

Testimony of E. Donald Elliott

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United States House of Representatives

Committee on the Judiciary

Subcommittee on Regulatory Reform, Commercial and Antitrust

Hearing on Permitting Litigation Efficiency Act of 2018

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Chairman Marino, Ranking Member Cicilline and Distinguished Members of the Subcommittee:

It is an honor and a privilege once again to testify before this honorable House. I come as a concerned citizen, not as a representative of any organization or group. I am a lifelong environmentalist and a strong supporter of environmental law in general and the National Environmental Policy Act (NEPA) in particular, and that is why I support the proposed Permitting Litigation Efficiency Act of 2018. I believe that this legislation is necessary to cure some of the abuses and misuses of environmental review and permitting litigation that have grown up over time in order to save environmental review so that it can perform its important mission.

Coleridge once wrote: **“Every reform, however necessary, will by weak minds be carried to an excess, that will itself need reforming.”**¹ I agree with that (except perhaps for the “weak minds” part). That is exactly what has happened to environmental review and permitting in my opinion; it was a wonderful reform in 1970 but today it itself needs reforming, particularly as a result of judicial interpretations that have lengthened the process unnecessarily.

¹ Samuel Taylor Coleridge, *Biographia Literaria* 13 (1817; ed. Ernest Rhys, 1906). <http://www.archive.org/details/biographialitera027747mbp>

The NEPA process to consider the environmental costs and benefits of projects or other major governmental actions in advance, and to evaluate reasonable alternatives, is a great American invention. NEPA has been copied by over 200 countries worldwide as well as by international organizations such as the UN. I remember vividly meeting with a Russian counter-part when I was General Counsel of EPA who lamented that his country did not have a similar process in place when they drained the Aral Sea to create farmland, only to find it was not arable due to the high salt content of the land; that area is now described as “a toxic desert littered with rusting ships and plagued with lung-choking dust storms.”² I have no doubt that NEPA has prevented similar environmental disasters in the U.S. and I support it strongly.

Unfortunately, however, fly-specking judicial challenges to environmental impact statements (EISs) under NEPA have become a means not to improve environmental review but primarily to delay and derail projects that someone opposes, often for reasons that have little or nothing to do with the environment. Today other countries such as Canada and Germany do environmental permitting and review much better and faster than we do. They are generally able to complete their assessments of major projects within two years by setting deadlines and focusing on the major issues.³ This is all documented and elaborated in an excellent 2015 report by Philip K Howard of the non-

² Ella Morton, *Aridity and Anthrax: The Disastrous Effects of a Shrinking Sea*, Slate http://www.slate.com/blogs/atlas_obscura/2014/05/02/the_shrinking_of_the_aral_sea_ha_s_resulted_in_a_toxic_disaster_area.html

³ In academic work, I have argued that this is a general phenomenon, and that countries that are not the first to adopt a legal device, often do it better because they have the benefit of other countries’ experience. See E. Donald Elliott, *U.S. Environmental Law in Global Perspective: Five Do's and Five Don'ts from Our Experience*, 2010 NATIONAL TAIWAN UNIVERSITY LAW REVIEW 144 http://digitalcommons.law.yale.edu/fss_papers/2717/

partisan NGO Common Good, *Two Years, Not Ten Years*,⁴ which I am submitting for the record and to which I was privileged to contribute on a *pro bono* basis. As the Common Good report notes, the experience of other countries teaches that the single most important reform is to set firm deadlines. I particularly applaud section 1 of the proposed legislation that would strengthen the legal basis for setting legally enforceable deadlines for environmental reviews. That will in turn encourage agencies to prioritize and to focus on the most important environmental issues.

The Common Good report concluded that just a six year delay in starting construction on a project typically *doubles* its cost, and that in the aggregate such delays have cost our nation over \$3.7 trillion (yes, with a “t”) on public projects alone. That number, impressive even by current Washington standards, will mushroom if we move forward with ambitious new proposals to repair our crumbling infrastructure.

