

# ***SUBVERTING DEVELOPMENT: AMERICA'S INDUSTRIAL STRENGTH AT RISK***

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THE NATIONAL ENVIRONMENTAL POLICY ACT  
HAS DEGENERATED FROM A HIGH-MINDED LAW  
TO PROMOTE PRODUCTIVE HARMONY  
INTO A WEAPON TO STOP ALL DEVELOPMENT

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A REPORT BY  
THE CENTER FOR THE DEFENSE OF  
FREE ENTERPRISE

# ***Subverting Development: Introduction***

The National Environmental Policy Act of 1969 (42 U.S.C.A. §§ 4321-4335) is the umbrella statute covering all other environmental laws of the United States. Over the past 35 years, through litigation, expanding regulations, and doctrinal drift in the courts, it has become a cumbersome and unwieldy law routinely used by those opposed to economic growth and prosperity to frustrate all kinds of activities.

The Congressional declaration of national environmental policy in Section 101 of NEPA was high-minded and idealistic:

[I]t 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.

However, the courts have banned this uplifting purpose from every NEPA lawsuit on record. It is simply not allowed to be considered.

As a result, NEPA has been twisted into a procedural, bureaucratic, punitive, dangerous obstruction to the social and economic requirements of present generations of Americans.

Courts have repeatedly issued the most bizarre “flyspecking” rulings against development proposals at the tiniest whim of opponents.

The problems this misuse of NEPA has generated include:

- preparation of NEPA documents requires a substantial investment of time, money and energy.
- the endless litigation allowed by NEPA adds millions of dollars to the start-up costs of a wide range of development projects without protecting the environment in any real way or adding anything to the general welfare.
- the added costs of NEPA have rendered thousands of development projects uneconomic and brought them to an expensive and wasteful halt.
- NEPA lawsuits have added substantially to the offshoring of American industry to more development-friendly nations.
- NEPA has become the weapon of choice for ideological litigation groups opposed to development, to corporations, to capitalism or to the industrial strength of America.
- NEPA has become a threat to America’s national security and survival.

NEPA must be reformed.

*Subverting Development* explains some of the background, the problems, and practical reforms that can set NEPA on the track of productive harmony to fulfill the social and economic needs of modern America.

This report is the result of a conference sponsored by The Partnership for America in Denver, Colorado on March 24, 2006. It was produced by the Center for the Defense of Free Enterprise in the public interest. Permission to reproduce portions of this report is granted.

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## ***THE COURT-LIMITED LAW***

**POINT:** NEPA'S GOAL OF ENSURING CONSIDERATION OF ENVIRONMENTAL FACTORS HAS BEEN LIMITED BY COURTS TO REQUIRING PREPARATION AND PUBLIC CIRCULATION OF ENVIRONMENTAL IMPACT STATEMENTS ("EISs") ON "PROPOSALS FOR...MAJOR FEDERAL ACTIONS SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT" WITHOUT ANY CONSIDERATION OF THE PURPOSE STATEMENT OF THE LAW, WHICH PLACES "PRODUCTIVE HARMONY" AND "SOCIAL AND ECONOMIC" NEEDS ON AN EQUAL FOOTING WITH "OTHER" CLAIMS FOR OR AGAINST DEVELOPMENT.

**POINT:** COURTS WILL NOT ALLOW CLAIMS OR ARGUMENTS FOR PRODUCTIVE HARMONY INTO EIS LITIGATION. WORSE, SOCIAL AND ECONOMIC NEEDS ARE RELEGATED TO MERE AFTERTHOUGHTS, COUNTER TO THE PURPOSE STATEMENT OF THE LAW.

**POINT:** DURING THE EARLY HISTORY OF NEPA, OPPONENTS OF ANY EIS HAD TO PROVE A FUNDAMENTAL FLAW IN THE STUDY. JUST IDENTIFYING NUMEROUS SMALL ERRORS - "FLYSPECKING" THE EIS — WAS NOT TO BE SUFFICIENT. [COUNTY OF DEL NORTE V. UNITED STATES, 732 F.2D 1462, 1467 (9TH CIR. 1983), CITING VERMONT YANKEE, FRIENDS OF THE BITTERROOT V. FOREST SERVICE, 900 F. SUPP. 1368, 1372 (D. MONT. 1994). ]

**POINT:** HOWEVER, FLYSPECKING OF ONE SORT OR ANOTHER HAS BECOME A GENERIC FEATURE OF COURT RULINGS IN EIS LITIGATION.

**POINT:** ONLY CONGRESS HAS THE POWER TO REFORM NEPA TO GIVE THE LAW'S PURPOSE STATEMENT REAL MEANING, POWER AND FORCE IN THE COURTS. CONGRESS MUST ADDRESS THIS SERIOUS DEFECT IN PUBLIC POLICY.

