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The Devil in NEPA's Details: Amending NEPA to Prevent State Interference with Environmental Reviews

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THE DEVIL IN NEPA'S DETAILS: AMENDING NEPA TO
PREVENT STATE INTERFERENCE WITH ENVIRONMENTAL
REVIEWS

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INTRODUCTION

The environment is susceptible to human harms because it lacks a voice of its own. Yet environmentalists have used their voices for generations to promote environmental protection, causing Congress to pass a variety of laws that prevent needless environmental destruction. The National Environmental Policy Act of 1969 (NEPA) advances this goal by directing the federal government to undergo an environmental review process anytime it wants to begin a project that could have detrimental environmental impacts.¹ This process ensures that the federal government knows how a project will impact the environment and whether any feasible alternatives to a project may have less of an impact on the environment.²

However, problems can arise when state agencies circumvent NEPA and interfere with the mandated environmental review to reach a result that ultimately benefits the state but harms the environment. Such was the case in Minnesota in July 2014.³ While the federal government was studying the impacts of a proposed railroad that would cut through an environmentally sensitive area, the Minnesota state government began making deals with cities in the region concerning the path of the tracks.⁴ The federal agency in charge of the project could have chosen a different route for the tracks—one that either did not cut through the protected area or that included efforts to minimize the environmental damage—but the state agency's actions essentially ensured the tracks would be laid in the exact way the state wanted.⁵

A local environmental group attempted to enjoin the agencies from deviating from NEPA's strict guidelines, but the Court of Appeals for the Eighth Circuit held that the statute did not permit the group to bring a private cause of action against state officials.⁶

1. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(C).

2. *Id.*

3. *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 91 F. Supp. 3d 1105, 1111-14 (D. Minn. 2015), *rev'd and remanded*, 928 F.3d 759 (8th Cir. 2019).

4. *Id.* at 1114-15.

5. *Id.* at 1112-15.

6. *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759, 762-63 (8th Cir. 2019).

The case was dismissed, and the court neither reprimanded the state for interfering with the federal government's planning efforts nor prevented the state from interfering further in future projects.⁷

This problem is not unique to environmental groups in Minnesota. The way in which Congress wrote NEPA has caused citizen groups around the country to confront this same issue.⁸ This Note contends that Congress should amend the National Environmental Policy Act of 1969 to include a specific "citizen suit" provision that would authorize concerned individuals and environmental groups to bring private causes of action against state actors and agencies to prohibit states from unduly interfering with NEPA's environmental review process.

Part I explains how NEPA currently functions and how environmental groups can allege violations of the statute in federal court. Part II explores a particular flaw in NEPA's application and examines the current circuit court split concerning different interpretations of the statute. Building upon this foundation, Part III proposes that Congress should amend NEPA to include a citizen suit provision, thus resolving the circuit court split and providing federal courts with some much-needed clarity on the scope of NEPA's application to state actors. Part IV addresses potential counterarguments before concluding that the proposed citizen suit provision will best protect against environmental harms.

I. BACKGROUND

It is essential to understand what NEPA requires and how citizens can raise NEPA challenges in order to recognize the particular flaw in the statute this Note analyzes. Section A examines the environmental review process that NEPA mandates while Section B explains how plaintiffs can challenge NEPA violations through the Administrative Procedures Act (APA).

7. *See id.* at 763.

8. *See infra* Part II.B.

A. *Environmental Review Under NEPA*

NEPA revolutionized the federal government's decision-making process. Congress stated that the Act's purpose was "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment."⁹ When setting this national policy, Congress mandated that the federal government develop and administer all federal policies, regulations, and laws in accordance with NEPA and its goal of achieving environmental-human harmony.¹⁰ This policy focused the government's attention on the environmental impacts of any proposed action instead of allowing decision makers to simply ignore the damage they inflicted on the environment (as had been the trend in the preceding years).¹¹

NEPA is a procedural statute¹² and thus requires federal actors to build environmental reviews into their decision-making processes.¹³ To accomplish its goal of striking a balance between human progress and environmental health, Congress established a set of procedural requirements that the federal government must adhere to whenever the government proposes any "major Federal actions significantly affecting the quality of the human environment."¹⁴ The most notable of these procedural requirements is the preparation of an Environmental Impact Statement (EIS).¹⁵ These documents address a number of environmental concerns, including (1) the total "environmental impact of a proposed action"; (2) the unavoidable

9. 42 U.S.C. § 4321.

10. *Id.* § 4332; see Sam Kalen, *The APA's Influence on the Development of the National Environmental Policy Act*, NAT. RES. & ENV'T, Spring 2009, at 3, 3-4.

11. See Helen Leanne Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review*, 45 TEX. ENV'T L.J. 317, 317-18 (2015) (discussing the impact that environmental disasters, such as the Cuyahoga River fire and Santa Barbara oil spill, had on Congress and the American people).

12. Procedural laws require decision makers to take certain steps and perform required processes prior to making a final decision. However, such laws do not require decision makers to reach a certain result or decision. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

13. 42 U.S.C. § 4332.

14. *Id.* § 4332(C).

15. *Id.*; see, e.g., *Robertson*, 490 U.S. at 336-37 ("Because that decision is a 'major Federal action' within the meaning of NEPA, it must be preceded by the preparation of an Environmental Impact Statement (EIS)." (quoting 42 U.S.C. § 4332)).

environmental damage the action would cause if implemented; and (3) reasonable “alternatives to the proposed action.”¹⁶ A completed EIS is incredibly detailed and can be hundreds or even thousands of pages long,¹⁷ but the finalized version represents the federal government’s attempt to consider every possible impact that a project could have on the environment.¹⁸

The White House Council on Environmental Quality (CEQ)—an executive agency created by NEPA—is responsible for promulgating regulations that define and clarify the EIS process for federal agencies.¹⁹ Federal actors must first publish a draft of the EIS and invite public comment.²⁰ Publishing a draft EIS is crucial to the NEPA process as it gives notice to the public and other regulatory agencies of a project’s potential environmental impacts.²¹ Once the comment period ends, the responsible federal agency publishes a finalized EIS, which represents the completed environmental review of the project and responds to the previously received comments.²² Finally, the federal agency must publish a “record of decision” (ROD) document that identifies the final action that the agency chose, the alternatives the agency considered, and the explicit

16. 42 U.S.C. § 4332(C)(i)-(iii).