The costs of unnecessary bureaucratic delays in the permitting process are not just measured in money but also in environmental damage:

“Rickety transmission lines lose 6 percent of their electricity, the equivalent of 200 coal-burning power plants. About 2,000 ‘high-hazard’ dams are in deficient condition. Century-old water-mains leak over 2 trillion gallons of fresh water a year. Over 3 billion gallons of gasoline are consumed by vehicles idling in traffic

⁴ Philip K. Howard, *Two Years, Not Ten Years: Redesigning Infrastructure Approvals* (2015) https://commongood.3cdn.net/c613b4cfda258a5fcb_e8m6b5t3x.pdf Some have criticized the report by pointing out that the average time to complete an EIS is “only” 4.6 years; that may be but we can and should do better, and some controversial projects are delayed far beyond that average. See Common Good Responds to Critique of “Two Years, Not Ten Years”, <https://www.commongood.org/views/common-good-responds-to-critique-of-two-years-not-ten-years/>

jams [not to mention millions of hours of productive time lost]. Half of fatal car accidents are caused in part by poor road conditions.”⁵

Plus there is another more subtle cost that I know concerns some of the leading national environmental groups as well as me: the longer and more arduous environmental review becomes, the more temptation there will be to exempt important projects from NEPA entirely in order to get them done in a timely fashion, thereby resulting in no mandatory environmental review at all.⁶ No one knows exactly how many statutes already exempt particular projects or even entire programs from NEPA review. (That might be a good project to ask the Congressional Research Service to compile). But based on my own limited research, I estimate that there are already more than 50 such statutory exceptions, plus hundreds more “categorical exclusions” created at the administrative level.

I have not studied the permitting process for the proposed Lower Bois d’Arc Creek Reservoir in Northern Texas in detail and therefore I take no position on H.R. 4423. I will say, however, that that saga clearly illustrates the problem that a long delay in environmental permitting, almost ten years in that instance, creates an almost irresistible demand to create exemptions so that necessary projects can be built.

Speeding up environmental review and permitting has been, and should continue to be, a bi-partisan issue. In August 2011, President Obama issued a Presidential Memorandum calling on federal agencies to expedite the review of high-priority

⁵ Philip K. Howard, Here’s the Infrastructure Deal that Trump and Dems should swing, THE NEW YORK POST, January 31, 2018 <https://nypost.com/2018/01/31/heres-the-infrastructure-deal-that-trump-and-dems-should-swing/>

⁶ This is what economists call a “Nash equilibrium”: the most costly it is in time and money to go through the NEPA process, the more temptation exists to create exceptions.

infrastructure projects. In March 2012, President Obama took further action to improve environmental permitting efficiency and transparency by signing Executive Order 13604, “Improving Performance of Federal Permitting and Review of Infrastructure Projects.” In December 2015, President Obama signed into law the Fixing America's Surface Transportation (FAST) Act, which contained bi-partisan reforms to speedup the environmental permitting process for highways and other transportation projects. The Obama-era Council on Environmental Quality, led by its then-Deputy Director and General Counsel, my current Covington colleague Gary Guzy, also made good progress to try to speed up the environmental review process to the extent possible through administrative changes.⁷ Further progress requires legislation.

The main culprit remaining in my view is a long-standing error by the courts that permits a single judge to issue a preliminary or permanent injunction halting a project because of errors or omissions in an EIS. That practice is an anomaly in judicial review of administrative action; judges are normally not permitted to issue injunctions dictating how government agencies must respond to their rulings on remand.⁸ There is no judicial review provision in the NEPA statute mandating such a result. The entire architecture of judicial review of EISs has been elaborated by the courts out of Congressional silence, and it is entirely appropriate for Congress to reign it in where it has gone too far.

⁷ Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act (CEQ, 2012), <https://www.energy.gov/nepa/downloads/final-guidance-improving-process-preparing-efficient-and-timely-environmental-reviews>

⁸ *FPC v. Transco*, 423 U.S. 326 (1976)(*per curiam*) (if agency action is not sustained on record before agency, proper remedy is to remand for agency to consider taking additional evidence, not to order it as to how to proceed on remand).

Philip Howard has correctly pointed out that the opportunity to go to court to get an injunction to halt a project based on omissions in an EIS feeds back into the administrative process and creates incentives for agencies to “leave no pebble unturned” and to “practice defensive medicine” by spending a great deal of time and money delving into minor issues that are not really necessary to decide whether the project will produce net environmental benefits. For example, the review for raising the roadway of the Bayonne Bridge, a project with virtually no environmental impact because it used the existing bridge foundations and merely raised the roadway so larger ships could pass below, was 20,000 pages including exhibits⁹ and took four years and millions of dollars to compile.¹⁰

Worse yet, judges in NEPA cases will sometimes allow challengers to raise new issues in court even if they did not raise them before the agency during the EIS scoping process, which is where the agency takes public input and decides which issues to consider in the EIS. This ill-advised judicial practice ignores the usual, and very sensible, requirement for challengers in court to exhaust their administrative remedies at the agency level before going to court. Accordingly, I strongly support section 2(c) of the proposed legislation that would require scoping issues to be raised during the scoping process when the agency can fix them without undue delay. (However, I note that the proposed language at page 3, line 9 of the bill applies the exhaustion requirement only to “any action seeking judicial review of *such a determination*,” which is potentially vague

⁹ Howard, *supra* note 5.

