NEPA's Insatiable Optimism

by William H. Rodgers Jr.

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I. Introduction

Why does this middle-aged environmental law deserve such a warm 40th birthday party? The usual reasons are well known:

The National Environmental Policy Act (NEPA)[1] has an elegant style. It is bold and sparse and trim. It comes close to eloquence now and then.

It is well-targeted—aimed squarely at the agencies of the United States. It is inviting, not punitive. It is tantalizing in the prospects.

It is generously designed. It puts the burden of environmental justification on the acting agency but then recruits widely in its consultation and other arrangements to draw others into the decision vortex.

It hits a number of appealing policy notes—good science, public participation, government reform, and protection of the environment.

NEPA received the greatest of institutional compliments—it was presaged,[2] then it was widely copied. Adrian Fischer, my law dean at Georgetown University in the early 1970s, saw the immediate pertinence of this impact statement approach to his work on disarmament negotiations. It would clearly help, he mused, to know a bit about the Pentagon's new weapons plans in any discussions to rid the world of weapons.

NEPA copycats have popped up everywhere, and we have to think of the response as the sincerest form of flattery: local laws, state laws, international laws, and of course, Tribal Environmental Policy Acts (TEPAs).[3] The powerful Endangered Species Act (ESA)[4] arrived in 1973 disguised as just another NEPA.[5] Newt Gingrich had his own NEPA epiphany, stripped of the environmental business, of course, and he called it an Unfunded Mandates Reform Act.[6] NEPA copycat it was.

NEPA is tough and durable. It has no friends on the U.S. Supreme Court and is fast losing the few that it once had on the courts of appeals, as the jurists selected by President George W. Bush and Sen. Orrin Hatch (R-Utah) take up their allocated space on the spectrum of public authority. Measured by what should have been, the Supreme Court has given us 15 consecutive misreadings of NEPA.[7] The latest three approach the pathological, if you care to consult Justice ClarenceThomas' complete misunderstanding of NEPA's role in supplementing agency mandates,[8] Justice Antonin Scalia's contrived twisting of the concept of continuing action to undermine prospects of supplemental environmental impact statements (EISs) and enforcement of mitigation commitments,[9] and Chief Justice John Roberts' starry-eyed suspension of NEPA remedies because a few admirals appeared in court.[10]

That NEPA has survived this pattern of sustained judicial abuse makes it doubly deserving of a birthday party. I

1. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
2. *See* Karl Boyd Brooks, Before Earth Day: The Origins of American Environmental Law, 1945-1970, ch. 2 (2009).
3. *Compare* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. L. Rev. 553, 617-18 (2001) (32 states have some form of impact assessment policy) *with* Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 Harv. Envtl. L. Rev. 49, 84 (2008) (as do over "a hundred other legal systems"). *See also* Gillian Mittelstaedt et al., Participating in the National Environmental Policy, Developing a Tribal Environmental Policy Act—A Comprehensive Guide for American Indian and Alaska Native Communities (2001); William H. Rodgers Jr., Environmental Law in Indian Country §1:15 (2005) (with semi-annual pocket parts) [hereinafter 2005 NEPA in Indian Country]. *See also id.* §1:14(D) (NEPA and the Indian Tribes).
4. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
5. The key staffer was Frank Potter, and his tactics are described in William H. Rodgers Jr., *The Most Creative Moments in the History of Environmental Law: The Whos*, 39 Washburn L.J. 1, 6 n.34 (1992).
6. Pub. L. No. 104-4, 109 Stat. 48 (1995) (the "impact" victims here, of course, are not natural treasures and wildlife, but downtrodden state and local governments).
7. 2005 NEPA in Indian Country §1:17 at 456-57 ("The Supreme Court and the Foul Fourteen"). These decisions used to be known as the Dirty Dozen but the total has risen now to a Flimsy Fifteen. *See* William H. Rodgers Jr., *NEPA at Twenty: Mimickry and Recruitment in Environmental Law*, 20 Envtl. Law 485 (1990). *See* David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 Envtl. L. 551, 667 (1990) (not hostility, but "respect for what Congress actually said in the statute and by a realistic appreciation of the courts' limited ability to oversee agency actions that affect the environment"). Does "realism" still hold as the record climbs to 15:0 or 21:0 in the immediately foreseeable future?
8. U.S. Dep't of Transportation v. Public Citizen, 541 U.S. 752, 34 ELR 20033 (2004) (9:0), which earns critical comment in William H. Rodgers Jr., *The Tenth U.S. Supreme Court Justice (Crazy Horse, J.) and Dissents Not Written—The Environmental Term of 2003-2004*, 34 ELR 11033, 11034 (Dec. 2004).
9. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 34 ELR 20034 (2004) (another award-winner through the eyes of Crazy Horse, J., *supra* note 8, at 11033).
10. Winter v. Natural Resources Defense Council, 129 S. Ct. 365, 39 ELR 20279 (Nov. 8, 2008).