17. Serassio, *supra* note 11, at 320.

18. *See* 42 U.S.C. § 4332; *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005) (explaining how NEPA requires the federal government “to consider every significant aspect of the environmental impact of a proposed action” (quoting *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir. 2002))).

19. *See* Exec. Order No. 11991, 3 C.F.R. 123-24 (1978) (amending Exec. Order No. 11514, 3 C.F.R. 531 (1970)). On July 16, 2020, the CEQ published a final rule enacting a number of comprehensive changes to the existing NEPA regulations. Update to Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020) (codified at 40 C.F.R. pts. 1500-08 (2020)). The majority of these changes were meant to streamline the NEPA review process and codify long-standing practices and case law into binding regulations. *Id.* Even though much of this Note was written prior to the CEQ finalizing these amendments, none of the changes to NEPA’s regulations alter the discussion of NEPA or the thesis of this Note as laid out in the following Parts.

20. 40 C.F.R. §§ 1502.9, 1503.1 (2020); *see* *S.C. Wildlife Fed’n v. Limehouse*, 549 F.3d 324, 328 (4th Cir. 2008) (explaining that the first step in the EIS process requires publishing a draft EIS).

21. *See* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989) (“[T]he EIS serves the function of offering those bodies adequate notice of the expected consequences.”).

22. 40 C.F.R. § 1502.9(b).

reasons for why the agency did not choose each alternative.²³ The CEQ promulgated a particularly important regulation that prohibits an agency from taking any action during the environmental review process that would adversely impact the environment or eliminate any reasonable alternatives to the proposed project.²⁴ This requirement preserves the statute's integrity by ensuring that the agency has seriously considered the potential consequences of its actions before taking any significant steps to begin a project.²⁵

However, as previously stated, NEPA is a procedural statute.²⁶ While federal agencies must consider the environmental impacts of a project and possible alternatives, the statute does not require the government to take one course of action over another.²⁷ NEPA ensures that a federal agency "take[s] a 'hard look' at [the] environmental consequences"²⁸ of its actions, but does not ultimately prevent the government "from deciding that other values outweigh the environmental costs."²⁹ To that end, the Supreme Court has held that even when a federal agency has identified steps it could take to mitigate the environmental harms resulting from a project, the agency is not obligated to actually implement those mitigation efforts.³⁰

Another important component of NEPA is its limited applicability to a state's actions. Though the NEPA review process is typically reserved for federal agencies, the same environmental review is required when the federal government funds, or even partially funds,

23. *Id.* § 1505.2; *Limehouse*, 549 F.3d at 328.

24. 40 C.F.R. § 1506.1(a). The CEQ recently adjusted the language of this section to expressly permit agencies to authorize certain incidental activities (such as acquiring an interest in land and purchasing construction equipment) prior to publishing a final EIS and ROD. *Id.* § 1506.1(b). However, the regulations continue to prohibit agencies from taking any action that would have a significant impact on the existing state of the environment or limit the project's reasonable alternatives. *Id.*

25. *See* 42 U.S.C. § 4332.

26. *See supra* note 12 and accompanying text.

27. Serassio, *supra* note 11, at 319.

28. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

29. *Id.* (first citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); then citing *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam); and then citing *Kleppe*, 427 U.S. at 410 n.21).

30. *Id.* at 352-53.

a state action.³¹ In these situations, either the federal government or a cooperating state agency can prepare the EIS so long as the process meets NEPA's requirements.³² Regardless of which agency prepares the EIS, the end goal is the same: assurance that the government has adequately considered the environmental effects of a proposed action and is making an informed decision.³³

B. Breach of NEPA and the APA

After Congress passed NEPA, scholars and courts were initially uncertain about the proper means of alleging a breach of NEPA's requirements.³⁴ But today, courts recognize NEPA to be a wholly procedural statute, thus mandating judicial review under the Administrative Procedure Act (APA).³⁵ A single circuit court has held that citizens can sue the government for a breach of NEPA by a different means. Part II explores this minority approach.

Citizens can allege a few different types of violations when filing a NEPA claim against the government under the APA. Litigants can contend that an agency decision (in the form of a final EIS or ROD) was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³⁶ For example, if the government failed to adequately explain in an ROD why it chose one course of action over another reasonable alternative, a litigant could contend this failure was arbitrary and capricious.³⁷ Another possible route for alleging

31. 42 U.S.C. § 4332(D); *see, e.g.*, *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759, 761 (8th Cir. 2019) ("Because the [project] is partially funded by the Federal Transit Administration ... completion of the project also required environmental review under NEPA."); *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 328 (4th Cir. 2008) ("The [Federal Highway Administration] and the South Carolina Department of Transportation ... undertook the NEPA process following Congressional approval of the [project], with the federal and state agencies sharing responsibility for the preparation of the EIS.").

32. 42 U.S.C. § 4332(D).

33. *See id.*

34. *See generally* Kalen, *supra* note 10 (detailing the historical development of the Supreme Court's interpretation of NEPA and how agency actions should be reviewed).

35. *See* Serassio, *supra* note 11, at 319; 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action ... is entitled to judicial review thereof.").

36. 5 U.S.C. § 706(2)(A).

37. *See, e.g.*, *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1076, 1082 (9th Cir. 2011) ("[T]he Board's own explanation that the Otter Creek mines were not foreseeable is arbitrary and capricious.").

a breach of NEPA would be to argue that the responsible government agency acted “without observance of procedure required by law.”³⁸ This type of challenge arises in situations in which a government actor simply does not follow NEPA’s procedural requirements.³⁹

While the APA provides a means for citizens or groups to challenge agency actions, courts cannot review every governmental action under the APA. An APA challenge applies only to “final agency action[s]” that are not reviewable under any other statute.⁴⁰ In the context of NEPA violations, courts typically find just two kinds of final agency action: publishing a finalized EIS and publishing an ROD.⁴¹ This APA requirement effectively bars any NEPA challenges prior to the government issuing one of these documents.⁴²

II. NEPA’S CURRENT FLAW AND THE CIRCUIT COURT SPLIT

While the APA provides citizens and interest groups with the means of alleging NEPA violations against federal actors, the way in which the statutes interact with each other raises a major concern: the APA applies only to *final agency actions* taken by the *federal government*.⁴³ However, as previously noted, NEPA permits *state agency* involvement in the environmental review process.⁴⁴

This combination of factors has given rise to a particularly complex and challenging problem: What can citizens do if a state

38. 5 U.S.C. § 706(2)(D).

