

JUDGING NEPA:

A “Hard Look” at Judicial Decision Making Under the National Environmental Policy Act

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This report examines current trends in National Environmental Policy Act (“NEPA”) litigation in the federal courts. It builds upon past research to determine whether NEPA cases are being brought at the same rate as in the past; whether cases are being won more or less frequently; and whether the party affiliation of the presiding judge is correlated with the case outcome. Based upon a review of all reported NEPA decisions since early 2001, the results are dramatic and, in some instances, troubling.

During this period, the rate of new NEPA litigation has increased significantly, in contrast to the general declining trend in NEPA litigation since 1974. This recent spike in litigation may be due to a number of factors, including an increase in environmentally significant actions by federal agencies and a corresponding increase in challenges to those actions, or environmental parties’ reported perception of the current administration as hostile to the values NEPA was designed to protect. Despite the increase in the number of new filings, the overall win rate for NEPA litigants has remained remarkably stable over thirty years of litigation.

This study also reveals a dramatic correlation between the outcome of NEPA cases and the party affiliation of the presiding judge, using the party of the President who nominated that judge as a rough proxy. In 325 NEPA cases decided from January 21, 2001, to June 30, 2004, EJI’s study found that:

- federal district court judges appointed by a Democratic president ruled in favor of environmental plaintiffs just under 60% of the time, while judges appointed by a Republican president ruled in their favor less than half as often – 28% of the time;
- district judges appointed by President George W. Bush have an even less favorable attitude toward environmentalists’ NEPA suits, ruling in their favor only 17% of the time;
- when industry or pro-development interests sue under NEPA, the results are almost exactly reversed: judges appointed under a Democratic administration rule in favor of pro-development plaintiffs 14% of the time, while Republican-appointed judges rule in favor of such plaintiffs almost 60% of the time.

An even more striking pattern can be discerned in the federal circuit courts, in which three-judge panels decide appeals from the district courts. Here, the study found that:

- circuit court panels with a majority of judges appointed by a Democratic president (those with two or three such judges) ruled in favor of environmental plaintiffs 58% of the time.

- In contrast, Republican-majority panels ruled in favor of environmental plaintiffs just 10% of the time – only one-sixth as often.

These results suggest that judges’ political affiliations often have a pronounced impact on their disposition of NEPA claims. This is especially significant given the federal judiciary’s central role in defining and enforcing NEPA’s obligations. The results call into question whether NEPA is meeting its core purpose of providing a transparent environmental impact assessment process that generates information about proposed federal actions regardless of which administration proposes them, who objects to them, or who hears any dispute about them.

The National Environmental Policy Act (“NEPA”) is the cornerstone of federal environmental law. It represents the “national environmental policy,” and is the closest thing the United States has to a framework environmental law. As part of NEPA’s 35th anniversary, and in response to the recent rise in controversy and litigation under the Act, the Environmental Law Institute decided to examine how NEPA has been faring in the courts. This report reviews the importance of NEPA to federal environmental policy and the role of federal courts in defining it; the number and disposition of NEPA cases decided during the study period (January 21, 2001, to June 30, 2004); and the correlation between the political affiliation of the presiding judges and the ultimate outcome of NEPA cases decided during this same time period.

The Environmental Law Institute (“ELI”) has a special affinity with NEPA that dates back to December 22, 1969, when the statute was first enacted and ELI was chartered to track the emerging field of federal environmental law. Over the years, ELI has reported on, analyzed and conducted groundbreaking research on NEPA as it evolved. For example, ELI has collaborated with the Council on Environmental Quality (“CEQ”) on numerous reports and studies on the law’s effectiveness and implementation.¹ ELI also has published or co-authored a number of reference materials that are recognized as among the foremost authorities on NEPA,² and has provided training in NEPA compliance to government agencies, including the

National Park Service, the U.S. Forest Service, and the Natural Resources Conservation Service. ELI likewise provides training and technical assistance to foreign countries that continue to look to the United States – and NEPA specifically – as a model of transparent and effective environmental policy.

This report is issued under the auspices of ELI’s Endangered Environmental Laws Program, which is an initiative by the Institute and its partner organizations to reinforce the foundations of environmental law and to help defend its intellectual and constitutional legitimacy.³ The Program monitors cases currently before the federal judiciary, and calls attention to developments that might threaten the continued vitality of our long-standing environmental protections. By publishing this study, we hope to spark dialog regarding the current health of NEPA, the degree of polarization among sitting judges, and the appropriate role of political views in environmental decision making.

¹ See, e.g., FREDERICK R. ANDERSON, ENVIRONMENTAL LAW INSTITUTE, NEPA IN THE COURTS (1973). In the early 1980s, ELI was commissioned by CEQ to prepare a report on NEPA compliance across 19 federal agencies. See ENVIRONMENTAL LAW INSTITUTE, NEPA IN ACTION: ENVIRONMENTAL OFFICES IN NINETEEN FEDERAL AGENCIES, A REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY (October 1981). ELI’s NEPA scholarship continued into the 1990s with publication of REDISCOVERING THE NATIONAL ENVIRONMENTAL POLICY ACT: BACK TO THE FUTURE (1995).