will aim my toast especially at NEPA's roles in protecting science, promoting cumulative knowledge, inspiring investigation, and serving as a resilient precautionary law against future dangers.

A. Nurturing Science

Who could have imagined that the very notion of "science" (and its countless corollaries built around the "pursuit of truth")[11] could be under serious attack in the United States? It was climate change and its implications that brought out the worst in us. The campaign of deliberate denial based on entire regimes of "counterknowledge" (false facts)[12] is most impressive. Fiction made reality, courtesy of fossil fuel interests.[13] But this campaign was aided by the shocking ignorance of many members of the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit when they were presented with a clear choice of scientific truth[14] and scientific nonsense.[15] And the Supreme Court has been so arrogant as to insist that "good science" itself must be compatible with economic necessity.[16] There was no serious dissent from this offensive proposition.[17]

Fortunately, NEPA stands in the way of the forces of ignorance. Though it did not originate the flood of "best available science" clauses in federal legislation,[18] it certainly presaged them. NEPA both promotes good science,[19] and even more fortunately, through its consultation and commenting procedures, establishes a rough-hewn and reliable peer review process. Comments are drawn from many directions and poor science attracts its own critics. What you might read in the NEPA cases (this one involving the Waste Isolation Pilot Plant (WIPP) in New Mexico) is something like this: "[The Department of Energy has pursued] a pattern of lies and deceptions designed to disguise the true hydrology of the site."[20] Now in the old days, when judicial review was taken seriously, any claimed "pattern of lies and deceptions" could be expected to attract appellate curiosity. No more, it seems. This court didn't want to hear this story— it was "extra-record" evidence and, at most, "a dispute among members of the scientific community."[21] But I don't wish to frown upon the particular result. I would urge you, instead, to celebrate and take comfort in the fact that NEPA has put in place a legal system for exploring, contesting, and understanding the hydrology underlying the WIPP. It's not foolproof, but it's not bad either.

