

The National Environmental Policy Act: An Overview

Environmental Law Institute
Summer School Series
NEPA & the ESA



THE UNIVERSITY OF UTAH
**S.J. QUINNEY
COLLEGE OF LAW**

Wallace Stegner Center for Land,
Resources, and the Environment

Law & Policy Program



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Mike Budd, USFWS



From the Catskills Environmental
Research and Monitoring Conference
website

Agenda

Birth of NEPA

NEPA's Contents (big picture)

Past NEPA Implementation

Recent Changes to NEPA

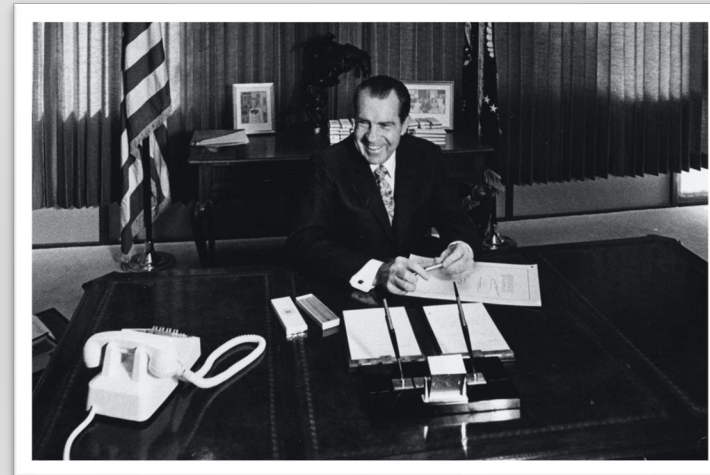
The National Environmental Policy Act (NEPA)

Passed by Congress in December of 1969.

Signed into law by President Richard Nixon on January 1, 1970.

“Magna Carta of environmental law.”

Some disparage it as a “Paper Tiger”



A Procedural Law

“NEPA has twin aims.

First, it places upon an agency the obligation to **consider** every significant aspect of the environmental impact of a proposed action.

Second, it ensures that the agency will **inform the public** that it has indeed considered environmental concerns in its decisionmaking process.”

Agencies are not required “to elevate environmental concerns” only to take a “hard look.”