² See NICHOLAS C. YOST, NEPA DESKBOOK (Environmental Law Institute, 3d ed. 2003). See also McELFISH, J., THE REGULATIONS IMPLEMENTING NEPA, IN M. SQUILLACE AND K. SHELDON, THE NEPA LITIGATION GUIDE (American Bar Association, Chicago, 1999); ENVIRONMENTAL LAW INSTITUTE, LAW OF ENVIRONMENTAL PROTECTION (Sheldon M. Novick et al., eds., Vol. 2, April 2004) (containing chapter on NEPA).

³ See www.endangeredlaws.org for additional information regarding the Endangered Environmental Laws Program.

NEPA's Vital Role in U.S. Environmental Policy

NEPA was the first modern environmental statute and remains among the most important. Often referred to as the “backbone” of federal environmental law, it sets comprehensive ecological goals for the federal government, and requires federal agencies to fully consider and report on the environmental impacts of their decisions prior to acting. Simply put, the statute’s goal is to improve decision-making by incorporating environmental information into all major federal decisions, and to encourage agencies to adopt environmental values in their internal practice and culture. NEPA also established the Council on Environmental Quality, which was intended to promote implementation of NEPA throughout the federal government and to report on compliance.

NEPA’s key provisions require government agencies to prepare environmental impact statements for major federal actions significantly affecting the environment. These statements must consider not only the impacts of the proposed project, but also the potential environmental impacts of other alternatives, including the alternative of taking no action at all. Importantly, NEPA provides for public access to this information, and directs federal agencies to respond to public input. NEPA thus insures a measure of transparency in decision-making, accountability for environmental consequences, and access to administrative processes and the courts, both for people directly affected by federal decisions and for the public at large. Despite initial (and in some cases ongoing) administrative resistance, for more than thirty years NEPA has been widely used throughout the United States as a tool to review, reconsider, and improve projects that affect the environment.

Although NEPA only applies to federal government actions, this does not reduce its importance. The U.S. Government owns over one-quarter of the nation’s landmass and has an annual budget of almost \$2 trillion. NEPA applies to management activities on federal lands, such as the preparation of resource management plans and forest plans; leasing of federal land for oil and gas exploration and development; leases for grazing on federal land; and timber sales in the national forests. NEPA also affects federal

regulatory activities, such as the granting of a federal permit or license to a private party or the dedication of federal funding to a state or local project.

NEPA has also affected national infrastructure. It applies to federal or federally-funded road construction projects; oil and gas pipelines that require federal licenses or permits; the construction of federally licensed power plants; publicly owned sewage treatment facilities that require federal permits and receive federal funds; construction or expansion of airports; and the construction of federally licensed dams. It covers federal actions concerning everything from motor vehicle safety regulations to testing military sonar in international waters.

Thus, although its enforceable requirements are largely procedural, NEPA remains one of the most far-reaching and significant environmental protections in our nation’s history. The benefit of NEPA across this wide range of activities has been felt in virtually every sector of society. To comply with NEPA, federal agencies must take a “hard look” at the environmental consequences of certain proposed actions – a searching and transparent review that has averted countless unnecessary environmental impacts through the years.

Courts' Crucial Role in Defining and Implementing NEPA

Courts have played an unusually direct role in implementing NEPA, particularly during the first decade of the law's existence. NEPA is a very concise statute—a mere three pages in length. Moreover, Congress did not provide for the promulgation of regulations to guide the interpretation and implementation of the statute. In the words of former Supreme Court Justice Thurgood Marshall, “[T]his vaguely worded statute seems designed to serve as no more than a catalyst for development of a ‘common law’ of NEPA. To date, the courts have responded in just that manner and have created such a ‘common law.’ . . . Indeed, that development is the source of NEPA’s success.”⁴

By executive order, President Jimmy Carter required the CEQ to promulgate official NEPA regulations in 1978. These regulations were largely a codification of existing NEPA “common law,” and designed to clarify and reinforce the judicially interpreted obligations of federal agencies.⁵ But even after the promulgation of CEQ’s regulations, the courts continued to play an active role in interpreting and defining agency obligations under NEPA. The real power of NEPA flows from this accrued “common law,” and lies in the fact that federal courts have consistently interpreted NEPA obligations and procedures as binding and enforceable on federal agencies, often through lawsuits brought by citizens.

Unlike many environmental statutes, NEPA is largely enforced by the courts, rather than by any single administering executive branch agency. In order to implement the Clean Air Act, for example, the Environmental Protection Agency (“EPA”) and state agencies set requirements that may be enforced against private parties, either through administrative

action or by seeking judicial intervention. With NEPA, by contrast, the federal agencies themselves must decide how to comply with the law’s requirements. If the implementing agency even arguably fails to abide by NEPA, aggrieved private parties, non-profit groups, or others may seek direct judicial enforcement in the federal courts.