11. James Lovelock, The Vanishing Face of Gaia: Final Warning 11 (2009) ("Science is about the truth and should be wholly indifferent to fairness or political expediency"); *see* Susan Jacoby, The Age of American Unreason: Dumbing Down and the Future of Democracy (2008).
12. *See* Damian Thompson, Counterknowledge: How We Surrendered to Conspiracy Theories, Quack Medicine, Bogus Science, and Fake History 1 (2008) ("counterknowledge" is "misinformation packaged to look like fact"; *see id*. at 2. (emphasis added):
    > (The essence of counterknowledge is that it purports to be knowledge but is *not* knowledge. Its claims can be shown to be untrue, either because there are facts to contradict them or because there is no evidence to support them. It misrepresents reality (deliberately or otherwise) by presenting non-facts as facts.).
13. *See* Bert Bolin, A History of the Science and Politics of Climate Change: The Role of the Intergovernmental Panel on Climate Change ch. 9 (2007).
14. Commonwealth of Massachusetts v. EPA, 415 F.3d 50, 61, 62-64, 67-81, 35 ELR 20148 (D.C. Cir. 2005) (Opinion of Tatel, C.J., dissenting) (science accurately portrayed).
15. *Id*. at 50, 56-59 (D.C. Cir. 2005) (Opinion of Randolph, C.J.) (science falsely portrayed), *adhered to en banc* by seven (of nine) judges in 433 F.3d 66 (D.C. Cir. 2005) (per curiam)) (the seven are Ginsburg, Sentelle, Henderson, Randolph, Garland, Brown, and Griffith, C.J.s; the two are Tatel and Rogers, C.J.s)
16. Bennet v. Spear, 520 U.S. 154, 176-77, 27 ELR 20824 (1997) (Opinion of Scalia, J.) (emphasis added):
    > The *obvious* purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA *not be implemented haphazardly, on the basis of speculation or surmise*. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) *is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives*. That economic consequences are an explicit concern of the ESA is evidenced by §1536(h), which provides exemption from §1536(a)(2)'s no-jeopardy mandate where there are no reasonable and prudent alternatives to the agency action and the benefits of the agency action clearly outweigh the benefits of any alternatives. *We believe* the "best scientific and commercial data" provision *is similarly intended, at least in part, to prevent uneconomic* (because erroneous) jeopardy determinations. Petitioners' claim that they are victims of such a mistake *is plainly within the zone of interests that the provision protects*.
17. Crazy Horse (borrowed from William H. Rodgers Jr., *The Tenth U.S. Supreme Court Justice (Crazy Horse, J.) and Dissents Not Written—The Environmental Term of 2003-2004*, (2004)) might write this parody of the paragraph quoted in note 16:
    > The *obvious purpose* of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA *not be implemented on the basis of power politics and economic influence*. While this [clause] no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is *to improve the quality of decisionmaking, enhance public confidence, and import technical accuracy so that environmental decisionmaking is not derailed by zealous and misguided interference*. The confinement of economic objection to a rare and radically limited sidebar (§1536(h)) is definitive evidence that economic objection should not be smuggled in here under the implausible guise of a citizen suit. *We believe* the "best scientific and commercial data" provision is no way intended, neither in whole nor in part, to prevent uneconomic (because erroneous) jeopardy determinations. Petitioners' claim that they are victims of such a mistake *is plainly without the zone of interests that the provision protects*.
18. The "best available science" clauses appeared first in the Marine Mammal Protection Act (MMPA) of 1972, 16 U.S.C. §§1361-1421h, ELR Stat. §§2-410. There are 12 of these clauses in the MMPA and another eight in the ESA, which made a conspicuous appearance in 1973. Committee on Defining Best Scientific Information Available for Fisheries Management, Ocean Studies Board, National Research Council, Improving the Use of "Best Scientific Information Available" Standard in Fisheries Management (Nat'l Acad. Press 2004).
19. NEPA §102(2)(A), (B), (H) of, 42 U.S.C.A. §4332(2)(A), (B), (H); 2005 NEPA in Indian Country §1.14(C).
20. Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy, 485 F.3d 1091, 1095, 37 ELR 20098 (10th Cir. 2007) (challenge to the WIPP, a nuclear waste repository in southeastern New Mexico; three EISs).
21. 485 F.3d at 1099.

This is a system of learning and it is protective of science, in this case and hundreds like it. NEPA is a friend of good science and an enemy of bad science. It's a paragon of peer review. And it's a steady danger to justification of science that strays toward the ideological, the political, and the convenient.

B. Promotion of Cumulative Knowledge

One of NEPA's less appreciated functions is to build knowledge (and of course encourage the adaptive management that goes with it) over time. Who would not celebrate a built-in improvement function? Of course, we never learn fast enough or well enough. A committee of the National Academy of Sciences recommended many years ago[22] that the impact statements themselves (filled with projections and predictions as they are) could serve nicely as scientific hypotheses that could be tested and therefore confirmed, spurned, or modified. This didn't happen dramatically, but it's still a good idea.

Yet, things can get better under NEPA. Climate change is a case in point.