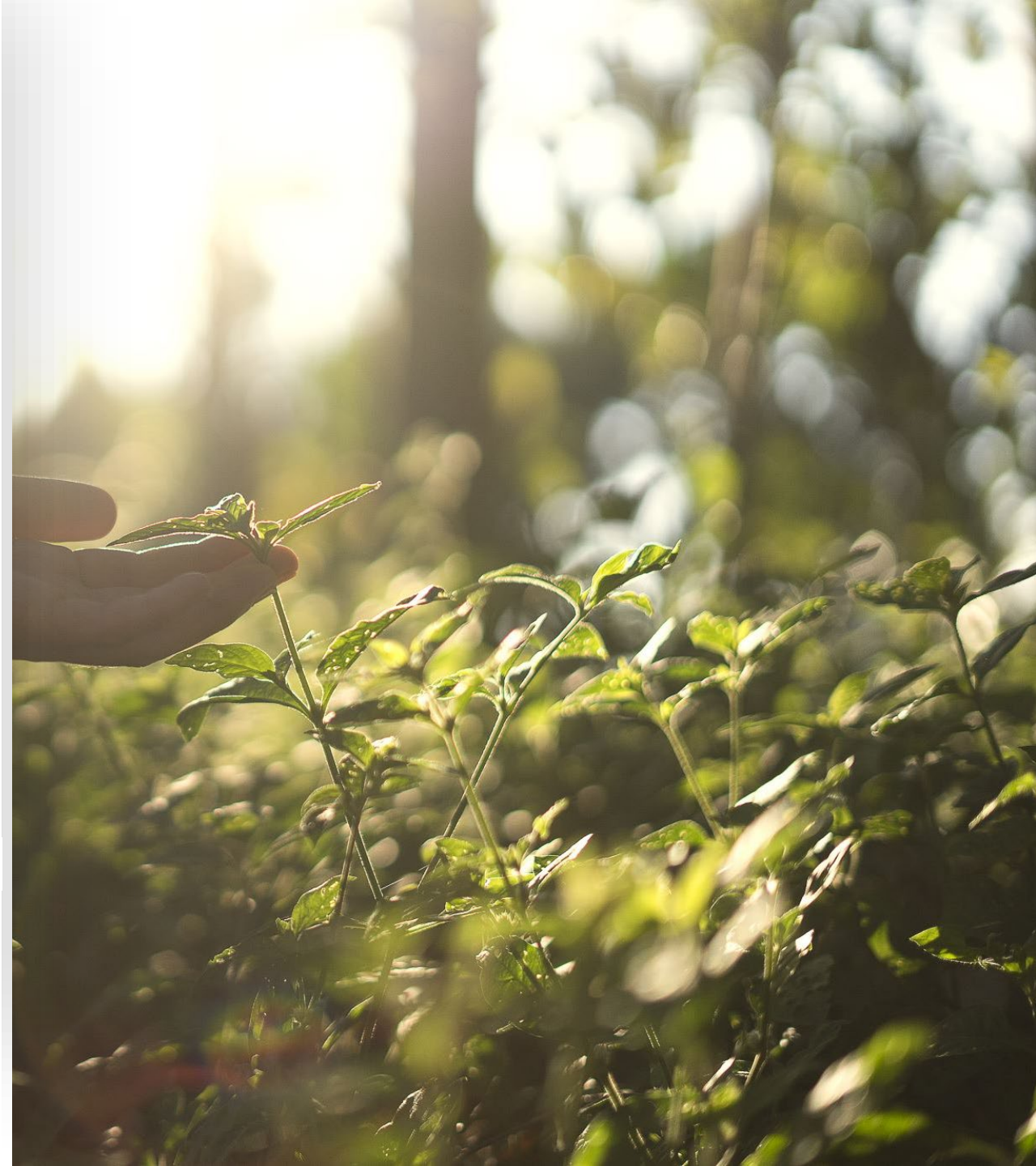
Baltimore Gas & Electric Co v. NRDC, 462 U.S. 87 (1983)



Statement of Purpose

42 U.S.C. § 4321

- To declare a national policy which will:
 - encourage productive and enjoyable **harmony between man and his environment**;
 - to promote efforts which will **prevent or eliminate damage to the environment** and biosphere and stimulate the health and welfare of man;
 - to **enrich the understanding of the ecological systems** and natural resources important to the Nation;
 - and to **establish a Council on Environmental Quality**.



Excerpts from the Congressional Declaration of Policy 42 U.S.C. § 4331

“Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances . . .”

“Recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man”

Excerpts from the Congressional Declaration of Policy § 4331

- “It is the continuing policy of the Federal Government,
- in cooperation with State and local governments, and other concerned public and private organizations,
 - to use all practicable means and measures, including financial and technical assistance,
 - in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”

Excerpts from the Congressional Declaration of Policy § 4331

It is the continuing responsibility of the Federal Government to . . .

- (1) Fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations;
- (2) Assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;
- (3) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) Preserve important historic, cultural and natural aspects of our national heritage . . .
- (5) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities;
- (6) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources

Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

RESTORING THE QUALITY
OF
OUR ENVIRONMENT



*Report of The
Environmental Pollution Panel
President's Science Advisory Committee*

THE WHITE HOUSE
WASHINGTON

November 5, 1965

Ours is a nation of affluence. But the technology that has permitted our affluence spews out vast quantities of wastes and spent products that pollute our air, poison our waters, and even impair our ability to feed ourselves. At the same time, we have crowded together into dense metropolitan areas where concentration of wastes intensifies the problem.