Thus, the judicial branch’s administration of NEPA is of great importance and effect. When judges hear NEPA cases, they decide both the relevant facts and the applicable law en route to concluding whether the government has met its obligation to consider the environmental impact of its actions. These judicial decisions determine both the mundane and the extraordinary, ranging from whether to count weekends as part of a public comment period to the fate of entire ecosystems.

⁴ *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., dissenting).

⁵ See Exec. Order No. 11991, 42 Fed. Reg. 26967 (May 24, 1977).

NEPA in Crisis?

While NEPA has brought three decades of unquestionable successes and benefits, it has not been without cost. Some agencies balk at the procedural steps that NEPA requires, particularly for what they regard as routine actions. Repeated NEPA reviews have been criticized as unduly expensive during a time of tight budgets. Further, project sponsors sometimes complain of perceived efforts to delay or stop projects through NEPA litigation for purposes ultimately unrelated to environmental protection.

On the other hand, some have claimed that recent political skirmishing around NEPA is part of a determined effort to circumvent its protections or to eliminate them altogether.⁶ The Bush Administration, for example, has been very active in altering the way federal agencies discharge their NEPA obligations. It has expanded the use of “categorical exclusions”⁷ to prevent NEPA review for broad categories of actions.⁸ Some charge that this is a back-door method of weakening NEPA’s environmental protections, while the Administration defends its actions as needed “streamlining” that will allow federal agencies to conduct routine activities without the threat of frivolous lawsuits.

Whether motivated by political concerns or attempts to streamline, recent cases demonstrate that agencies continue to seek ways to skirt NEPA:

- In *Wyoming Outdoor Council, et al.*, the Bureau of Land Management (“BLM”) decided that it did not have to conduct any NEPA review prior to leasing 49 parcels of land in the Powder River Basin for coal-bed methane development.⁹ On appeal, the Interior Board of Land Appeals flatly rejected this approach, with one judge finding that BLM’s position would completely “eviscerate NEPA as it relates to pre-leasing environmental analysis.”¹⁰ The Tenth Circuit agreed on appeal, finding that BLM’s proposed action raised “significant new environmental concerns.”¹¹
- In *Wilderness Society v. Rey*,¹² the Forest Service selected a timber sale “preferred alternative” that was not included in the NEPA analysis originally circulated for public comment. Although agencies frequently alter the potential alternatives in response to public comment, the Forest Service then attempted to exempt the timber sale from administrative appeal altogether by having the Undersecretary of Agriculture, who oversees the Forest Service, sign the decision. The Forest Service then argued that the timber sale was not really its decision. After the court rejected this argument, the Administration published new rules that gave the Department of Agriculture the power to simply exempt certain forest projects from appeals.¹³

⁶ William Snape III and John M. Carter II, *Weakening the National Environmental Policy Act*, 33 ELR 10682 (Sept. 2003); Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. Envtl. L.J. 50 (2003).

⁷ Categorical exclusions are authorized under NEPA as a tool to avoid unnecessary environmental analysis where an agency has made a determination that the category of action at issue will have no appreciable effect, individually or cumulatively, on the environment. See 40 C.F.R. §1508.4 (2003).

⁸ For instance, in June and July of 2003, two new NEPA categorical exclusions were implemented. The first exempts timber sales of up to 1,000 acres from NEPA review as long as the sales are described as “fire prevention” projects. There is no limit on the number of contiguous sales that may be exempted. 68 Fed. Reg. 33814. The second creates an exemption for all timber sales of up to 70 acres, salvage sales up to 250 acres, and associated road construction up to one-half mile. 68 Fed. Reg. 44598. For criticism of these kinds of rule changes, see John M. Carter, Mike Leahy, & William J. Snape, *Cutting Science, Ecology, and Transparency Out of National Forest Management*, 33 ELR 10959 (2003). For the Administration’s defense of these rule changes, see James L. Connaughton, *Modernizing the National Environmental Policy Act: Back to the Future*, 12 N.Y.U. Envtl. L.J. 1, 13-15 (2003).

⁹ 157 IBLA 259 (2002).

¹⁰ *Id.* at 269. District Judge Clarence Brimmer overturned the IBLA’s decision in *Pennaco Energy, Inc. v. U.S. Dep’t of Interior*, 266 F. Supp. 2d 1323 (D. Wyo. 2003). However, Brimmer himself was reversed by the 10th Circuit in *Pennaco Energy, Inc. v. U.S. Dep’t of Interior*, 377 F.3d 1147 (10th Cir. 2004).

¹¹ *Pennaco Energy*, 377 F.3d at 1157.

¹² 180 F. Supp. 2d 1141 (D. Mont. 2002).

¹³ See USDA, Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. 33582, 33600 (June 4, 2003).