Go back in time to 1990. The Corporate Average Fuel Economy (CAFE) standards of the National Highway Traffic Safety Administration were under attack for being oblivious to carbon dioxide (CO_2) and its prospects of climate change.[23] There were NEPA violations alleged. Two of the three judges who heard this case saw no problem. The Hon. D.H. Ginsberg spoke sneeringly of the need to withhold standing "for anyone with the wit to shout 'global warming' in a crowded courthouse."[24] This sassy display of conspicuous ignorance was enough to earn his nomination to (but not selection for) the Supreme Court. Justice Ruth Bader Ginsburg thought that the contribution of CO_2 from U.S. auto exhaust was too tiny to matter in any projected "global warming disaster." It was therefore not "significant" for NEPA purposes.[25] Her cautious display of agreeable satisfaction with the status quo earned her a spot on the Supreme Court.

The only one of the three who was not Supreme Court-worthy was Chief Judge Patricia Wald, who said in 1990:

> First, the evidence in the record suggests that we cannot afford to ignore even modest contributions to global warming. If global warming is the result of the cumulative contribution of myriad sources, any one modest in itself, is there not a danger of losing the forest by closing our eyes to the felling of the individual trees? Second, evidence in the record points out that international policymakers and scientists are calling for drastic reductions in carbon dioxide emissions to curb global warming. In the face of that evidence, how can we be sure without more explanation that increases of the magnitude of over 50 billion pounds of carbon dioxide over 20 years are really insignificant?[26]

Fast-forward nearly 20 years. The Hon. Betty Fletcher gets her creative hands on the latest head-in-the-sand NEPA effort on CAFE standards by the National Highway Traffic Safety Administration.[27] Judge Fletcher even was obliged to appease the "denier" faction on her own court; the opinion was withdrawn and rewritten (under an apparent threat of an en banc move) to excise a direct order to the agency to prepare an EIS. But we do get a splendid NEPA opinion in full demolition mode. Thus, the Judge Fletcher opinion does a NEPA renovation of the agency's CAFE standards decision on multiple grounds:

- "failure to monetize" the value of carbon emission reductions;
- failure to fix the "SUV loophole";
- failure to set fuel-economy standards for the so-called Class 2b trucks;
- inadequate analysis of cumulative effects;
- inadequate assessment of alternatives that are confined to a "very narrow range"; and
- failure to address the "tipping point" evidence that small changes can have big effects.

Judge Fletcher reasoned that, on the earlier occasion, Justice Ginsburg might have told a plausible story of why small is small and why marginal effects could be disregarded. But "[t]hese reasons do not apply here. Petitioners have provided substantial evidence that even a small increase in greenhouse gases could cause abrupt and severe climate changes."[28] Thus, the "tipping point" evidence serves as the "tipping point" for the judicial decision, too.

And how should Chief Judge Patricia Wald be remembered? "In light of the emergent consensus on global warming," according to Judge Fletcher, "Chief Judge Wald's reasoning in her dissent in *City of Los Angeles* is not only prescient but persuasive."[29]

Twenty years of NEPA and CAFE standards. Improvement detected. Celebrate the capacity for self-correction built into the system.

C. NEPA's Unheralded Investigative Function

NEPA's broad mandate and clear duties to justify, rationalize, explain, and study are warm-siren calls to the curious, the compassionate, and many who believe themselves to be

22. Comm. on the Application of Ecological Theory to Environmental Problems, Comm'n on Life Sciences, National Research Council, Ecological Knowledge and Environmental Problem Solving: Concepts and Case Studies (1986) (chaired by the distinguished zoologist, Gordon Orians).
23. City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 21 ELR 20170 (D.C. Cir. 1990), *overruled on other grounds by* Fla. Audubon Soc. v. Bentsen, 94 F.3d 658, 27 ELR 20098 (D.C. Cir. 1996).
24. 912 F.2d at 484.
25. 912 F.2d at 504.
26. 912 F.2d at 501 (dissenting opinion).
27. Center for Biological Diversity v. National Highway Traffic Safety Administration, 508 F.3d 508, 37 ELR 20281 (9th Cir. 2007), *opinion vacated and withdrawn in* Center for Biological Diversity v. National Highway Traffic Safety Administration, 538 F.3d 1172, 38 ELR 20214 (9th Cir. 2008) (Judge Fletcher is joined by Hawkins, C.J., with Siler, C.J., concurring in part and dissenting in part, in a brief opinion).
28. 538 F.3d at 1224.
29. 538 F.3d at 1224 n.76.