39. *See, e.g.*, *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006) (“Under NEPA and our case law, the agencies were required to complete an environmental impact statement before extending the leases.”).

40. 5 U.S.C. § 704.

41. *See, e.g.*, *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759, 762 (8th Cir. 2019) (recognizing “final agency action” to mean issuing a final EIS or an ROD); *Latin Ams. for Soc. & Econ. Dev. v. Adm’r of Fed. Highway Admin.*, 756 F.3d 447, 464 (6th Cir. 2014) (finding that an ROD constitutes a “final agency action” under the APA (citing *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997))).

42. *See, e.g.*, *Lakes & Parks All.*, 928 F.3d at 762-63 (“[T]he [plaintiff] filed suit prior to a final agency action.... Therefore, the [plaintiff] has no cause of action through which it could state a plausible claim.”).

43. *See* 5 U.S.C. § 701(b)(1) (“[A]gency’ means each authority of the Government of the United States.”); *see also* *S.C. Wildlife Fed’n v. Limehouse*, 549 F.3d 324, 330 (4th Cir. 2008) (“Neither NEPA nor the Administrative Procedure Act ... in itself provides a cause of action against state actors.”).

44. *See supra* notes 31-33 and accompanying text.

agency or official interferes with a NEPA environmental review before the process has concluded? Under NEPA, the federal government cannot take any action that would affect the outcome of a final EIS and ROD,⁴⁵ but the APA does not provide a cause of action against state officials.⁴⁶

This gap leaves the door open for state agency abuse and interference. For example, if a state were to begin construction of a federally funded highway while the federal government was still drafting the project's EIS, the final EIS would inevitably be altered.⁴⁷ The federal government would not seriously consider reasonable alternatives for the project (which might have had a smaller environmental impact than continuing with construction), and the entire NEPA review process would become nothing more than "a meaningless formality."⁴⁸

Realistically, the APA offers no relief to this sort of problem.⁴⁹ While most circuits continue to treat NEPA as a purely procedural statute,⁵⁰ a single circuit has ruled that in these select circumstances, NEPA authorizes private causes of action against state actors to ensure full compliance with the spirit and language of the statute.⁵¹ Section A explains the Fourth Circuit's unique interpretation and application of NEPA in these scenarios, and Section B sets forth the prevailing NEPA interpretation employed by the rest of the circuit courts.

A. Limehouse and the NEPA Cause of Action

The Fourth Circuit has an unusual precedent relating to private causes of action under NEPA, and the circuit upheld this interpretation most recently in 2008 in *South Carolina Wildlife Federation v.*

45. See *supra* note 24 and accompanying text.

46. See *supra* note 43 and accompanying text.

47. See, e.g., *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042-43 (4th Cir. 1986) (recognizing that the final EIS and ROD would be unduly influenced if the state began construction of a federal highway before publishing the final EIS).

48. *Id.* at 1043 (quoting *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1333 (4th Cir. 1972)).

49. See *supra* note 43 and accompanying text.

50. See *infra* Part II.B.

51. See *infra* Part II.A.

Limehouse.⁵² The action arose out of a controversy involving a proposal to construct the Briggs-DeLaine-Pearson Connector, a bridge that would connect two towns in South Carolina.⁵³ The bridge was to be completely funded by federal money, thus triggering an environmental review under NEPA.⁵⁴ The South Carolina Department of Transportation (SCDOT) and the Federal Highway Administration (FHWA) split the environmental review process.⁵⁵

During this process, the state and federal agencies published a draft EIS and received numerous comments, some of which identified crucial defects in the EIS.⁵⁶ However, when the final EIS was promulgated and the FHWA approved the project in the ROD, these issues had not clearly been addressed or adequately resolved.⁵⁷ The South Carolina Wildlife Federation (SCWF) then brought suit against the agencies, alleging “an impermissibly narrow purpose and need statement, a failure to adequately consider alternatives, and a failure to adequately assess the project’s environmental impacts.”⁵⁸ The SCWF sought both declaratory relief on the basis that the agencies improperly issued the final EIS and ROD, and injunctive relief to bar any further action on the project until the agencies fully complied with NEPA.⁵⁹

While the trial court initially dismissed the action against the SCDOT based on Eleventh Amendment sovereign immunity, the court allowed the suit to proceed against the Executive Director of the SCDOT in his official capacity.⁶⁰ The Director initially argued that the SCWF could not bring suit against a state official for violating NEPA because the APA does not authorize lawsuits against state actors, and NEPA does not authorize any private causes of action.⁶¹ Though most federal circuit courts would likely

52. 549 F.3d 324 (4th Cir. 2008).

53. *Id.* at 327-28.

54. *Id.* at 328.

55. *Id.*

56. S.C. Wildlife Fed’n v. S.C. Dep’t of Transp., 485 F. Supp. 2d 661, 667-68 (D.S.C. 2007), *aff’d in part sub nom.* S.C. Wildlife Fed’n v. Limehouse, 549 F.3d 324 (4th Cir. 2008).

57. *Id.* at 668.

58. *Id.*

59. *Limehouse*, 549 F.3d at 328.

60. *Id.* at 332 (“*Ex parte Young* ... permits suits against state officers for prospective relief where there is an ongoing violation of federal law.”).

61. *See id.* at 330.

have agreed with this argument,⁶² the Fourth Circuit took a different approach.

The Court of Appeals for the Fourth Circuit held that “NEPA does provide a cause of action for private plaintiffs challenging compliance.”⁶³ The court noted that the Fourth Circuit’s precedent permitted suits against state actors “to preserve federal rights under NEPA pending the outcome of federal procedural review.”⁶⁴ Furthermore, the court reasoned that injunctive relief was proper in these circumstances because state actors had the potential to “significantly alter” the results of the review process.⁶⁵

In upholding its precedent, the Fourth Circuit found that reconsideration of the final EIS and ROD was a federal remedy that needed protection.⁶⁶ If the NEPA documents needed to be reevaluated to address their alleged shortcomings, then any sort of action taken by the state to further the proposed bridge would lead to different findings in the final EIS and ROD.⁶⁷ Though the Director assured the court he would not proceed with any action until the full NEPA process was complete, such a promise was not judicially enforceable.⁶⁸ Therefore, the court ruled that injunctive relief against the state actor was proper in order to preserve the federal remedy.⁶⁹

The Fourth Circuit’s interpretation of NEPA did not rely upon any specific statutory language that suggested a private action against state actors.⁷⁰ Rather, the court rested its holding on a form of pendent jurisdiction that protects federal remedies from undue interference.⁷¹ In the realm of environmental law, this concept is especially appealing. An actor can irreversibly affect the environment in countless ways. Therefore, ensuring that the government

62. *See infra* Part II.B.