Cases like *Wyoming Outdoor Council and Wilderness Society* demonstrate the critical importance of the judiciary in holding federal agencies to their NEPA obligations. Although the current administration publicly states that its purpose in altering NEPA regulations is to avoid costly and time-consuming lawsuits, the amount of NEPA litigation recently has been increasing, not decreasing. There had been a general declining trend in the number of NEPA lawsuits filed annually, with a historical average of 108 filings per year between 1974 and 1997. However, the number of filed NEPA cases spiked to 137 in 2001 and 150 in 2002. Thus, the annual number of NEPA cases filed during the first two years of the George W. Bush administration has been at least one-third higher than both the historical average and the number of cases filed over a comparable period of the Clinton Administration.¹⁴ Figure 1 illustrates this trend for the years in which official data were reported by the CEQ.¹⁵

This increase is also reflected in the total number of cases ultimately resolved by the courts. From 1970 through 1984, there were 1067 NEPA-related cases decided in federal court, an average of 71 per year.¹⁶ A preliminary review of federal court litigation during the first two years of the Clinton administration revealed that a total of 105 NEPA cases were decided, an average of 52.5 per year.¹⁷ In contrast, the present study reports 325 NEPA cases decided during the period between January 21, 2001 and June 30, 2004, a 95-case-per-year rate.¹⁸ Thus, whether or not NEPA is in “crisis,” it is clear that recent changes in implementation of the statute, increases in proposed and actual development of public lands, and other administrative actions have sparked a noticeable increase in cases filed and decided in the federal courts.

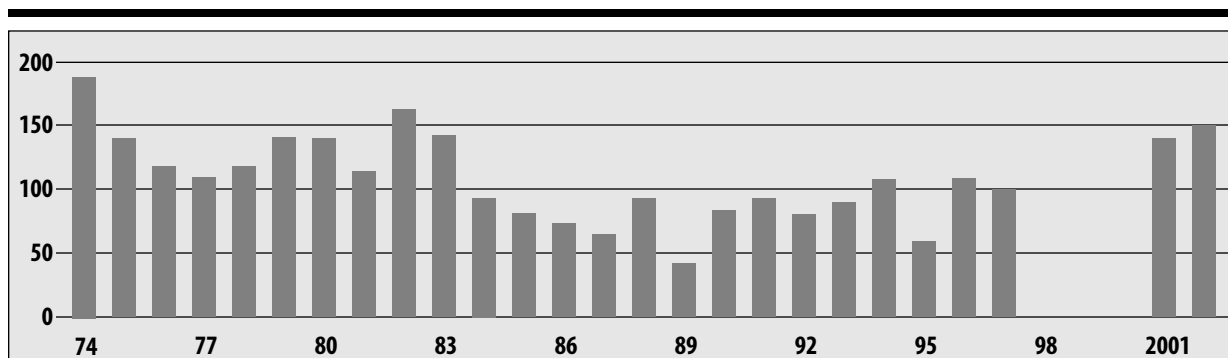


FIGURE 1: CEQ Data on NEPA Filings, 1974 - 2002 – Number of NEPA Lawsuits Filed Annually

¹⁴ 89 NEPA cases were filed in 1993 and 106 were filed in 1994, the first two years of President Clinton's administration.

¹⁵ Based on data from available CEQ annual reports from 1974 to 2002. Data from 1998, 1999 & 2000 are unavailable due to the Federal Report Sunset Act, passed by the 104th Congress, which CEQ interpreted as preventing it from issuing annual reports during those years. In addition, CEQ's reported data from 1995 did not include data from at least one agency.

¹⁶ See Paul G. Kent and John A. Pendergrass, *Has NEPA Become A Dead Issue?* 5 TEMPLE ENVTL LAW & TECH J. 11, 12 (Summer 1986).

¹⁷ See Snape and Carter, *supra* note 6, at 10692.

¹⁸ The methods used by Kent & Pendergrass and this report's authors to identify decisions have some variation due to the use of different electronic search databases and the potential changes in standards for publishing decisions or electronically reporting them between 1984 and the present day. The CEQ data regarding number of NEPA cases filed do generally track the data reported herein for number of NEPA cases resolved, which provides some confidence that any discrepancies have not materially affected the results.

Methodology

For this study, ELI sought to determine the total number of NEPA cases filed over the past three-and-a-half years, plaintiffs' average success rate in bringing NEPA claims, and whether judges hearing these claims were as receptive as they have been in the past. Further, given the intensity of the current debate over judicial nominations, we also examined whether judges' political affiliations appear to have any bearing on the outcome of the cases they decide.

The study reviews 325 NEPA decisions issued by the federal courts during the period from January 21, 2001, to June 30, 2004.¹⁹ This time frame was selected in order to hold the underlying litigation climate relatively constant; the report reviews only NEPA decisions issued after President George W. Bush took office in order to gather a representative sample of decisions from all sitting judges, regardless of who appointed them, as they hear arguments from the same administration defending agency actions. It covers both cases filed in the federal district courts and appeals filed in the circuit courts.²⁰

The study divides the universe of NEPA cases into two broad categories of parties bringing suit: "pro-environment plaintiffs" and "pro-development plaintiffs." Generally, this distinction proved fairly easy to make, based on the nature and goals of the individual or organization bringing suit.