Melting of the Antarctic ice cap.—It has sometimes been suggested that atmospheric warming due to an increase in the CO₂ content of the atmosphere may result in a catastrophically rapid melting of the Antarctic ice cap, with an accompanying rise in sea level. From our knowledge of events at the end of the Wisconsin period, 10 to 11 thousand years ago, we know that melting of continental ice caps can occur very rapidly on a geologic time scale. But such melting must occur relatively slowly on a human scale.

The Antarctic ice cap covers 14 million square kilometers and is about 3 kilometers thick. It contains roughly 4×10^{16} tons of ice, hence 4×10^{24} gram calories of heat energy would be required to melt it. At the present time, the poleward heat flow across 70° latitude is 10^{22} gram calories per year, and this heat is being radiated to space over Antarctica

h measurable effect on the ice cap. Suppose that the poleward heat flow were increased by 10% through an intensification of the atmospheric circulation, and that all of this increase in the heat flow were utilized to melt the ice. Some 4,000 years would

Section I. CARBON DIOXIDE FROM FOSSIL FUELS—THE INVISIBLE POLLUTANT

We can arrive at a smaller melting time by supposing a change in the earth-wide radiation balance, part of which would be used to melt the ice. A 2% change could occur by the year 2000, when the atmospheric CO₂ content will have increased perhaps by 25%. Since the average radiation at the earth's surface is about 2×10^5 gram calories per square centimeter per year, a 2% change would amount to 2×10^{22} calories per year. If half this energy were concentrated in Antarctica and used to melt the ice, the process would take 400 years.

Rise of sea level.—The melting of the Antarctic ice cap would raise sea level by 400 feet. If 1,000 years were required to melt the ice cap, the sea level would rise about 4 feet every 10 years, 40 feet per century. This is a hundred times greater than present worldwide rates of sea level change.

Warming of sea water.—If the average air temperature rises, the temperature of the surface ocean waters in temperate and tropical regions could be expected to rise by an equal amount. (Water temperatures in the polar regions are roughly stabilized by the melting and freezing of ice.) An oceanic warming of 1° to 2°C (about 2°F) oc-

What does
NEPA really
do?



Section 102(2)(C): The “action forcing” provision



- “For every **major Federal action significantly** affecting the quality of the human environment, [prepare] a **detailed statement** on:
 - The environmental impact of the proposed action
 - Any adverse environmental effects which cannot be avoided should the proposal be implemented
 - Alternatives to the proposed action
 - The relationship between short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
 - Any irreversible and irretrievable commitments of resources if the proposed action is implemented
- Consultation with federal agencies, consider state and local agency comments, and disclose to the public.

Forgotten elements of Section 102—

“Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall

- (A) Use a systemic, interdisciplinary approach to ensure the integration of “environmental design arts” in planning and decisionmaking . . .**
- (B) Identify and develop methods and procedures to “insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking. . .”**

Council on Environmental Quality

- Section 202 (42 U.S.C. 4342)
- Within the Executive Office of President
- Tasked with specific responsibilities including:
 - Gathering authoritative information on conditions and trends in the environment
 - Documenting changes in the natural environment
 - Developing an annual report on the state of the environment
 - Develop implementation measures for NEPA
- Develops and recommends national policies to the President that promote the improvement of environmental quality and meet the Nation's goals.