truth-tellers and justice-seekers. This law beckons to a variety of get-it-right personalities within and without U.S. administrative agencies.

Courts, too. Especially U.S. district courts, who are still populated by a number of inspiring and daring individuals.

I'll mention but two of dozens of recent examples. These two cases ended "badly," if you focus on narrow outcomes, but they illustrate how NEPA can lead—and inspire—extraordinary court-originating inquiries.

First, is the amazing case of the Hon. James Hoeveler, U.S. District Court, Southern District of Florida. Judge Hoeveler did yeoman's service for the public in the famous Everglades litigation.[30] His outspoken honesty eventually got him removed from the case at the behest of "big sugar," who did not like what he was saying. A brief timeline of this incident is as follows:

Date	Event
May 3, 2003	Judge William Hoeveler holds hearings on "sugar bill" that would delay cleanup.
May 9, 2003	Judge Hoeveler issues order, expressing "fervent hope" that Gov. Jeb Bush not sign a "clearly defective" bill.
June 4, 2003	Former Florida Attorney General Bob Butterworth and law professor William Rodgers nominated as Special Masters. Governor signs bill. Sugar industry seeks recusal of Judge Hoeveler.
Sept. 23, 2003	Chief Judge William J. Zloch (Southern District of Florida) enters "Order of Disqualification" removing Judge Hoeveler from the case upon motion of intervenor U.S. Sugar Corp. The judge had been quoted in the press on this case, and the sugar companies could not expect a fair shake from this man.

We hear next from Judge Hoeveler in his famous opinion of *Sierra Club v. Strock*,[31] where he found multiple violations of multiple federal statutes in connection with the U.S. Army Corps of Engineers'(the Corps') issuance of Clean Water Act (CWA)[32] §404 permits to nine private corporations "for the destruction of approximately 5,400 acres of wetlands in order to remove the underlying limestone for processing into cement, concrete, and other products."[33] As is so often in NEPA cases, the overall performance of the federal agency was roundly criticized: "this case presents the first time in three decades of judicial service that this Court is left with the impression that a federal agency has exhibited a disregard for its duty."[34] The Corps was faulted for its "lack of concern" about contamination of the Biscayne Aquifer by the mining activities,[35] its timid acquiescence,[36] its "disregard" for "critical information,"[37] its toleration of the "unnecessary destruction of hundreds of acres of wetlands,"[38] and its ready choice of "expediency over enforcement."[39] Judge Hoeveler found that the Corps did not know how to write permits: "From their initiation, these permits were designed to fail the test of practicable alternatives."[40] It did not know how to prescribe mitigation: "The Court has doubts as to whether the mitigation being attempted at this point even remotely resembles the mitigation announced in the permits."[41] And it couldn't even muster the requisite remorse for the damage it had done: "It is heartbreaking to realize, five years into these improperly issued permits, that nine [wood stork] nestlings already have been lost—particularly when this Court and the public were assured by the Defendants that this mining was not likely to adversely affect the wood stork or any protected species."[42]

The most remarkable part of the litigation was the revelation that the mining was the likely source of the contamination of the Biscayne Aquifer. "Shockingly," wrote Judge Hoeveler, "the Court learned for the first time during the evidentiary hearing, in June 2005, that benzene , a carcinogen, had been detected as early as January 2005 in the water being pumped from the Biscayne Aquifer,"[43] which serves the Miami-Dade County area. Judge Hoeveler found further that the Corps-permitted mining was the likely culprit, that there was "mounting evidence that the Aquifer has been irreversibly contaminated,"[44] and that costs of improving the drinking water plant would range between $97.9 million and $188 million, with mining fees paying perhaps 20% of the costs.[45]

This NEPA case was a tremendous public service. The lawyers who constructed the case and the judge who decided it deserve medals of honor. NEPA's investigative function was on full display. A serious environmental problem had been identified, defined, and revealed.