Environmental groups almost always qualified as "pro-environment" plaintiffs, while businesses, wise-use groups, industry or trade associations, and property owners almost always qualified as "pro-development" plaintiffs. Local or state governmental plaintiffs were presumed to be acting in the public interest and were categorized as environmental plaintiffs, unless it was clear that the government entity was behaving as a market actor, such as seeking to develop an area or engage in traditional commercial activity, in which case it was categorized as a pro-development plaintiff.

By tracking case data based on the plaintiffs' stated goals, the study seeks to discern trends about the relative success rates of pro-environment and pro-development claims made under NEPA. A case is counted as a "success" where the litigant prevailed on at least one of its NEPA claims and was awarded some type of judicial relief. Cases disposed of on other grounds, or purely procedural dispositions that did not reach the merits of the NEPA claim(s), were not included. After analyzing these cases, we then tested whether there is any correlation between NEPA success rates and the political affiliation of the presiding judge, using the party of the president who appointed that judge as a rough proxy.²¹

¹⁹ These decisions were located primarily by searching the Westlaw database and by monitoring the *Environmental Law Reporter* and other sources. Decisions were included regardless of whether they were published in a federal reporter.

²⁰ The Supreme Court recently decided two cases with implications for NEPA, *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), and *Department of Transp. v. Public Citizen*, 124 S. Ct. 2204 (2004). At first read, these unanimous decisions appear to have limited impact on NEPA law or regulation, although some of the language in Justice Thomas's *Public Citizen* opinion may be broad enough to cause some confusion. This study does not attempt to analyze Supreme Court decisions.

²¹ Judges' actual party affiliations do not entirely correspond to that of their nominating president. Some nominees are chosen through bipartisan consensus, state-level nominating commissions, or approval of home-state senators, especially at the district court level. These processes are utilized by both parties, and appear to have a negligible impact on overall trends.

Results

NEPA in the District Courts

ELI identified 217 federal district court (trial court) NEPA cases that were decided during the study period. The overall success rate of NEPA plaintiffs in these cases was 44%, roughly consistent with long-term historical averages.²² Environmental plaintiffs had a somewhat higher-than-average success rate – just over 46% – while the much smaller group of pro-development plaintiffs who invoked NEPA provisions fared worse than average, with a 35% success rate in the trial courts.

However, when the cases were analyzed to account for the political affiliation of the president who appointed the judges, a remarkable pattern emerged. (See Figure 2.) Environmental plaintiffs appearing before Democrat-appointed judges had a 59.2% success rate, while environmental plaintiffs who appeared before Republican-appointed judges were successful only 28.4% of the time – less than half as often. For pro-development NEPA litigants, the trend is reversed: development plaintiffs were successful 14.3% of the time before Democrat-appointed judges, but 57.9% of the time – more than four times as often – before Republican appointees. Thus, even at the district court level, party affiliations appear to have a substantial impact on the outcome of NEPA cases.

Moreover, in the 23 cases that have been decided so far by George W. Bush’s (“Bush II”) district court appointees, pro-environment plaintiffs successfully advanced NEPA claims in only four instances. This 17.4% success rate for such plaintiffs is well below the average for all judges (46%), noticeably below the current average for all Republican-appointed judges (28%), and barely more than one-fourth the current average for Democratic appointees (59%).²³ Although the statistical significance of this initial sample of Bush II decisions is not yet at the highest level of confidence,²⁴ the current trend is troubling.

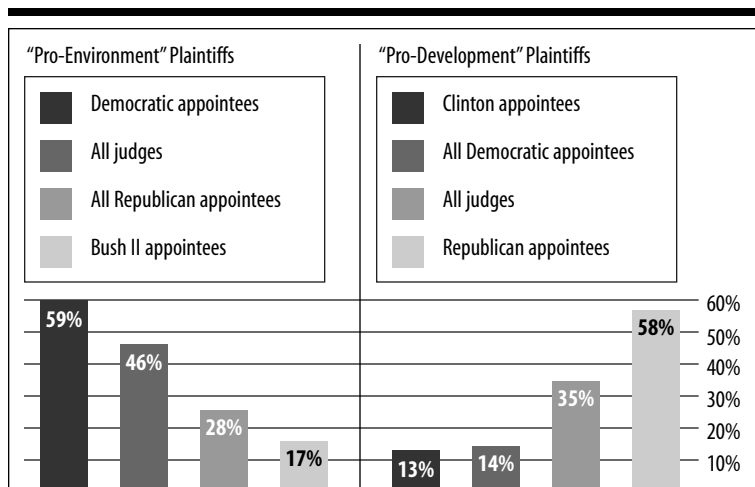


FIGURE 2: NEPA Success Rates in the U.S. District Courts, Jan. 2001 – June 2004

Judge	Pro-environment plaintiffs			Pro-development plaintiffs		
	Total cases	# of wins	Success rate	Total cases	# of wins	Success rate
Clinton-app.	89	54	60.7	16	2	12.5
All Dems.	103	61	59.2	21	3	14.3
All Judges	177	82	46.3	40	14	35.0
All Reps.	74	21	28.4	19	11	57.9
Bush II-app.	23	4	17.4	0	0	n/a

²² An earlier study reported a 45.7% overall success rate for all NEPA plaintiffs before the district courts for the period of 1969 to 1984. Kent & Pendergrass, *supra* note 16, at 15.