## ***FLYSPECKING***

***POINT:*** A RECENT FEDERAL COURT ORDER IN THE ALASKA DISTRICT HAS TURNED FLYSPECKING INTO A SERIOUS THREAT.

***POINT:*** IN LATE 2005, U.S. DISTRICT COURT JUDGE JAMES SINGLETON ISSUED AN ORDER RESULTING FROM A LAWSUIT FILED BY THE EARTH ISLAND INSTITUTE AND OTHER ENVIRONMENTAL GROUPS. THE RULING SEVERELY LIMITS THE ABILITY OF THE USDA FOREST SERVICE TO USE THE CATEGORICAL EXCLUSION (CE) PROCESS. CE HAD PREVIOUSLY BEEN AN APPROVED METHOD OF MAKING DECISIONS FOR MINOR PROJECTS THAT ALLOWS THE AGENCY TO BYPASS THE LENGTHY NEPA PROCESS. FLYSPECKING HAD TRIUMPHED.

***POINT: JUDGE SINGLETON'S RULING HAS MADE IT IMPOSSIBLE FOR THE FOREST SERVICE TO CARRY OUT MANY BASIC DAY-TO-DAY OPERATIONS. THE FOREST SERVICE HAS THUS POSTPONED HUNDREDS OF NECESSARY AND ENVIRONMENTALLY FRIENDLY PROJECTS, INCLUDING***

- FUELS REDUCTION PROJECTS
- PRESCRIBED BURNING
- MANAGING WILDLIFE OPENINGS
- RECREATIONAL SPECIAL USE PERMITS FOR CAMPS, OUTFITTERS, EVENTS, AND CABIN USE.
- ROAD USE PERMITS
- GRAZING PERMITS
- OIL AND GAS PERMITS
- WILDLIFE, FISHERY AND WATERSHED PROJECTS

***POINT:*** THIS SINGLE DESTRUCTIVE RULING HAS STOPPED 808 PROJECTS IN 234 COMMUNITIES AND AFFECTS 1.2 MILLION ACRES OF FEDERAL LANDS. SUCH DISASTROUS RULINGS MUST BE OUTLAWED IF AMERICA IS TO SURVIVE AND THRIVE.

## ***SOCIAL AND ECONOMIC NEEDS MARGINALIZED***

***POINT: BY RULING THAT NEPA IS AN ENTIRELY PROCEDURAL LAW WITHOUT THE HIGHER GOALS OF ITS PURPOSE STATEMENT, INCLUDING SOCIAL AND ECONOMIC NEEDS, THE COURTS HAVE NULLIFIED CONGRESS, THUS BEHAVING AS IF THEY WERE A HEEDLESS INSTRUMENT OF SOCIAL AND ECONOMIC CHAOS.***

***POINT: AN IMPORTANT QUESTION POSED BY NUMEROUS LAW TEXTS, SUCH AS WILLIAM H. RODGERS, JR'S CASEBOOK, ENERGY AND NATURAL RESOURCES LAW (P. 192), IS:***

***MUST AN EIS ADDRESS SOCIAL OR ECONOMIC IMPACTS?***

***THE MERE FACT THAT SUCH A QUESTION CAN ARISE IS COMPELLING EVIDENCE THAT CONGRESS IN ITS NEPA PURPOSE STATEMENT IS BEING CONTEMPTUOUSLY DISREGARDED BY THE COURTS.***

***POINT: IN DISCUSSING THE QUESTION, THE CASE OF SOUTH CAROLINA V. FEDERAL POWER COMMISSION IS FREQUENTLY CITED, IN WHICH THE STATE ARGUED THAT THE COMMISSION'S EIS DID NOT ADEQUATELY CONSIDER THE SOCIAL COST OF RELOCATING PERSONS DISPLACED BY A PROPOSED DAM AND RESERVOIR. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT RULED THAT THE EIS WAS ADEQUATE BECAUSE IT "CONTAINS PRECISE DATA CONCERNING THE NUMBERS OF PERSONS TO BE DISPOSSESSED." MERELY COUNTING HEADS IS NOT ENOUGH. THE COMMISSION TRIED TO TAKE CARE OF THOSE IT HARMED NOT THROUGH NEPA, BUT WITH PROVISIONS IN THE LICENSE IT ISSUED FOR THE DAM TO "GIVE REASONABLE FINANCIAL ASSISTANCE TO ASSIST IN THE RELOCATION OF PERSONS NOW LOCATED IN THE PROJECT AREA AND TO MINIMIZE AND HARDSHIP TO SUCH PERSONS ARISING FROM SUCH RELOCATION." EVEN SO, THE PROVISIONS DID NOT GUARANTEE REPLACEMENT HOUSING.***