Executive Orders

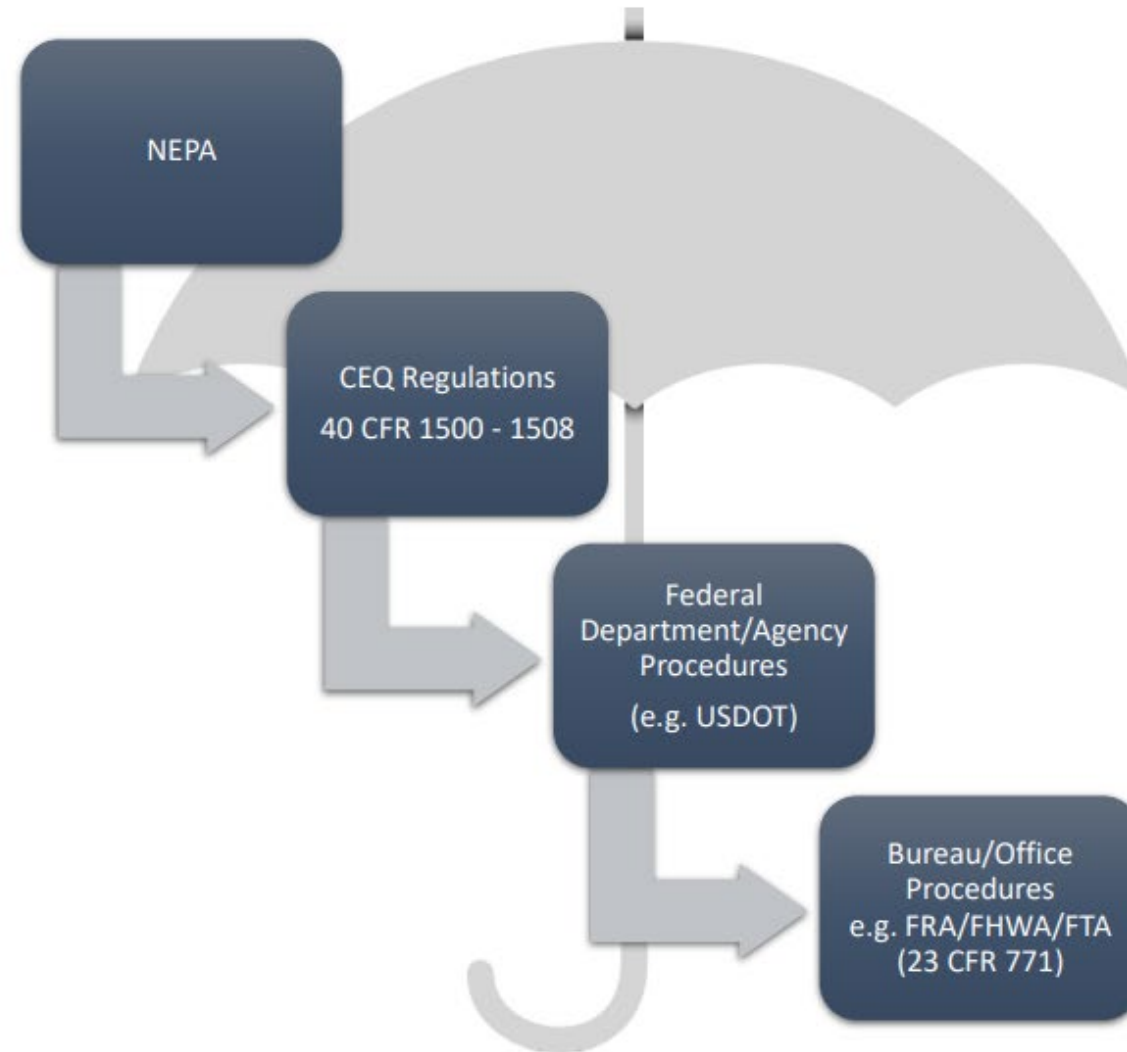
11514 (1970) &

11991 (1977)