¹⁰ Sam Roberts, High Above the Water, but Awash in Red Tape: Long Review of Bayonne Bridge Project Is Assailed, THE NEW YORK TIMES, Jan. 2, 2014, <https://www.nytimes.com/2014/01/03/nyregion/long-review-of-bayonne-bridge-project-is-assailed.html>

and subject to misinterpretation and I urge the Subcommittee to clarify its intent.)

Moreover, the current general federal six-year statute of limitations allows opponents to lie in wait until construction is about to begin, or even has commenced, and then seek an injunction. That would be fixed by section 2(c) that substitutes a 180 day statute of limitations for NEPA claims, which is the same period as provided by the Clean Air Act and other environmental statutes.

Whether to enjoin a project because of an oversight in an EIS is a notoriously subjective process because it involves vague standards such as “the balance of the equities” and what is “in the public interest.”¹¹ A 2004 study of 325 NEPA cases by the non-partisan Environmental Law Institute found that federal district court judges appointed by Democratic presidents 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, and district judges appointed by President George W. Bush ruled in their favor only 17% of the time.¹² I strongly support section 3 of the proposed bill that would remind judges to weigh the costs of delay, the effects on workers and the benefits of the proposed project in striking this balance.

It is my personal observation that in practice judicial review of EISs under NEPA contributes relatively little to actually improving environmental review despite its substantial costs. The guidelines for EISs issued by experts at CEQ, and the review and

¹¹ *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008)(a plaintiff seeking a preliminary injunction in a NEPA case “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).

¹² JAY E. AUSTIN, JOHN M. CARTER II, BRADLEY D. KLEIN AND SCOTT E. SCHANG, *JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT* (2004). <http://www.eli.org/research-report/judging-nepa-hard-look-judicial-decision-making-under-national-environmental-policy-act>

comment on individual EISs by the environmental experts at the EPA required by Section 309 of the Clean Air Act, do most of the work of improving environmental reviews in my opinion. Duplicative judicial review over and above these administrative reviews within the Executive branch imposes substantial costs but with very little additional benefit, particularly at the preliminary injunction stage. Left to my own devices, I would probably remove jurisdiction from the federal courts to issue injunctions in NEPA cases; we do not allow judicial review, much less injunctions, for other kinds of reviews of proposed actions within the Executive branch, nor do the other countries that do environmental reviews more efficiently than we do.

But I recognize that politics is the art of the possible, and I support the alternative approach in section 3 of the proposed bill to beef up existing bonding requirements to try to discourage judges and litigants from enjoining projects unnecessarily. A recent court case halting the construction of the \$2.5 billion Atlantic Sunrise natural gas pipeline illustrates the need to make challengers think twice before they impose substantial, unjustified costs on others. After a four year permitting process before the Federal Energy Regulatory Commission (FERC), the D.C. Circuit entered an emergency “administrative stay”¹³ that temporarily halted construction in five states based on a claim by opponents that the four-year permitting process should have been prolonged even further to reconsider issues that had already been considered and rejected by FERC in other cases.¹⁴ According to published reports, this particular court order put 2,500

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<https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/Atlantic%20Sunrise%20Stay.pdf>

¹⁴ <https://www.platts.com/latest-news/natural-gas/washington/transco-asks-us-court-to-clarify-stay-for-atlantic-10013855>

workers out of work temporarily and cost the company \$8 million a day.¹⁵ The court later dissolved the order,¹⁶ but real economic harm had been done in the meantime. I was not counsel for any of the parties in that case, and I have no stake in whether that particular pipeline is or is not built. But it does seem to me to illustrate Coleridge's point about necessary reforms being taken too far until they themselves need reforming

I thank you for this opportunity to share my views and I would be pleased to answer your questions.

¹⁵ <http://naturalgasnow.org/job-killing-sierra-club-abuses-2500-atlantic-sunrise-workers-fun/>

¹⁶ <https://www.platts.com/latest-news/natural-gas/washington/us-court-ends-atlantic-sunrise-gas-line-pause-21492275>