63. *Limehouse*, 549 F.3d at 331.

64. *Id.* (citing *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986)).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.* at 330.

71. *Id.* at 330-31 (“[F]ederal courts have ‘a form of pendent jurisdiction ... based upon necessity’ over claims for injunctive relief brought against state actors in order to preserve the integrity of federal remedies.” (alteration in original) (quoting *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1329 (4th Cir. 1972))).

fully complies with NEPA's requirements before acting is of paramount importance.⁷²

B. The Other Circuit Courts

The Fourth Circuit is unique in its approach to NEPA causes of action. In fact, many of the other circuit courts have explicitly held that NEPA does *not* provide a private cause of action and that litigants must challenge such violations solely under the APA.⁷³

The most recent case that addressed this issue was before the Eighth Circuit in 2019 in *Lakes & Parks Alliance of Minneapolis v. Federal Transit Administration*.⁷⁴ The facts of *Lakes & Parks Alliance* were quite similar to those of *Limehouse*: a local government agency (the Council) was working with a federal agency (the Federal Transit Administration (FTA)) to construct a light rail line that would connect a city to its suburbs, and thus the agencies jointly conducted an environmental review under NEPA.⁷⁵ However, unlike *Limehouse*, the Lakes and Parks Alliance (LPA) brought suit against the Council and the FTA alleging a failure to comply with NEPA (and other state laws) *prior* to the promulgation of a final EIS or ROD.⁷⁶

The agencies filed motions to dismiss based on the fact that no final agency action had occurred that was judicially reviewable under the APA.⁷⁷ The district court granted the motion in regards to the FTA but allowed the case to continue against the state agency based on the NEPA private cause of action that the Fourth Circuit had recognized in *Limehouse*.⁷⁸ Although the trial court recognized this narrow cause of action, it ultimately determined that the LPA

72. See, e.g., *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042-43 (4th Cir. 1986) (determining that a state agency had the potential to influence the final location of a federal project by initiating construction before the agencies published the final EIS and ROD).

73. See *infra* notes 80-88 and accompanying text.

74. 928 F.3d 759 (8th Cir. 2019).

75. Compare *id.* at 761, with *Limehouse*, 549 F.3d at 327-28.

76. Compare *Lakes & Parks All.*, 928 F.3d at 761, with *Limehouse*, 549 F.3d at 328.

77. *Lakes & Parks All.*, 928 F.3d at 761.

78. *Id.* (citing *Limehouse*, 549 F.3d at 331).

failed to prove that the Council had violated the environmental review requirements of NEPA.⁷⁹

On appeal, however, the Eighth Circuit explicitly rejected the Fourth Circuit's *Limehouse* holding and affirmed Eighth Circuit precedent that "NEPA's statutory text provides no right of action."⁸⁰ The court noted that there was no indication that Congress intended "to provide a remedy for private individuals who may be injured by a violation of NEPA."⁸¹ Additionally, the Eighth Circuit identified three key distinctions between the facts in *Limehouse* and the ones before it in *Lakes & Parks Alliance* which made *Limehouse* "in-apposite" to the case.⁸² In *Lakes & Parks Alliance*, (1) the plaintiff filed the suit prior to any final agency action; (2) the only federal defendant (the FTA) was no longer a party to the case; and (3) the Eighth Circuit's precedent clearly did not recognize a private cause of action under NEPA (unlike that of the Fourth Circuit).⁸³ Because the LPA could not use this *Limehouse* private cause of action, the Eighth Circuit reversed and remanded the entire action with instructions to dismiss the case.⁸⁴

The Eighth Circuit is not alone in its interpretation of NEPA. The D.C. Circuit also held that "NEPA creates no private right of action"⁸⁵ and rejected the Fourth Circuit's precedent by "reiterating the requirement that NEPA claims must be brought under the APA and allege final agency action."⁸⁶ Additionally, a recent First Circuit

79. *Id.* at 761-62.

80. *Id.* at 762 (quoting *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 91 F. Supp. 3d 1105, 1120 (D. Minn. 2015), *rev'd and remanded*, 928 F.3d 759 (8th Cir. 2019)). The district court justified its decision to adopt *Limehouse's* NEPA cause of action by attempting to distinguish the facts of the case from previous Eighth Circuit precedent. *Lakes & Parks All.*, 91 F. Supp. 3d at 1123-24. The district court found that the LPA cited Eighth Circuit case law on only NEPA challenges in the context of federal action, while a NEPA challenge to state action presented a completely novel issue. *Id.* But ultimately the Eighth Circuit found this interpretation to be flawed and announced that *all* NEPA challenges fell under the purview of the APA. *Lakes & Parks All.*, 928 F.3d at 762-63.

81. *Lakes & Parks All.*, 928 F.3d at 762 (quoting *Noe v. Metro. Atlanta Rapid Transit Auth.*, 644 F.2d 434, 438 (5th Cir. 1981)).

82. *Id.*

83. *Id.*

84. *Id.* at 762-63.

85. *Karst Env't Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) (first citing *Pub. Citizen v. Off. of U.S. Trade Representatives*, 970 F.2d 916, 918 (D.C. Cir. 1992); then citing *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993)).