And how was Judge Hoeveler rewarded? His orders were vacated by the U.S. Court of Appeals for the Eleventh Circuit[46] on the contrived and spurious grounds that the court did not give the Corps proper deference and misunderstood the 20-year reality (a court-declared one, to be sure) that NEPA is nonsubstantive. "We commend the District Court for his thorough analysis," said these judges, while reciting the *Robertson* dictum that "it would not violate NEPA if the EIS noted that granting the permits would result in the permanent irreversible destruction of the entire Florida

30. For background, see William H. Rodgers Jr., *The Miccosukee Indians and Environmental Law: A Confederacy of Hope*, 31 ELR 10918 (Aug. 2001).
31. 495 F. Supp. 2d 1188, 37 ELR 20188 (S.D. Fla. 2007).
32. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
33. *Id.* at 1286.
34. *Id.* at 1286.
35. *Id.* at 1194.
36. *Id.* at 1199 ("The Corps was driven by a sense of predetermination and an urgency.").
37. *Id.* at 1224.
38. *Id.* at 1248-49.
39. *Id.* at 1254.
40. *Id.* at 1270.
41. *Id.* at 1252-53.
42. *Id.* at 1262.
43. *Id.* at 1191.
44. *Id.* at 1200.
45. *Id.* at 1243.
46. Sierra Club v. Van Antwerp, 526 F.3d 1353, 38 ELR 20113 (11th Cir. 2008) (Kravitch, C.J., with a partial dissent).

Everglades, but the Corps decided that economic benefits outweighed the negative environmental impact."[47]

Judge Hoeveler found "striking parallels"[48] between his case and the mountaintop mining case of Judge Robert Charles Chambers of West Virginia.[49] So there were. A brave and brilliant investigative effort in the district court. A pale and wan collapse in the court of appeals.

But what should be celebrated is the NEPA work that mattered.

Judge Chambers' experience with NEPA in West Virginia was a replay of Judge Hoeveler's in Florida. A forceful, brilliant, creative, and instructive effort in the district court. Followed by a thud and a dud in the court of appeals.

Judge Chambers, like Judge Hoeveler before him, had a CWA/NEPA challenge to the issuance of four permits by the Corps. These permits allowed the filling of West Virginia streams in conjunction with surface coal mining operations. As later explained by the court of appeals: "All together, the four challenged permits authorize the creation of 23 valley fills and 23 sediment ponds, and they impact 68,841 linear feet of intermittent and ephemeral streams, or just over 13 miles."[50]

I will give you a taste of the to-and-fro between Judge Chambers and the U.S. Court of Appeals for the Fourth Circuit. We call this the "NEPA dialogue."

Judge Chambers said that filling streams with ripped-off mountains was destructive, wrong, and illegal under the CWA and NEPA. The court of appeals said this technique was "pioneered in West Virginia."[51]

Speaking of the proposed mitigation, Judge Chambers said that it's not very easy to make a stream.[52] The court of appeals said that one stream might have been reestablished in Kentucky and that surely "the novelty of a mitigation measure alone cannot be the basis of our decision to discredit" the practice.[53]

Judge Chambers said that the Corps offered "only the conclusion that mitigation will offset the losses and simply no explanation for how the mitigation proposed will replace what will be lost."[54] The court of appeals embraced this dubious conclusion and said that "whatever the functional uniqueness of headwater streams, nothing in NEPA, the CWA, or the Corps' regulations prevents them from allowing mitigation of headwater stream destruction through enhancement, restoration, or creation of a downstream perennial system."[55]