²³ In contrast, there was little discrepancy between judges appointed by President Clinton and Democrat-appointed judges as a whole, largely because 101 out of 119 Democrat-appointed judges in the cases reviewed were Clinton appointees to begin with. These Clinton appointees were slightly more likely to decide in favor of pro-environment plaintiffs than the Democrat-appointed bench as a whole, and slightly less likely to decide in favor of pro-development plaintiffs.

²⁴ See page 10.

NEPA in the Circuit Courts

Similar patterns were observed in the circuit courts. During the study period, the overall success rate for all NEPA claims at the appellate level was 31.8%, which is relatively consistent with the historical baseline of 35%.²⁵ Again, environmental plaintiffs' success rate was slightly higher than the overall average – 35.3% – while development plaintiffs were successful on appeal only 18.2% of the time.

In one of the most striking patterns revealed by this study, environmental NEPA plaintiffs were nearly six times more likely to prevail before majority Democrat-appointed panels (26 cases out of 45, or 57.8%) than before majority Republican-appointed panels (4 cases out of 40, or 10%).²⁶ However, in the much smaller sample of cases involving pro-development plaintiffs, the data failed to show a statistically significant difference between Democrat- and Republican-appointed panels.

Breaking down the panel composition in detail reveals an even more significant political and ideological divide. (See Figure 3.) At the opposite ends of the spectrum, panels composed of three Democrat-appointed judges ruled for environmental plaintiffs 75% of the time, compared to 11% for entirely Republican-appointed panels – a nearly seven-to-one differential. Panels composed of two Democratic and one Republican appointee voted in favor of environmental plaintiffs 51.5% of time, while the reverse lineup of two Republican and one Democratic appointee did so only 9.7% of the time – a five-to-one differential. Further, when Bush II-appointed judges served on the circuit court panel, pro-environment petitioners prevailed in only two of eleven cases – with one of those victories coming over the separate dissent of the Bush II judge.

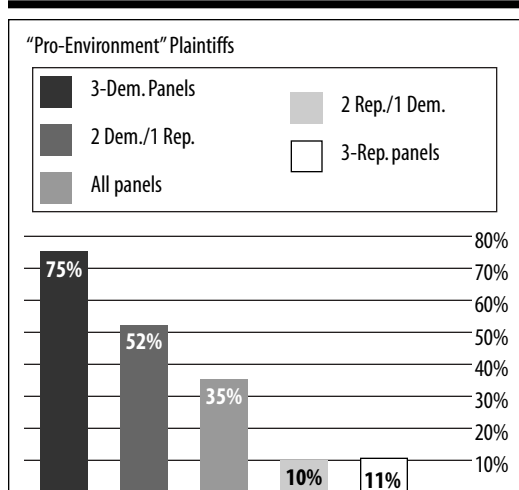


FIGURE 3: NEPA Success Rates in the U.S. Courts of Appeals, Jan. 2001 – June 2004

Panel Composition	Pro-environment plaintiffs			Pro-development plaintiffs		
	Total cases	# of wins	Success rate %	Total cases	# of wins	Success rate %
3 Dem.-app.	12	9	75.0	3	2	66.7
2 Dem.,1 Rep.	33	17	51.5	9	0	0
All panels	85	30	35.3	22	4	18.2
2 Rep. 1 Dem.	31	3	9.7	8	1	12.5
3 Rep.-app.	9	1	11.1	2	1	50

²⁵ See Kent & Pendergrass, *supra* note 16, at 13.

²⁶ Circuit court cases impose additional layers of complexity on the analysis. Unlike district court outcomes and opinions, which can be attributed to a single judge, discerning the contribution of any one judge to the panel decision in a given circuit court case can be difficult, even where that judge authors the opinion. The methodology used here for analyzing panel compositions is borrowed from recent studies by Professors Richard Revesz and Cass Sunstein, which are discussed on page 11.

Historical Baseline and Comparable Research Efforts

Statistical Significance of Results

The results reported here display a high degree of statistical significance. Statistical analysis of Republican-appointee versus Democratic-appointee voting trends (using a chi square test of independence) in all cases in the district courts, and in cases involving pro-environment plaintiffs in the courts of appeals, yields a probability of greater than 99% ($p < 0.01$) that the variables tested are not independent.²⁷ Traditionally, experimenters in the natural sciences use either the $p < 0.05$ level (95% confidence level) or $p < 0.01$ level (99% confidence level) for statistical significance.