86. *Id.* at 1297.

opinion devoted only three sentences to addressing and rejecting the plaintiff's entire NEPA claim because the statute did not authorize a private cause of action.⁸⁷ These three circuits join the Fifth, Sixth, and Ninth Circuits in employing a bright-line rule: if a plaintiff wants to allege a violation of NEPA, it must come in the form of an APA challenge to final agency action.⁸⁸

However, this hard-and-fast rule comes at the price of inadequate remedies for citizens and environmental groups. By not recognizing a cause of action under NEPA, potential plaintiffs are left without a means of challenging and preventing state interference with the NEPA review process.⁸⁹

III. A PROPOSED CONGRESSIONAL AMENDMENT TO NEPA

This Part proposes a solution to the problems that plaintiffs and courts have faced with NEPA in the past: a congressional amendment to NEPA adding a "citizen suit" provision. It is a well-established principle that "private rights of action to enforce federal law must be created by Congress," and when there is uncertainty over the meaning of a congressional act, courts "must 'interpret the statute ... to determine whether it displays an intent to create not just a private right but also a private remedy.'"⁹⁰ At present, the federal circuit courts are split on whether Congress provided such a private right of action against state actors in NEPA,⁹¹ and there is no indication that this problem will be resolved soon.⁹² The best

87. *Portsmouth v. Lewis*, 813 F.3d 54, 62 (1st Cir. 2016) ("We need not linger over the argument based on NEPA. We have expressly held that NEPA provides no private right of action at all.")

88. *See, e.g., Latin Ams. for Soc. & Econ. Dev. v. Adm'r of the Fed. Highway Admin.*, 756 F.3d 447, 462 (6th Cir. 2014); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005); *see also Noe v. Metro. Atlanta Rapid Transit Auth.*, 644 F.2d 434, 438-39 (5th Cir. 1981) (holding that NEPA is a procedural statute and does not provide a private cause of action for substantive violations). As of writing this Note, the issue of whether NEPA creates a private cause of action has not been addressed by the remaining circuit courts.

89. *See Karst*, 475 F.3d at 1295, 1297.

90. *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759, 762 (8th Cir. 2019) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)).

91. *See supra* Part II.

92. At the time of writing this Note, the Supreme Court has not granted certiorari to hear *Lakes & Parks Alliance* or any of the other recent circuit court cases involving the NEPA private right of action recognized by the Fourth Circuit.

cure is an amendment to NEPA that specifically authorizes citizens to bring suit against state actors and agencies participating in the NEPA process.

Part III begins by proposing a model amendment to NEPA and identifies the important features such an amendment should include to be effective. Next, this Part discusses how the proposed provision would adequately address the issues highlighted in Part II. Finally, Part III concludes with a comparison of the proposed amendment to other citizen suit provisions that Congress has enacted in the realm of environmental law.

A. A Citizen Suit Provision Under NEPA

This Section discusses what a congressional amendment to NEPA could look like and the possible remedies that this provision should provide. First, it is of paramount importance to identify which persons would be authorized to bring suit under this proposed amendment and which parties the plaintiffs could name as defendants.

To ensure the greatest level of protection for the environment and the integrity of the NEPA review process, Congress should create an explicit NEPA cause of action that would allow any citizen with Article III standing to bring a lawsuit under NEPA. Federal courts are extremely familiar with conducting Article III standing analyses,⁹³ and granting citizens the broadest constitutional authority to sue state agencies would ensure that parties with redressable injuries caused by agency actions could proceed to argue the merits of their case.⁹⁴ Regarding which parties could be named

93. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that Article III standing requires a plaintiff to show that they have suffered an injury in fact that is “fairly ... trace[able] to the challenged action of the defendant” and that there is a legal remedy to redress the injury (alterations in original) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41-42 (1976))); see, e.g., *Karst Env’t Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1294 (D.C. Cir. 2007) (“Before considering the merits, we must determine whether Karst has Article III standing.” (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-102 (1998))).

94. To clarify, the Supreme Court has held that citizen suit provisions do not eclipse the requirement that plaintiffs have Article III standing before bringing suit. *Lujan*, 504 U.S. at 578. Rather, these provisions expand the types of injuries that satisfy the “injury in fact” prong of Article III standing by creating legal causes of action, “the invasion of which creates

as defendants in this new NEPA cause of action, Congress should authorize private citizens to sue any state agencies or actors that violate or interfere with the NEPA review process in some manner.⁹⁵ Thus, if a state agency attempts to begin construction on a project prior to completing the NEPA process or sets plans in motion before issuing a final EIS and ROD,⁹⁶ citizens could step in to force compliance.

One important distinction between this proposed amendment and the current system of suing federal agencies under the APA concerns the “final agency action” requirement. To reach the most equitable result, Congress should authorize citizens to sue these state actors *anytime* the state engages in activities that would unfairly affect the outcome of the review process. This protection would ensure that private citizens and environmental groups do not have to wait until publication of a final EIS and ROD before seeking an injunction to prevent further state meddling.⁹⁷

The other important component of this proposed citizen suit provision concerns potential remedies that courts could grant when plaintiffs prove a violation of NEPA. Just as the Fourth Circuit noted in *Limehouse*, the proper remedy when a state interferes with or violates the NEPA review process should be injunctive relief.⁹⁸ Federal courts should have the authority to enjoin these state agencies from interfering further with the environmental review process, and should be able to do so prior to the publication of a final EIS or ROD. As this Note later explains, this sort of injunctive relief is very common in modern environmental statutes’ citizen suit provisions.⁹⁹

standing.” *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

95. Although this proposed NEPA amendment clearly implicates principles of congressional abrogation of state sovereign immunity, such considerations go beyond the scope of this Note.

96. *See, e.g., Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 91 F. Supp. 3d 1105, 1113-14 (D. Minn. 2015).

97. *See, e.g., Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759, 763-63 (8th Cir. 2019) (holding that the plaintiff had no cause of action because it filed suit prior to final agency action).

98. *S.C. Wildlife Fed’n v. Limehouse*, 549 F.3d 324, 330-31 (4th Cir. 2008).

99. *See infra* Part III.C.

B. Solving the Current Controversy

This proposed citizen suit amendment would solve NEPA's current flaws in two ways: (1) a private cause of action against state actors would prevent undue interference with the environmental review process,¹⁰⁰ and (2) authorizing courts to grant injunctive relief before an actor takes some final agency action would prevent a NEPA challenge from becoming ineffective and moot.¹⁰¹

1. Private Action Against State Actors and Agencies

One of the most readily apparent benefits of an amendment to NEPA would be the resolution of the current circuit court split over whether NEPA provides a private cause of action.¹⁰² Courts such as the Fourth Circuit would have Congress's unequivocal support in finding that citizens can bring NEPA challenges against state actors and agencies, and the other circuits that denied citizen challenges to state interference would receive clear statutory instruction to recognize this cause of action.