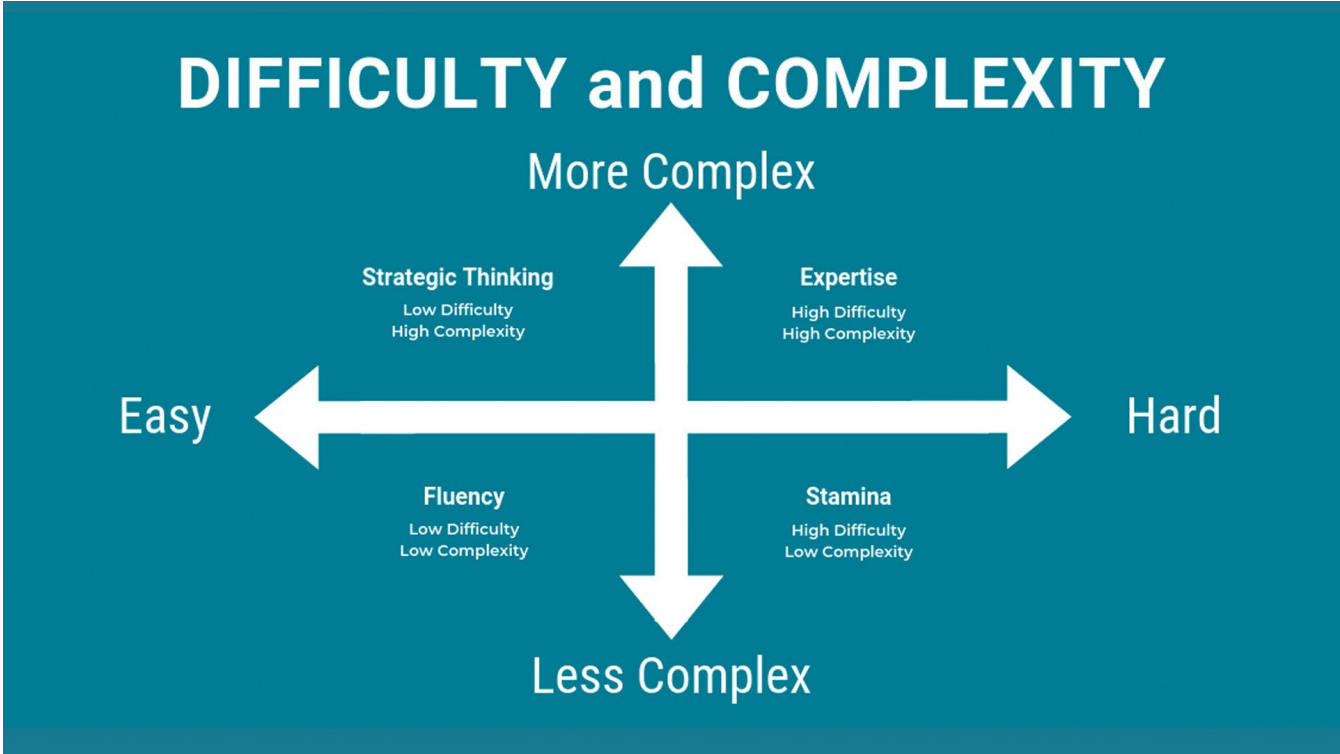
- Directed CEQ to promulgate regulations applicable to all federal agencies
- Directed federal agencies to comply with CEQ regulations
- Directed federal agencies to supplement CEQ's regulations with their own
- In 1978, CEQ issued NEPA regulations. They remained unchanged until 2020.



NEPA Implementation is Tiered



NEPA's Analytical Rigor Is Scaled to the Significance of a Project's Impacts



Environmental impact statement (EIS)

- Actions that significantly affect the environment require an EIS

Environmental assessments (EA)

- Actions for which a Federal agency has not yet or cannot clearly establish the significance of the environmental impact.

Categorical exclusions (CE)

- Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS
- Many agencies identify these by regulation

What is an
impact?





The background of the image shows a series of wide, light-colored marble steps leading up to a row of tall, fluted marble columns. The columns are part of a classical architectural structure, likely a courthouse or government building. The lighting is bright, casting soft shadows and highlighting the texture of the marble.

Federal Courts & Case Law



A lot has changed



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Recent Regulatory, Statutory, and Judicial Developments

- 2020: CEQ finalizes comprehensive amendments
- 2022: CEQ finalizes Phase 1 amendments
- 2023: Fiscal Responsibility Act - NEPA amendments
- 2024: CEQ finalizes Phase 2 amendments
- 2024-25:
 - *Marin Audubon Society v. FAA* (D.C. Cir.)
 - *Iowa v. CEQ* (D. N.D.)
 - E.O. 14154, “Unleashing American Energy”
 - *Seven County Infrastructure Coalition v. Eagle County* (S. Ct.)
- E.O. 14154 “Unleashing American Energy” (Jan. 25, 2025)
- CEQ publishes an Interim Final Rule (Apr. 11, 2025)
 - Removes its regulations from the C.F.R.