Judge Chambers was tempted by the metaphor that it was a "Field of Dreams" approach to think you could make streams out of rocks.[56] The court of appeals said this attitude shows no respect for the "best professional judgment" of the Corps.[57]

Judge Chambers said it was a "Federal" action for the Corps to issue permits for these valley fill projects. The court of appeals said that this was not so because "NEPA plainly is not intended to require duplication of work by state and federal agencies."[58]

Judge M. Blane Michael did write a dissent in the court of appeals:

> Today's decision will have far-reaching consequences for the environment of Appalachia. It is not disputed that the impact of filling valleys and headwater streams is irreversible or that headwater streams provide crucial ecosystem functions. Further, the cumulative effects of the permitted fill activities on local streams and watersheds are considerable. By failing to require the Corps to undertake a meaningful assessment of the functions of the aquatic resources being destroyed and by allowing the Corps to proceed instead with a one-to-one mitigation that takes no account of lost stream function, this court risks significant harm to the affected watersheds and water resources. [59]

We will see, of course, whether this valley fill business makes its way to the Supreme Court and if so, whether the Court will diminish NEPA yet again with its haughty ideology dressed up as law. But the story never would have been so clearly, conspicuously, and publicly told had not an honest and admirable district court judge found the right legal vehicle to draw out facts, reach conclusions, and face reality. NEPA is a powerful weapon against agencies that stoop to the level of junk thought.

It's another "medal of honor" moment for these NEPA attorneys and the judge who had the patience, compassion, and conviction to hear them out.

NEPA is a wonderful instrument of investigative honesty in the hands of a James Hoeveler or a Robert Charles Chambers.

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47. *Id.* at 1361-62, paraphrasing the no-substantive-NEPA rule of *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 19 ELR 20743 (1989).
48. 495 F. Supp. 2d at 1282-83.
49. Ohio Valley Envtl. Coalition v. U.S. Army Corps of Eng'rs, 479 F. Supp. 2d 607, 37 ELR 20264 (S.D. W. Va. 2007).
50. Ohio Valley Envtl. Coalition v. Aracoma Coal Co., 556 F.3d 177, 187, 39 ELR 20035 (4th Cir. 2009) (Gregory and Shedd, C.J.s, with Michael, C.J., dissenting in part).
51. 556 F.3d at 186.
52. 479 F. Supp. 2d at 648-49 (footnote bracketed below):
    At trial, Plaintiffs offered Dr. Palmer as an expert in stream restoration. In her extensive participation in restoration projects and review of such projects across the United States, she explained that stream creation "has not succeeded and is not scientifically credible." [Dr. Palmer served as the lead of the National River Restoration Science Synthesis project, and in that capacity, stated that she had yet to learn of a single case of successful stream creation despite the compilation of over 30,000 stream and river restoration projects throughout the United States on behalf of the project.]
53. 556 F.3d at 205.
54. 479 F. Supp. 2d at 652.
55. 556 F.3d at 203.
56. 479 F. Supp. 2d at 648 (footnote bracketed below):
    Plaintiffs' experts characterized the Corps position as a "Field of Dreams" approach [As in, "[i]f you build it, [the streams] will come." *Field of Dreams* (Universal 1989)] and explained that many obstacles make this theory of stream creation doubtful. The scientific community is skeptical of the likelihood that important headwater stream functions will actually be achieved in manmade streams. In addition, the [U.S. Fish and Wildlife Service], a sister federal agency with expertise in aquatic ecosystems, advised the Corps that there was no scientific support for the concept that these ditches could be considered "even rough approximations" biologically of a stream.
57. 556 F.3d at 204.
58. *Id.* at 196.
59. *Id.* at 226.

D. NEPA's Rugged Resiliency

NEPA has a charmed life. There's no other explanation for its capacity to escape the cascade of mortal blows sent its way.