But resolving the circuit court split is not this proposal's only value. The reality is that an amendment authorizing these lawsuits against state actors would be the most effective way for Congress to uphold NEPA's goals and legal mandates. In passing NEPA, Congress wanted the federal government to consider the full range of a project's environmental effects *prior* to taking any action in furtherance of that project.¹⁰³ And Congress clearly meant to bind state governments to comply with this process whenever "major Federal actions" intertwine with a state project.¹⁰⁴ The current understanding of NEPA—which permits states to interfere with an environmental review by limiting the alternatives to a project¹⁰⁵—

100. See *infra* Part III.B.1.

101. See *infra* Part III.B.2.

102. Compare *Limehouse*, 549 F.3d at 330-31, with *Lakes & Parks All.*, 928 F.3d at 762-63.

103. See 42 U.S.C. §§ 4321, 4332.

104. *Id.* § 4332.

105. See, e.g., *Karst Env't Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007) (affirming district court's holding that when a government-created corporation began construction on a federal project before issuing a final EIS, the plaintiffs could not bring suit to enjoin this action because there was no final agency action to review under the APA).

does not comport with the statute's congressional intent and mandates as it was originally written.¹⁰⁶ The most logical solution to this contradictory outcome would be for Congress to bolster the statute through a new provision that holds these state actors to the same standard as their federal counterparts.

The issue of who can sue and be sued has proven imperative in the development of environmental law.¹⁰⁷ After Congress initially passed NEPA, a great deal of uncertainty existed even in the Supreme Court about whether the statute provided substantive mandates in addition to the clearly procedural ones.¹⁰⁸ While the courts eventually settled on the rule that NEPA, as written, could be challenged only through the APA,¹⁰⁹ Congress can alter the course of NEPA's application and litigation under the statute. NEPA was not clearly crafted to fit the APA's rigid requirements,¹¹⁰ and Congress should thus step in to address the problems that APA challenges cannot.

2. Preventing Irreversible Interference

The other main benefit flowing from a NEPA citizen suit provision would be citizens' ability to block state officials from irrevocably altering the natural environment and the outcome of a required NEPA review. Instead of having to wait for some final agency action to bring an APA challenge,¹¹¹ concerned citizens could bring suit anytime a perceived violation occurs and could enjoin states from engaging in further violations. The Fourth Circuit addressed this concern by applying the principles from *Ex parte*

106. See 42 U.S.C. §§ 4321, 4332.

107. See *Massachusetts v. EPA*, 549 U.S. 497, 516-26 (2007); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-62 (1992).

108. See *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regul. Agency Procs.* (*SCRAP II*), 422 U.S. 289, 319 (1975) ("NEPA does create a discrete procedural obligation on Government agencies to give written consideration of environmental issues ... and a right of action in adversely affected parties to enforce that obligation."); *supra* note 34 and accompanying text; see also *Karst*, 475 F.3d at 1297 (discussing the early implications of *SCRAP II* in the context of a private right of action under NEPA).

109. See *Kalen*, *supra* note 10, at 11 ("[T]he Court's interpretation of evolving APA principles, solidified during NEPA's early years, arguably caused NEPA's demotion to a procedural statute.")

110. See *id.*

111. See *supra* notes 40-42 and accompanying text.

Young, but no other circuit has recognized and applied the same principles.¹¹²

Under the CEQ's NEPA regulations, prior to issuing an ROD, federal agencies may not take action that would “[h]ave an adverse environmental impact” or “[l]imit the choice of reasonable alternatives.”¹¹³ It is therefore baffling to imagine that Congress and the CEQ would permit a state agency involved in the NEPA process to engage in one of those proscribed actions. However, under the current scheme and application of NEPA, courts cannot enjoin a state agency from doing just that.¹¹⁴

The nature of APA challenges under the current NEPA regime directly opposes the CEQ's mandate that agencies not interfere with ongoing NEPA reviews. By forcing citizens to wait to bring challenges until there has been final agency action, states can fundamentally alter the natural environment in irreversible ways.¹¹⁵ Even if a federal court were to order the state and federal agencies to reconsider their EIS and ROD, the court could not return the natural environment to its prior condition before the state agency interfered.¹¹⁶ Permitting this state interference undermines the core mandate of NEPA to consider reasonable alternatives and to think before acting, essentially rendering the entire process a “meaningless formality.”¹¹⁷ To safeguard the integrity of NEPA's environmental review process and address this glaring loophole, Congress should create a NEPA cause of action that (1) permits citizens to sue state actors whenever citizens have Article III standing, and

112. See *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)).

113. 40 C.F.R. § 1506.1 (2020).

114. See, e.g., *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759, 762-63 (8th Cir. 2019).

115. See, e.g., *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (“The decision of the Secretary of the Interior to approve the project ... would inevitably be influenced if the County were allowed to construct major segments of the highway before issuance of a final EIS.”).

116. See *Limehouse*, 549 F.3d at 331 (finding that a state could “eviscerate the federal remedy” of reconsidering a final EIS and ROD by taking significant action before the agencies had published this reconsidered EIS and ROD (citing *Gilchrist*, 808 F.2d at 1042)).

117. *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1333 (4th Cir. 1972) (“If investment in the proposed route were to continue prior to and during the Secretary's consideration of the environmental report, the options open to the Secretary would diminish, and ... would become a meaningless formality.”).

(2) authorizes courts to enjoin such action until the state and federal agencies issue a final EIS and ROD.

C. Comparison to Other Environmental Statutes with Citizen Suit Provisions

Congress has authorized citizen suits in almost every major environmental statute enacted since the early 1970s.¹¹⁸ Because Congress has so much experience in crafting citizen suit provisions for environmental statutes, drafting a provision tailored to NEPA should not be difficult. Three of the most prominent and well-known environmental statutes—the Clean Air Act, the Clean Water Act, and the Endangered Species Act—all have some form of a citizen suit provision resembling this Note’s proposed NEPA provision. NEPA is fundamentally different from these Acts because it imposes only procedural requirements on the government.¹¹⁹ However, a comparison of the various citizen suit provisions will demonstrate just how effective an amendment to NEPA would be.