Similar statistically significant conclusions cannot be drawn from the cases involving pro-development plaintiffs in the courts of appeals, in part because of the relatively sparse data set. Moreover, while the initial sample of Bush II decisions suggests that George W. Bush's appointees are less likely to vote in favor of pro-environment plaintiffs than Republican appointees as a whole, there have not yet been enough Bush II NEPA opinions to state this conclusion with the highest degree of confidence.²⁸

Kent/Pendergrass Study of NEPA in the Federal Courts

A historical baseline for this study was provided by a 1986 survey of NEPA litigation that was co-authored by ELI's John Pendergrass.²⁹ The Kent/Pendergrass study reviewed 1067 NEPA lawsuits decided from the statute's inception in 1970 through 1984, and discussed various aspects of the resulting litigation.

Although the Kent/Pendergrass study and this study differ in certain details,³⁰ there are common points of comparison. The Kent/Pendergrass study reported an overall NEPA success rate of 45% for plaintiffs in the district courts and 35% in the federal courts of appeal from 1970 to 1984. This study reports a 44.2% overall success rate in district court NEPA litigation and 31.8% in the circuit courts from January 2001 to June 2004.

The Kent/Pendergrass study also indicated that in both district court and circuit court litigation, environmental plaintiffs were more likely to succeed than other categories of plaintiffs. These trends remain consistent in the current report, with environmental plaintiffs prevailing at a higher rate than pro-development plaintiffs in both the district courts (46.3% vs. 35%) and the circuit courts (35.3% vs. 18.2%). In both studies, this significant advantage for environmental plaintiffs likely is explained by NEPA's express environmental goals, among other factors.³¹

²⁷ Two variables are independent if knowledge of the value of one variable provides no information about the value of another variable. It is important to recognize that the statistical analyses do not "prove" that political affiliation is the causative factor behind these results. They only show that the results are not a random distribution.

²⁸ These data have a confidence level between 80% and 90% ($0.1 < p < 0.2$), which is generally acceptable in social science applications.

²⁹ Kent & Pendergrass, *supra* note 16.

³⁰ For example, the Kent/Pendergrass study divided the case data into several additional categories of NEPA legal issues and sub-issues presented by the litigation. *Id.* at 12-13. Further, the Kent/Pendergrass study did not attempt to analyze the effect of the judges' political affiliation on case outcome.

³¹ For example, it is possible that pro-environment plaintiffs are able to be more selective in the cases they bring than pro-development plaintiffs.

Revesz and Sunstein Studies of the Circuit Courts

Several previous studies, including prominent works by Dean Richard Revesz of New York University Law School and Professor Cass Sunstein of the University of Chicago Law School, have attempted to discern trends in judicial voting patterns across a broad range of environmental and regulatory issues. Like the present ELI study, the Revesz and Sunstein studies broke down appellate panels by the party of the judges' nominating presidents and examined the correlation between political affiliation and case outcomes.

The Sunstein study, published in 2003, focuses on appellate decisions across several areas, including industry challenges to environmental regulation.³² Sunstein notes distinct ideological voting patterns, but finds that these patterns are often moderated by subtle "panel effects," including conformity pressures and "group polarization."³³ In one of the central conclusions of the study, Sunstein reports that in many cases (including the area of environmental regulation), "the political party of the appointing president is a fairly good predictor of how an individual judge will vote."³⁴ But because of the conformity pressures exerted by panel members on

each other, Sunstein also concluded that in those same areas, "the political party of the president who appointed the other two judges on the panel is at least as good a predictor of how individual judges will vote."³⁵

Dean Revesz's earlier study of D.C. Circuit environmental cases reached three conclusions: (1) ideology was a significant factor in judicial decisionmaking; (2) ideological voting was most pronounced in those cases that were the least likely to be reviewed by the Supreme Court; and (3) a judge's vote in any given case was strongly influenced by the ideological identity of the other two judges serving on the panel.³⁶ ELI's findings are consistent with the findings of these earlier studies.

³² Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, IDEOLOGICAL VOTING ON FEDERAL COURTS OF APPEALS: A PRELIMINARY INVESTIGATION (AEI-Brookings Joint Center for Regulatory Studies and The University of Chicago Law School, September 2003).

³³ In reviewing the results of D.C. Circuit cases involving industry challenges to EPA regulations, Sunstein found that Republican-appointed judges sitting with two other Republican-appointed judges were the least likely to vote to uphold the regulations, siding with EPA just 27% of the time. *Id.* at 11 (Table 1). Republican-appointed judges on panels composed of one other Republican- and one Democrat-appointed judge voted in favor of EPA and against industry challenges 55% of the time. *Id.* Republican-appointed judges on panels with two Democrat-appointed judges sided with EPA 62% of the time, while panels composed entirely of Democratic appointees upheld EPA 72% of the time. *Id.* at 11. Democratic appointees did not show the same pattern of ideological amplification based on the political identity of the other judges on the panel. *Id.* at 19.