President Ronald Reagan Administration loyalists set about to murder NEPA's "worst-case" analysis only to see it rise from the ashes because they neglected to read the fine print.[60] The Supreme Court deliberately killed substantive NEPA[61] only to see the litigators flock to the NEPA-plus strategy (combining NEPA with substantive laws of convenience such as the CWA, the ESA, or National Forest Management Act (NFMA))[62] to minimize the damage. Confined to a NEPA process, lower courts expanded their demands for better reasons, study, consultation, and deliberation. Some bad actors are captured by this approach[63] despite the altogether-too-many collapses in the courts of appeals.[64]

Even the U.S. Congress has difficulty picking on NEPA. At the wholesale level, the statute is close to "not repealable under any circumstance." At the retail level, of course, this project or that one can be declared NEPA-exempt, or NEPA-compliant, or NEPA-dumbed-down. Political molesters of NEPA settled confidently on the early strategy to declare their favored enterprise something other than a "major Federal action." But providence is always ready to protect this statute. The "major Federal action" formulation could earn an exemption from §102(2)(C) but not §102(2)(E)[65] where other burdens awaited. Quite a setback for the exemption writers. They could live with shameless backroom dealing. But it was quite another consequence to face the music for shameless backroom dealing shown to be *incompetent*.

NEPA's greatest protection is that it is enormously useful in a dangerous world. It has proven its mettle in exposing all manner of hare-brained schemes dreamed up by the bureaucratic elite and their ravenous cheerleaders. On the immediate horizon appear the various "geoengineering" proposals to combat climate change.[66] Frankly, I believe, we should all be relieved to have NEPA standing between us and the hasty implementation of, say, the plans to use shipboard cannons to blast aerosols into space for the next 1,000 years.[67]

Ultimately, of course, NEPA's resiliency is an expression of its popularity. People admire this law and show up for its birthday party for the same reasons they turn out for the Fourth of July. This statute is a wonderful separator of powers. It shares authority. It's a hedge against tyranny. It's an amplifier of the right to speak out. And it's preadapted to the challenges our children will face.

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60. 40 C.F.R. §1502.22 ("Incomplete and unavailable information"). Dinah Bear reminds me that the "reasonably foreseeable" information that can be discussed in NEPA documents "includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." *Id*. §1502.22(b)(1). Some agencies and courts continue to use the dreaded "worst case" language. *E.g*., Habitat Education Center, Inc. v. U.S. Forest Service, 593 F. Supp. 2d 1019, 1035 (E.D. Wis. 2009) (timber project; no NEPA error for the U.S. Forest Service to assume in its analysis a "worst-case scenario," i.e., a complete absence of suitable habitat on private lands). For elaboration, see William H. Rodgers Jr. and Anna T. Mortiz, *The Worst Case and the Worst Example: An Agenda for Any Young Lawyer Who Wants to Save the World From Climate Chaos*, __S.E. Envtl. L.J.__ (2009).
61. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 19 ELR 20743 (1989).
62. 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16.
63. Western Watersheds Project v. Kraayenbrink, 2007 WL 1667618, 37 ELR 20147 (D. Idaho June 8, 2007) (Judge B. Lynn Winmill) (procedural errors in failure to explain limitation of public participation, ignoring of the Bureau of Land Management's own studies, not revealing conflicts among experts, and embracing monitoring requirements that would make standards on grazing allotments unenforceable).
64. Wildwest Inst. v. Bull, 547 F.3d 1162, 39 ELR 20276 (9th Cir. 2008) (O'Scannlain, Goodwin, and Fisher, C.J.s), *esp. id*. at 1170 (the "closed press conference" was "perhaps unfortunate" but "not a violation of NEPA"; an "invitation only" press conference upon release of the EIS on a hazardous fuel reduction project).
65. 42 U.S.C.A. §4332(2)(E).
66. James Lovelock, The Vanishing Face of Gaia: A Final Warning 139 (2009) ("purposeful human activity that significantly alters the state of the earth").
67. Novim Study Group Report, Climate Engineering Responses to Climate Emergencies (Dec. 2, 2008) (delivered to the Pentagon).