The Clean Air Act (CAA) authorizes two different kinds of citizen suits: (1) citizen suits against a person, entity, or against the Administrator of the EPA for violating the statutory requirements of the CAA,¹²⁰ and (2) citizen suits against the EPA challenging promulgated regulations or any “final action.”¹²¹ Here, “any person” may bring suit against the EPA or a party that violates the Act, thus eliminating any jurisdictional limitations on standing.¹²² The CAA’s statutory scheme makes it clear that citizens may bring suit against the EPA *anytime* there is a perceived violation of the statute, whether the EPA is in the middle of promulgating new regulations or if the agency has made some final decision.¹²³ Finally, the citizen suit provision of the CAA authorizes federal district courts to enjoin the EPA Administrator or noncompliant parties

118. Matthew Burrows, Note, *The Clean Air Act: Citizen Suits, Attorneys’ Fees, and the Separate Public Interest Requirement*, 36 B.C. ENV’T AFFS. L. REV. 103, 104 (2009).

119. See Kalen, *supra* note 10, at 11.

120. 42 U.S.C. § 7604(a).

121. *Id.* § 7607(b).

122. Burrows, *supra* note 118, at 110 (quoting 42 U.S.C. § 7604(a)).

123. *Id.* at 110, 112.

from engaging in any further actions that would violate the statute.¹²⁴

The Clean Water Act (CWA) provides citizens with nearly identical authority to sue parties that violate the statute.¹²⁵ Section 505 of the CWA authorizes “any citizen” to bring suit against any party (private or governmental) that violates the CWA,¹²⁶ while section 509 authorizes citizens to bring suit against the EPA in order to get judicial review of certain EPA final actions.¹²⁷ Like the CAA, federal courts can compel any violator to comply with the terms of the CWA.¹²⁸ Both of these Acts vest the primary regulatory authority in the EPA,¹²⁹ but the presence of the citizen suit provisions makes it clear that Congress intended citizen suits to act as another layer of protection in case the federal government abrogated its duties.¹³⁰

The Endangered Species Act (ESA) takes a slightly different approach. While the ESA authorizes citizen suits against private and government parties that violate the Act, it does not grant the same judicial review to final agency actions.¹³¹ Instead, litigants must bring these challenges under the APA; these challenges often focus on the final decisions of the Fish and Wildlife Service and the National Marine Fisheries Service.¹³² But when citizens allege a

124. 42 U.S.C. § 7604(a) (“The district courts shall have jurisdiction ... to enforce such an emission standard or limitation ... or to order the Administrator to perform such [nondiscretionary] act or duty.”).

125. Compare *id.* §§ 7604(a), 7607(b), with 33 U.S.C. §§ 1365(a), 1369(b).

126. 33 U.S.C. § 1365(a).

127. *Id.* § 1369(b).

128. *Id.* § 1365(a) (“The district courts shall have jurisdiction ... to enforce such an effluent standard or limitation ... or to order the Administrator to perform such [nondiscretionary] act or duty.”).

129. 33 U.S.C. §§ 1251(d), 1361(a); 42 U.S.C. §§ 7601(a)(1), 7602(a).

130. Özge Atil, *Adopting the Citizen Suit Provision of the United States Clean Water Act as a Tool for Water Pollution Enforcement in Turkey*, 26 J. TRANSNAT’L L. & POL’Y 75, 82-83 (2016-2017) (explaining how Congress intended the Clean Water Act’s citizen suit provision to act as another layer of protection when state and federal governments fail to enforce water pollution regulations).

131. 16 U.S.C. § 1540(g).

132. Kirsten Nathanson, Thomas R. Lundquist & Sarah Bordelon, *Developments in ESA Citizen Suits and Citizen Enforcement of Wildlife Laws*, NAT. RES. & ENV’T, Winter 2015, at 15, 15-16; see, e.g., *Dow Agrosciences LLC v. Nat’l Marine Fisheries Serv.*, 707 F.3d 462, 464-66 (4th Cir. 2013) (recognizing that the plaintiffs filed an ESA lawsuit by using the APA to challenge the actions of the National Marine Fisheries Service).

violation of the ESA using the citizen suit provision, federal courts can once again issue injunctive relief against violators.¹³³

Drawing from these examples of implemented citizen suit provisions, the proposed NEPA amendment shares many qualities with these statutes and addresses the same problems. The environmental statutes create causes of action that permit “any person” or “any citizen” who has Article III standing to initiate a lawsuit,¹³⁴ and all of the statutes explicitly vest federal district courts with the power to grant injunctive relief.¹³⁵ In the same vein, an amendment to NEPA could authorize “any person” to bring suit against state actors and agencies, and federal courts could grant that same injunctive remedy to prevent states from further violating NEPA.

One last interesting point is that the ESA leaves final agency action challenges to the APA,¹³⁶ much like NEPA’s current structure.¹³⁷ This similarity indicates that while Congress believed the APA could adequately address judicial review of some final determinations, Congress still considered citizen suits to be an appropriate means of enforcing the ESA when a party violated its provisions.¹³⁸ That framework easily extends to a NEPA amendment: challenges to a final EIS or ROD could still be made under the APA, but specific instances of state violations could be covered by a separate citizen suit provision.

IV. COUNTERARGUMENTS

While an amendment to NEPA would solve some of the problems with the statute as it exists today, critics could argue that such an amendment would create new problems with potentially worse outcomes. One common argument against the use of citizen suit provisions is that creating such a broad cause of action for citizens will lead to a massive waste of judicial time and resources due to

133. 16 U.S.C. § 1540(g) (“The district courts shall have jurisdiction ... to enforce any such provision or regulation, or to order the Secretary to perform such [nondiscretionary] act or duty.”).

134. 42 U.S.C. § 7604(a); 33 U.S.C. § 1365(a); 16 U.S.C. § 1540(g)(1).

135. *See supra* notes 124, 128, 133 and accompanying text.

136. *See supra* notes 131-32 and accompanying text.

137. *See supra* Part I.B.

138. *See supra* note 131 and accompanying text.

excessive, frivolous lawsuits.¹³⁹ A second argument that critics have consistently raised in NEPA litigation is that Congress never intended to authorize private rights of action under NEPA and that the status quo of bringing NEPA challenges under only the APA should be upheld.¹⁴⁰ However, examining historical trends surrounding citizen suits and NEPA litigation refutes both arguments.