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997). In a review of legal challenges to EPA decisions, Revesz found that Democrat-appointed judges appeared nearly twice as likely as Republican-appointed judges to find against EPA when the petitioner was an environmental organization, and around one-third less likely to find against EPA when the petitioner was an industry group. *Id.* at 1739. Revesz's research sparked a rebuttal from then-Chief Judge Harry Edwards, who argued vigorously that decision making on the D.C. Circuit is marked by collegiality, not ideology. See Harry T. Edwards, *Collegiality and Decisionmaking on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998). Revesz's response to Judge Edwards was published a year later. See Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805 (1999).

Judicial Enforcement of NEPA Remains Vital

Taken as a whole, the current federal judiciary does not appear to be more or less hostile to NEPA claims than it was during the first 15 years of NEPA's history. The rates at which district and appellate courts decide in favor of NEPA plaintiffs have been remarkably stable between that period and the present day. The success rates today are virtually indistinguishable from those in the 1970s and early 1980s (44% vs. 45% in the district courts, and 32% vs. 35% in the circuit courts).

One purely political explanation for this apparent continuity from 1984 to the present may be a rough parity between the parties on the total number of judicial nominations during that period, with eight years of Reagan and Bush I appointments being offset by eight years of Clinton appointments. Indeed, counting from the beginning of the Kennedy Administration in 1961 to the beginning of the current administration in 2001, there had been exactly 20 years of Republican nominees and 20 years of Democratic nominees. This historical balance may have begun to be altered by four years of George W. Bush appointments; and an extended stretch of appointments by either party could significantly alter the overall outcome of NEPA cases.

It also may be possible to explain the stability of NEPA outcomes in terms of the statute itself and the actions it was designed to govern. In any area of law as heavily litigated as NEPA, one ordinarily might expect to see a gradual decline in both the total number of cases filed and claimants' success rate, as the law's obligations become more clearly defined, compliance improves, and remaining legal issues decrease. And indeed, the number of cases filed annually did show a generally consistent decline from 1974 through 1993, and remained fairly constant at around 100 filings per year from 1994 through 1997. However, the recent increase in filings (137 cases in 2001 and 150 cases in 2002) suggests environmental plaintiffs feel it more necessary now than at any time over the last two-and-a-half decades to resort to the federal courts.

The fact that environmental plaintiffs continue to have almost even odds of winning their cases at the district court level and a one-in-three chance of winning at the appellate level suggests that federal agency compliance with NEPA still requires significant policing. These odds may simply reflect the background "error" or "dispute" rate that occurs within the NEPA process, meaning that agencies make errors at a relatively constant rate and/or that plaintiffs sue under NEPA at a relatively constant rate. Either way, it reinforces that the federal courts' role as enforcer of NEPA remains as important as ever.

Judges' Party Affiliation Affects the Outcome of NEPA Cases

The clear effect of the deciding judge's party affiliation on the outcome of NEPA cases, as revealed in this and similar studies, provides a sobering view into the rarified world of judicial decision-making. Simply put, the fact that an environmental plaintiff's chances of winning a NEPA case before the circuit courts varies by a factor of nearly six-to-one depending on the party of the judges' nominating president runs counter to our notion of impartial justice. Environmental litigants are frequently seeking judicial remedies as a backstop against executive branch actions that are perceived as hostile to conservation values.

The reverse also holds true for plaintiffs who use NEPA for pro-development goals. If such plaintiffs draw a Democratic-appointed district court judge, they will face obstacles in making their case. This situation, however, might be explained as more consistent with the expressly environmental goals and original intent of NEPA, which is to foster greater information disclosure and environmental protection, not less. Certainly the Ninth Circuit holds this view. As it recently pointed out in rejecting a development plaintiff's NEPA challenge to the recently dismantled "roadless rule," "NEPA may not be used to preclude lawful conservation measures by the Forest Service and to force federal agencies, in contravention of their own policy objectives, to develop and degrade scarce environmental resources."³⁷

Recent Trends in NEPA Litigation Point in a Disturbing Direction

For over thirty years, Americans have enjoyed a remarkable degree of transparency, openness and involvement in federal environmental policy decisions. The National Environmental Policy Act has played a primary role in increasing citizens' opportunities to remain informed of, participate in, and, if necessary, challenge federal actions that may significantly affect the environment.

Although it is difficult to predict how the trends revealed in this report will play out, the current direction is troubling. More environmental plaintiffs today feel it necessary to bring legal action under NEPA than at any time over the last twenty-five years, and recent judicial appointees may be more likely to reject environmentalists' claims in their NEPA decision-making. Judicial polarization over NEPA is acute, and may be growing. The fact that party affiliations of judges appear to influence NEPA cases is cause for concern about the objectivity of adjudications under the Act. The issue merits further research and discussion in both the judiciary and other branches to protect the integrity and effectiveness of our nation's bedrock environmental statute.

³⁷ *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1123 (9th Cir. 2002).

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