## ***UNPRODUCTIVE DISHARMONY***

**POINT:** “ENVIRONMENTAL GROUP LEADERS DON’T WANT DEVELOPMENT, PERIOD - THEY BELIEVE ANY DEVELOPMENT HARMS NATURE, AND THEY WON’T TOLERATE IT.” THOSE ARE THE WORDS OF ANDREW R. WHEELER, STAFF DIRECTOR AND GENERAL COUNSEL OF THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE. HE HAS OBSERVED HOW THE ENVIRONMENTAL MOVEMENT OPERATES ON CAPITOL HILL FOR MANY YEARS. IT REFLECTS THE VIEW OF MANY WHO HAVE BEEN FACED WITH A NEPA STRIPPED OF THE HIGH MEANING CONTAINED IN ITS PURPOSE STATEMENT.

**POINT:** IDEOLOGIES NOW GUIDE THE USE OF NEPA:

- **ANTI-CORPORATE INTENT:** NEPA LAWSUITS ARE FILED FOR THE PURPOSE OF THWARTING ANY CORPORATE ACTIVITY BECAUSE OF FEAR AND HATRED OF CORPORATIONS, AS DESCRIBED IN THE INFLUENTIAL WORKS OF PROF. G. WILLIAM DOMHOFF, AUTHOR OF *WHO RULES AMERICA: POWER, POLITICS AND SOCIAL CHANGE*. THIS INTENT HAS NO RELATION TO PROTECTING THE ENVIRONMENT AND IS AIMED AT CRIPPLING OR ELIMINATING CORPORATIONS’ ABILITIES TO FUNCTION AS ECONOMIC CENTERS.
- **ANTI-CAPITALIST INTENT:** NEPA LAWSUITS ARE FILED FOR THE PURPOSE OF UNDERMINING THE CAPITALIST FREE MARKET SYSTEM AND REPLACING IT WITH SOME VERSION OF CENTRALIZED COMMAND AND CONTROL REGULATION IN WHICH GOVERNMENT, NOT THE PUBLIC, MAKES ECONOMIC AND SOCIAL DECISIONS, AS REFLECTED IN SUCH DOCUMENTS AS *THE PORT HURON STATEMENT* OF THE STUDENTS FOR A DEMOCRATIC SOCIETY, MANY ALUMNI OF WHICH ARE NOW IN POWERFUL POSITIONS IN LABOR UNIONS, ENVIRONMENTAL GROUPS, AND ACADEMIA.
- **ANTI-HUMAN INTENT:** NEPA LAWSUITS ARE FILED FOR THE PURPOSE OF STOPPING HUMAN DEVELOPMENT, CALLING HUMANITY A “CANCER UPON THE EARTH,” AS REFLECTED IN RECENT STATEMENTS OF PROF. ERIC R. PIANKA OF THE UNIVERISTY OF TEXAS, WHO HAS CALLED FOR THE DEATH OF 90% OF HUMANITY TO SAVE NATURE.

## ***OBSTRUCTION TRIUMPHANT***

***POINT: NEPA CAN BE USED SOLELY AS A TOOL OF OBSTRUCTION. THERE IS NO ACCOUNTABILITY TO ASSURE THAT SUCCESSFUL NEPA SUITS HAVE IN ANY WAY ACTUALLY PROTECTED THE ENVIRONMENT. THAT MUST STOP. NEPA AND NEPA USERS MUST BE HELD ACCOUNTABLE FOR THE CONSEQUENCES OF NEPA ACTIONS.***

***POINT: MAKING NEPA ACTIONS TOTALLY CONTINGENT UPON SOCIAL AND ECONOMIC FACTORS WOULD DEFEAT ITS PURPOSE. HOWEVER, GIVING SOCIAL AND ECONOMIC FACTORS HEARING, CONSIDERATION AND WEIGHT BEFORE DECISIONS ARE MADE WOULD NOT.***