A. *Waste of Judicial Resources*

Abundant criticism of other statutes' citizen suit provisions could be levied against this proposed amendment. When the Clean Air Act first became law, not everyone in Congress believed that citizen suits would actually promote the goals of the environmental statute.¹⁴¹ Many feared that environmental groups would bring nonstop lawsuits under a broad citizen suit provision, resulting in numerous "frivolous, harassing lawsuits that would frustrate enforcement and implementation of the Act and overburden the courts."¹⁴²

These same concerns apply to this proposed NEPA citizen suit provision. Under the current model of challenging final actions under the APA, clear statutory requirements must be met for a citizen to sue the government.¹⁴³ It is possible that broadening citizen suit standing could open "a flood of litigation" and thus inundate the courts.¹⁴⁴

However, upon review of the actual application of the Clean Air Act and its citizen suit provision, this concern seems unfounded. In crafting this provision, Congress laid out clear standards and guidelines that had to be met before a court could hear the merits of a citizen suit.¹⁴⁵ Courts therefore can easily determine when a

139. See *infra* Part IV.A.

140. See *infra* Part IV.B.

141. Burrows, *supra* note 118, at 110-11.

142. *Id.* at 110.

143. See *supra* notes 40-42 and accompanying text.

144. See Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. NEW ENG. L. REV. 311, 316, 318 (1998) (explaining some of the general fears surrounding environmental citizen suits).

145. Burrows, *supra* note 118, at 110-12 ("[C]itizens who bring actions under section 304 must meet established, objective evidentiary standards.").

lawsuit is frivolous and when it has merit.¹⁴⁶ Furthermore, filing and litigating lawsuits is expensive; the high cost of litigation encourages (but does not ensure) that plaintiffs bring only strong and well-supported claims against the government or polluters.¹⁴⁷

Finally, looking at the effects of this proposed NEPA amendment, the application of the citizen suit provision would be significantly narrower than the provisions of many other environmental statutes. This NEPA provision would authorize citizens to bring claims against state actors involved in the NEPA review process, a process that is typically reserved for federal agencies.¹⁴⁸ Thus, this amendment would not affect projects that involve only federal agencies. The scope of this proposed provision would already be more limited than those of other environmental statutes,¹⁴⁹ further lowering the risk of wasting federal courts' time and resources.

B. Maintaining the Status Quo

Critics of this provision could also raise concerns that changing the structure and application of a statute that is almost half a century old would be imprudent. Aside from two short amendments adding a few sentences to NEPA in 1975,¹⁵⁰ the statute has never undergone any significant changes.¹⁵¹ One could argue that Congress has had several decades to correct any perceived problems with the application of NEPA but has consciously chosen not to do so.

Yet that argument fails to stand against NEPA's historical context. As previously discussed, in the years following NEPA's

146. *See id.* ("Congress's view was that CAA rules and regulations contained sufficiently clear and specific guidelines to enable federal judges to direct compliance."); *see also* *Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976) (noting that Congress provided clear guidelines for federal judges to hear the merits of CAA citizen suits and to ultimately compel compliance with the statute).

147. James T. Lang, *Citizens' Environmental Lawsuits*, 47 TEX. ENV'T L.J. 17, 22 (2017).

148. *See supra* note 31 and accompanying text.

149. *See supra* Part III.A, III.C.

150. Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424 (codified as amended at 42 U.S.C. § 4332); Act of July 3, 1975, Pub. L. No. 94-52, 89 Stat. 258 (codified as amended at 42 U.S.C. §§ 4346-47).

151. As previously noted, the CEQ has recently amended the regulations governing NEPA. *See supra* note 24. However, the statute itself (and the state interference loophole discussed in this Note) was not altered. *See supra* note 150.

enactment, courts were initially uncertain as to the kind of rights NEPA provided and the means by which plaintiffs could challenge violations of the statute.¹⁵² Five years after NEPA became law, the Supreme Court was still unsure how to interpret NEPA.¹⁵³ There was no clear congressional intent to either provide or withhold substantive citizen suits under the statute.¹⁵⁴ Indeed, Congress enacted the first environmental citizen suit provision (as part of the Clean Air Act) nearly a full year after Congress passed NEPA.¹⁵⁵ Since that time, environmental statutes have prominently featured citizen suit provisions,¹⁵⁶ but this concept had not yet become a widespread practice when Congress enacted NEPA.

Starting in the late 1970s and continuing into the early 2000s, courts came to interpret NEPA as a purely procedural statute that does not provide any private rights (excluding the Fourth Circuit).¹⁵⁷ But this history does not indicate that Congress always intended NEPA to operate this way.¹⁵⁸ Congress likely never considered how NEPA would fail to address modern concerns surrounding the application of the statute to state agencies. And now that the issue has become pervasive throughout a plurality of circuit courts,¹⁵⁹ the time has come for Congress to step in and craft a workable solution.

152. See Kalen, *supra* note 10, at 3 (presenting some of the questions that courts grappled with following NEPA's enactment, such as "how could a court review and assess an agency's compliance with NEPA's *procedural* requirements" and "how should courts interpret and apply Congress's *substantive* mandate that agencies use all practicable means to advance the goals of the Act"); *supra* note 108 and accompanying text.

153. See *Karst Env't Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1297 (D.C. Cir. 2007) (quoting *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regul. Agency Procs. (SCRAP II)*, 422 U.S. 289, 319 (1975)).

154. See *supra* notes 108-10 and accompanying text.

155. See Atil, *supra* note 130, at 80 ("The CAA was the first federal environmental statute to include a citizen suit provision."); see also Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENV'T L.J. 75, 77 (2001) (noting that NEPA was enacted on January 1, 1970); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (enacted Dec. 31, 1970).

156. See *supra* Part III.C.

157. See Kalen, *supra* note 10, at 7, 11; *supra* Part II.A.

158. See generally Kalen, *supra* note 10.

159. See *supra* notes 84-88 and accompanying text.

CONCLUSION

In the context of environmental law, NEPA is an essential statute that ensures the federal government will make well-informed decisions. Yet under the current statutory scheme of NEPA and the APA, citizens cannot challenge state actors and agencies when they interfere with the environmental review process. This loophole undermines NEPA's entire purpose and foregoes the statutory requirement that agencies *seriously consider* alternatives to a project that might be less environmentally harmful. This Note recommends that Congress amend NEPA to authorize citizen suits against state actors and agencies and authorize courts to enjoin further interference from such actors. In doing so, Congress not only would provide courts with clear direction about how to apply NEPA to a state's actions but also would bolster the purpose and effect of this prominent environmental statute.

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