailed state plans for implementing the act.[72] From March 1974 to June 30, 1975, industrial dischargers and trade associations filed approximately 145 lawsuits challenging the validity of effluent limitations promulgated by EPA pursuant to the Federal Water Pollution Control Act.[73] An additional 90 lawsuits were filed challenging performance and pretreatment standards for new sources subject to regulation under the act.[74] Those suits that attacked the substance of EPA's decisions arguably required considerable attention from judges exercising their review responsibilities.[75]

CONCLUSIONS AND PREDICTIONS

During the 1970s, 1,191 lawsuits alleging NEPA violations were filed.[76] It appears that Congress did not anticipate the volume would

70. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE 12 MONTH PERIOD ENDED JUNE 30, 1977, at 353 (1978).

71. *See* Kiechel, *Environmental Court VEL NON,* 3 ENVT'L L. RPTR. 50013 (1973). The federal study did not employ a uniform definition of environmental litigation and did not offer data on lawsuits initiated under citizen suit provisions of federal environmental laws.

72. *See Litigation Under the Clean Air Act, supra* note 28.

73. COMPTROLLER-GENERAL OF THE UNITED STATES, IMPLEMENTING THE NATIONAL WATER POLLUTION CONTROL PERMIT PROGRAM: PROGRESS AND PROBLEMS 18 (1976). These lawsuits pertained to 28 of the 46 effluent limitation guidelines that had been published.

74. The standards were established pursuant to 33 U.S.C. § 1317 (1978).

75. The heavy case load under the air and water pollution control statutes continued into 1978. In mid-August 1978, EPA's Water Quality Division had approximately 300 lawsuits pending which could be consolidated by subject matter into approximately 75-80 cases. Approximately 10 percent of these cases were brought under statutory "citizen suit" provisions. EPA's Air Quality Division had 135 cases pending, including 22 brought under statutory citizen suit provisions. These figures were provided by Ann Jones, Legal Librarian in EPA's Office of General Counsel, in a phone interview on August 18, 1978.

76. *See* EQ 1980, *supra* note 35, at 383; EQ 1979, *supra* note 35, at 590.

be this great. However, it is doubtful that any considered congressional effort to predict the level of litigation would have been very successful, because too many factors influencing litigation were not readily foreseeable or measurable. By the end of the decade, NEPA was being used in litigation as much by industry as by environmentalists.

With the beginning of an avowedly pro-business, anti-regulation administration in Washington, it is timely to speculate on future litigation under NEPA, even though it is unwise to forecast particular levels of litigation.

President Ronald Reagan and the new Secretary of Interior, James Watt, have suggested that the public lands will be open to greater development than they were in the 1970s. If decisions to permit greater development require preparation of environmental impact statements, and these statements are not prepared or are inadequate, environmentalists may increase their litigation under NEPA. If these same decisions embody the values promoted by the corporate-funded public interest groups, these groups may file fewer NEPA lawsuits.

Environmental groups have been seeking special contributions from their members to defend the environmental gains of the 1970s against the anticipated policies of the Reagan administration. The resources of the environmental groups may fund a considerable amount of litigation, if the drop in resources stemming from complacency during the Carter administration is offset by increases derived from fears of the Reagan administration.

NEPA-based lawsuits may also increase as the nation struggles to find suitable repositories for hazardous wastes. Although these burial sites satisfy basic national or regional needs, local citizen groups who perceive them as undesirable may initiate NEPA-based lawsuits.

Local groups, and state and local governments, may also bring NEPA-based challenges in response to cutbacks in federal spending. For example, in 1979, seven suits were filed against the Federal Railroad Administration, challenging its finding that a new, more streamlined route structure for Amtrak would not have significant environmental effects.[77] On the other hand, NEPA-based lawsuits may decline if the federal government eliminates its support of controversial highway and water resource development projects. Environmentalists and community groups may forego NEPA lawsuits that they otherwise might have filed.

The future amount of litigation under NEPA may ultimately be influenced by congressional decisions regarding the availability of judicial review of agency decisions. Congress, on some occasions, has

77. EQ 1980, *supra* note 35, at 383.

limited the scope of judicial review under NEPA.[78] Since the Republicans have gained control of the U.S. Senate, and the House of Representatives is now somewhat more conservative, legislative proposals to limit judicial review under NEPA may find an even more positive reception.

Efforts to limit citizen redress in the courts would be unfortunate. Litigation is often a product of administrative failure to recognize the legitimacy of environmental and other relevant values in decisionmaking. Some litigation, therefore, is unavoidable, but responsiveness to relevant values in the administrative process, and development of carefully reasoned policies based on more than political ideology, are the best ways to minimize future NEPA litigation.

78. *See, e.g.*, Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d) (1976).