Major changes in FRA Amendments

- NEPA trigger
 - Section 106 “threshold determinations” clarified circumstances when NEPA documentation is not required. Codified the use of CEs to avoid a NEPA decision. Encouraged to use existing NEPA documents.
 - Section 111 “major federal action” definition
- Scope of Analysis
 - Agencies must describe “**reasonably foreseeable environmental effects**”
 - A “reasonable range of alternatives . . . that are technically and economically feasible and meet the purpose and need of the proposal”
 - And also: must
 - “ensure professional integrity, including scientific integrity of the discussion and analysis”
 - “make use of reliable data and resources”
 - “study, develop, and describe technically and economically feasible alternatives.”

Major changes in FRA Amendments (cont.)

- Codified levels of analysis (EIS, EA, and CE) 106(b)
- Coordinated review & lead agency designation
 - Section 107 codified procedures for unifying reviews between agencies when a project triggered the requirement for more than one agency.
- Imposed Deadlines & page limits
 - 2 years & 300 pages for an EIS. 1 year and 150 pages for EA (excluding appendices) 107(e) & (g).
 - Ability to extend (agency)
 - Right to petition court (project sponsor)
- Sponsor preparation allowed 107(f)

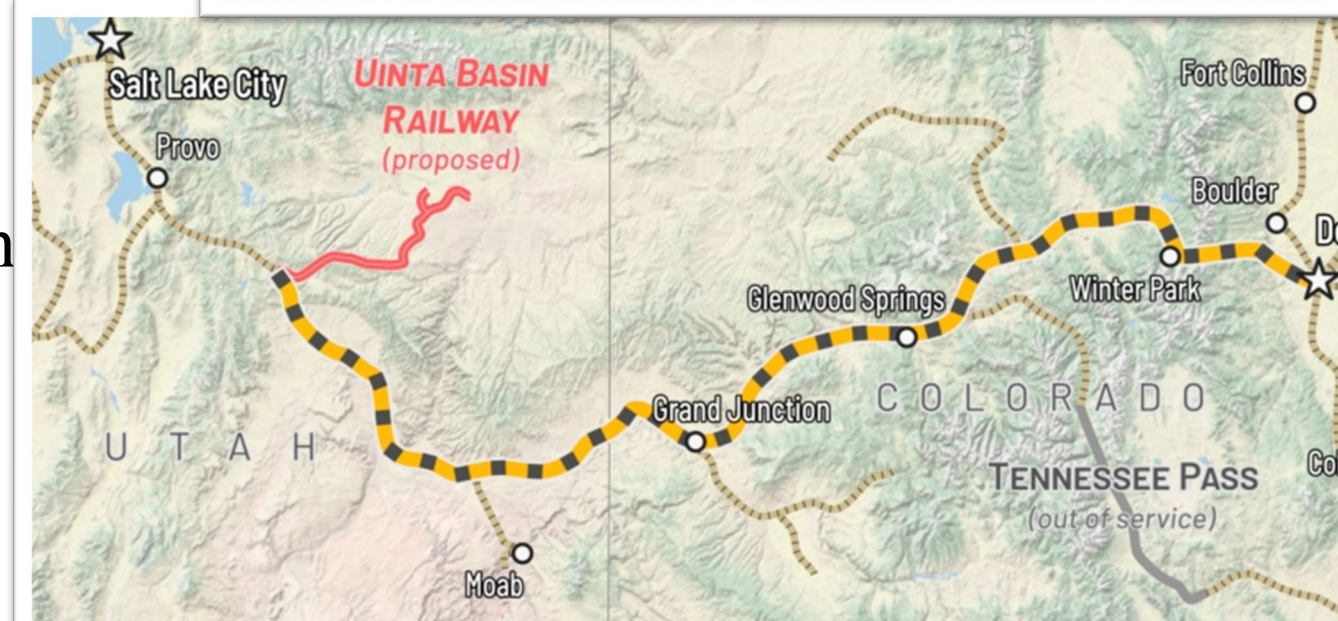
Case law and other developments affecting CEQ regulations