***POINT: COURTS MUST BE INSTRUCTED TO REGARD NEPA AS MORE THAN A MERE PROCEDURAL STATUTE, SINCE ITS PROCEDURES TAKEN ALONE HAVE THE POWER TO UTTERLY DESTROY AMERICA'S SOCIETY AND ECONOMY, AND PROFESSIONAL PLAINTIFFS WHO USE IT KNOW THAT.***

***POINT: NEPA IS A WEAPON OF SOCIAL CHANGE AGAINST WHICH TARGETS HAVE NO DEFENSE. NEPA IS TREATED AS A MEANS OF OPPRESSION BY PLAINTIFFS WHO SUFFER NO CONSEQUENCES AND BEAR NO RESPONSIBILITY, BUT WHO ARE REWARDED WITH COURT COSTS FOR DESTROYING THE LIVES AND LIVLIHOODS OF OTHERS.***

***POINT: COURTS MUST BE INSTRUCTED TO HEAR, CONSIDER AND WEIGH EVIDENCE OF SOCIAL AND ECONOMIC CONSEQUENCES AS A NECESSARY PROLOGUE BEFORE CONSIDERING ANY PROCEDURAL MATTERS.***

***POINT: COURTS MUST ALSO BE INSTRUCTED TO HEAR, CONSIDER AND WEIGH EVIDENCE OF MALICIOUS INTENT ON THE PART OF PLAINTIFFS AS A BAR TO STANDING AND AS A BASIS FOR SANCTIONS AND COSTS.***

***INDUSTRIAL STRENGTH AT RISK***

**POINT:** THE RISKS THAT NEPA POSES TO AMERICA'S SOCIETY AND ECONOMY ARE NOT CONSIDERED OR RECORDED. THAT MUST STOP.

**POINT:** THE PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY MUST BE INSTRUCTED TO RECORD AND PUBLISH ALL SOCIAL AND ECONOMIC IMPACTS OF EVERY NEPA ACTION ON AN ANNUAL BASIS. COUNCIL MEMBERS MUST BE HELD LIABLE FOR SUCH RECORDING AND PUBLICATION BY EMPOWERING CITIZEN ATTORNEYS GENERAL LITIGATION AGAINST INDIVIDUAL COUNCIL MEMBERS FOR NEGLIGENT OR DELIBERATE FAILURE TO RECORD AND PUBLISH NEPA IMPACTS.

**POINT:** THE ANNUAL SOCIAL AND ECONOMIC IMPACT REPORT MUST RECORD EACH AND EVERY PROJECT AFFECTED BY ANY NEPA ACTION WITHIN THE MOST RECENT CALENDAR YEAR.

**POINT:** THE ANNUAL SOCIAL AND ECONOMIC IMPACT REPORT MUST RECORD THE NUMBER OF PERSONS AFFECTED BY EACH NEPA ACTION AND MUST INCLUDE A DESCRIPTION OF THE IMPACT, NOT NEGLECTING DISRUPTIVE CHANGES IN CUSTOM AND CULTURE, ACCESS TO SERVICES AND LOCATIONS, LOST VISITOR DAYS, LOST HOMES, TRANSPORTATION LIMITS, AND ANY OTHER SOCIAL FACTORS.

**POINT:** THE ANNUAL SOCIAL AND ECONOMIC IMPACT REPORT MUST RECORD THE ESTIMATED DOLLAR COST OF EACH NEPA ACTION, INCLUDING THE COST OF FEDERAL ATTORNEYS, THE COST OF COURT AWARDS TO PLAINTIFFS, THE LOST OPPORTUNITY COST OF STOPPED OR ALTERED PROJECTS AND OTHER ECONOMIC MEASURES OF IMPACT.

**POINT:** THE ANNUAL SOCIAL AND ECONOMIC IMPACT REPORT MUST RECORD THE NUMBER AND NATURE OF ALL BANKRUPTCIES AND OFFSHORING OF BUSINESSES RESULTING FROM NEPA ACTIONS.

**THE CENTER FOR THE DEFENSE  
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is a non-profit, tax-exempt, publicly supported educational foundation organized under 501(c)(3) and 509(a)(1) of the Internal Revenue code.

The Center for the Defense of Free Enterprise was founded on July 4, 1976, by a coalition of concerned citizens to promote and defend the principles of the American free enterprise system. To that end, the Center for the Defense of Free Enterprise conducts many educational and legal action projects designed to better inform the public about the benefits of the free enterprise economic system. This report is one of a periodic series on the problems of free enterprise.

Additional copies of this report are available from the address below. Questions concerning this report should be addressed to: Editor, "Subverting Development" For more information, please contact:

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