- *Marin Audubon v. FAA* (D.C. Cir)
 - Challenge to renewal of air tour management plan over four national parks. Judge Randolph sua sponte held that CEQ lacked authority to issue binding NEPA regulations.
- *Iowa v. CEQ* (D. N.D.)
 - States had challenged Phase 2 NEPA regs. Court held that CEQ lacked authority to issue binding NEPA regs.
- E.O. 14154 “Unleashing American Energy”
 - Repeals E.O. 11991 (CEQ’s rulemaking authority)
 - Directs CEQ to propose rescinding its NEPA regulations.
- CEQ issues Interim Final Rule (Apr. 11, 2025)
 - Removes unifying regs from C.F.R.
- asdf



Seven County Infrastructure Coalition v. Eagle County (S. Ct., May 7, 2025)

- “NEPA imposes no substantive is a purely procedural statute that, as relevant here simply requires an agency to prepare an EIS—in essence a report.”
- “NEPA is a procedural cross-check, not a substantive roadblock.”
- “The goal of the law is to inform agency decisionmaking, not to paralyze it.”



Seven County Infrastructure Coalition v. Eagle County (cont.)

- **No more hard look?**

- “Under NEPA an agency’s only obligation is to prepare an adequate report.”
- The level of “detail” is not a question of statutory interpretation, but instead a factual determination to which courts should defer.

- **Abundance Policy?**

- “NEPA has transformed from a modest procedural requirement into a blunt and haphazard tool deployed by project opponents to try to stop or at least slow down new infrastructure and construction projects.”
- “A 1970 legislative acorn has grown over the years into a judicial oak that has hindered infrastructure development under the guise of just a little more process.”

Seven County Infrastructure Coalition v. Eagle County (cont.)

- **What about the FRA?**

- No reference or analysis of the new “reasonably foreseeable” language added through the FRA.

- **Supreme Court Rule?**

- Agencies do not need to consider “separate” projects that are “geographically distinct” (except sometimes).
- There must be a “reasonably close causal relationship” between the project and the environmental effects.”
- “Agencies are not required to analyze the effects of projects over which they do not exercise regulatory authority.”



CONSERVATIVE
COALITION *for* CLIMATE
SOLUTIONS

Options for Permitting and Regulatory Reform in the 119th Congress

A Roadmap for Energy Abundance, Economic Growth, and Reindustrialization in America

NEPA is an ineffective law and a major cause of delays in construction projects. NEPA is purely procedural and does not provide environmental protection. Instead, it simply requires the federal government to pause and assess before acting. In many ways, NEPA paved the way for the landmark environmental laws of the 1970s. But today, NEPA adds further delays to the process, even when companies are already complying with numerous other environmental laws. NEPA overlaps with multiple other federal and state regulations and involves lengthy, unclear processes.⁵



The EIA Process is increasingly a global legal norm.

- A survey of the world's 197 jurisdictions revealed that at least 93% (183) have adopted the EIA duty as part of their environmental governance system. Tseming Yang, *The Environmental Impact Assessment Duty as a Global Legal Norm*.
- The UN General Assembly has recognized the right to a clean, healthy and sustainable environment is a universal human right. The procedural elements of this right include:
 - Right of access to information
 - Public participation in environmental assessments and decisionmaking
 - Access to justice and effective remedies.

Martha F. Davis & Solene Kerisit, *The Human Right to a Healthy Environment: A research Guide and Annotated Bibliography*.

When the Bee Stings











Counting the Cost of Nature-Related Risks

December 9, 2023



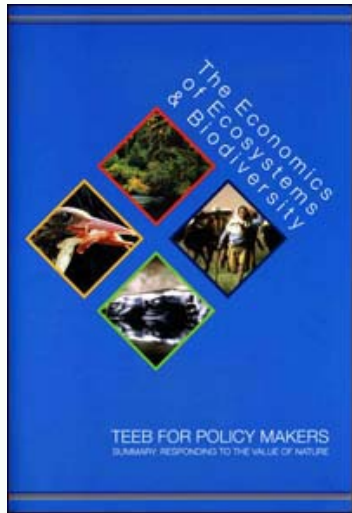
BloombergNEF

Table 1: Case studies included in this report

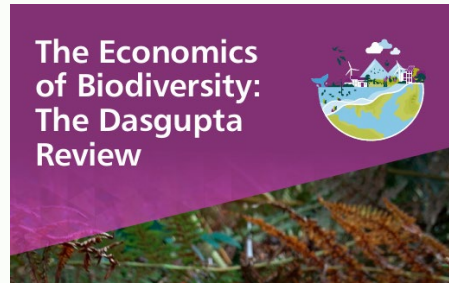
Company	Sub-sector	Event	Costs	Risks exposed	
				Physical	Transition
	Specialty chemicals	Since 2016, its US facilities have released toxic per- and polyfluorinated substances, or 'forever chemicals', into watercourses	At least \$10.5 billion in legal liabilities, layoffs		
	Grain and oilseed milling	Reported to have sourced palm fruit from protected plantations in Indonesia, in violation of its sustainability claims	5.5% fall in share price in the 24 hours after the newspaper investigation was published		
	Packaged food	Inadequate biosecurity measures enabled the avian influenza virus to enter its UK facilities in 2007	£20 million (\$25 million) loss of brand value, layoffs		
	Oil and gas exploration and production	Faced legal challenges to protect an endangered whale threatened by oil and gas activities in the Gulf of Mexico	Legal costs and development delays, which threatened up to \$49.6 million in revenue		
	Container shipping	Discharge of untreated ballast water without authority or adequate reporting spread invasive alien species	\$165,000 in fines		
	Basic and diversified chemicals	Discharged billions of plastic pellets from the wastepipes of its Texas facilities into waterways	\$50 million settlement, \$9.4 billion plant construction suspended		
	Metals and mining – base metals	Failed to adequately manage disposal of vast quantities of mining waste in Indonesia, polluting water and forests	18% share price fall in two days after CEO's reaction, \$55 million local investment		
	Packaged food – meat products	Repeatedly sourced cattle raised on illegally deforested land in the Brazilian Amazon	\$7.7 million in fines, potential loss of \$20 billion valuation gain		
	Electric transmission and distribution	Sparking transmission lines ignited untrimmed tree branches, leading to a series of deadly wildfires in California	91% share price fall from September 2017 to January 2019, \$5.36 billion settlement		
	Automotive	Planned Berlin gigafactory not adequately able to manage its dependency on declining groundwater	3.1% share price fall in 24 hours after court complaint, \$5.7 billion facility delayed		

Source: BloombergNEF

There Is a Growing Awareness That Environmental/Social Risks Are Financial Risks



2020



2022

July 2025



Feb. 2026

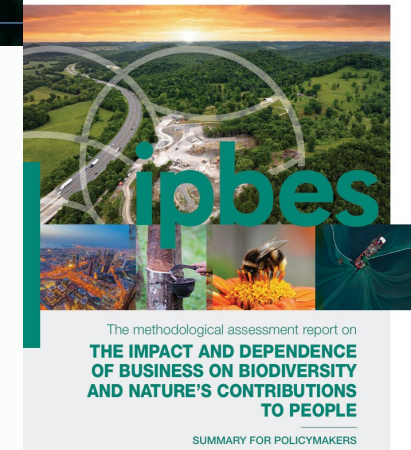
2010

Nature Risk Rising:
Why the Crisis Engulfing
Nature Matters for Business
and the Economy

In collaboration with PwC
January 2020



Jan. 2026



Congressional Declaration of Policy § 4331

“It is the continuing policy of the Federal Government

....

- to use all practicable means and measures, ... to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”



Conclusion

- “Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”
- 42 U.S.C. 4331

