

# Sierra Club Policy on Restoring and Enhancing the Federal and State Environmental Impact and Endangered Species Acts

## Background<sup>1</sup>

The National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) are key laws supporting Sierra Club's conservation work. These fundamental environmental laws spawned several state laws, which in some cases, such as that of California and Washington, are more restorative than the Federal models. Furthermore, globalization and the more modern treaties call on responsible governments to assess, adjust, and account for their actions affecting other countries.

With a couple exceptions, NEPA and ESA remained relatively steady in their implementation until recently when the Fiscal Responsibility Act included several minor and at least one major amendment to NEPA. Most of those changes, such as the limits on time and pages for the main documents allowing for appendixes, can be retained but one in particular should be reversed.

Specifically, in 1986 the Reagan Administration curtailed the geographic reach of the Endangered Species Act (ESA) regulations concerning biological assessments and interagency consultation to prevent jeopardizing listed species. Most major conservation groups joined in initial efforts to reverse that in court<sup>2</sup> and in Congress (e.g., in the Committee Chairman's ESA reauthorization bill of the early 1990s, but that effort has fallen by the wayside).

In June of 2023 the President signed into law a debt ceiling act that included several limits on the NEPA process, explicitly excluding the duty to assess the impact of projects outside the U.S. or those not substantially under US Government control.<sup>3</sup>

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<sup>1</sup> The Council of Club Leaders (CCL) approved Resolution 13 at its September 2023 meeting, which requested the Board of Directors to adopt a policy and plan to restore and reassert the intent and scope of the NEPA, ESA and their state counterparts. The Board directed the Conservation Policy Committee (CPC) to address the resolution and at its February 23, 2024, meeting, the CPC established a Task Force on restoring and enhancing the scope of the NEPA and the ESA assessment processes. The Task Force delivered its findings and recommendations to the CPC, including review of member comments, in August 2024.

<sup>2</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), June 12, 1992; and a subsequent case *Defenders* brought against the Clinton Administration Corps of Engineers and Bureau of Reclamation. The latter was mooted when the Administration ended the contract to help China build the Three Gorges Dam. The U.S. agencies were replaced by other foreign engineering experts who helped complete the dam which eliminated recovery prospects for the now extinct Yangtze River Dolphin and reduced habitat for other listed species. See, [https://en.wikipedia.org/wiki/Lujan\\_v.\\_Defenders\\_of\\_Wildlife](https://en.wikipedia.org/wiki/Lujan_v._Defenders_of_Wildlife).

<sup>3</sup> These NEPA amendments do not appear to have followed the regular process of hearings, committee votes and reports, etc. but appeared to have been inserted as part of the price of raising the debt limit and avoiding the downgrading of U.S. bond ratings that would in turn have raised the cost of borrowing money and might have triggered rapid declines in the market.

Both of these actions should be reversed, and in the process, the assessment process should be improved to disallow actions that would not improve or restore the environment as a net improvement, unless no practicable alternative were available. Further, NEPA and its state equivalents should also be enhanced by the addition of provisions requiring the agencies to award expert witness and attorneys' fees to successful intervenors or plaintiffs just as most Federal conservation laws do for successful plaintiffs and as the Federal Energy Regulatory Commission does once again for public interest participants in its proceedings through its Office of Public Participation.

Assessing the full scope of the impact of proposed government actions is now a near-universal requirement that was originally based on US law and the US should not shirk its duty nor hide from knowledge to be gained through the assessment process.

Over 193 Countries are now party to the Convention on Biological Diversity which was modeled largely on U.S. conservation laws enacted before 1992 and customary international law (akin to common law) when the CBD was negotiated and signed at the UN Conference on Environment and Development in Rio de Janeiro. Article 14.1 commits its parties to do environmental impact statements before undertaking actions that could significantly affect the environment and 14.2 commits the parties to develop a system for parties to compensate other parties when one has harmed the environment of another in violation of Article 3.

Improving the environment and public health and not just minimizing harm should be the goal and standard for an assessment process, so the reform would require that the agencies choose an alternative that does that unless no alternative could be found to improve the environment via the net impact as the project is done.

***Therefore, as part of its goals to reduce environmental impacts and to protect wildlife, the Sierra Club supports efforts to restore and enhance the intent and scope of the National Environmental Policy Act, the Endangered Species Act, and their state counterparts via amendments to require the following actions:***

- a) Assess the impacts of actions wherever those impacts are felt and wherever those agency decisions are made,
- b) Require action agencies to choose an alternative that advances the restoration of the affected resource or species whenever practicable, and
- c) Award market rate attorneys' and expert witnesses' fees to substantially prevailing plaintiffs who have sought to conserve and restore the affected resource or species.

Accordingly, the Sierra Club also calls upon Congress and the Administration to:

- a) amend NEPA to restore its full geographic scope by striking the line in the definitions section of the statute and hence the regulations that exclude from "major Federal actions" those that have effects felt entirely outside of the United States; and

- b) revoke the parallel provision excluding overseas effects in the regulations implementing Section 7 of the ESA and to revoke the categorical exclusion from NEPA for offshore oil and gas drilling.

**Supporting materials:**

- 1) Despite President Biden's 2021 pledge not to support overseas fossil fuel expansion, (<https://www.reuters.com/business/energy/biden-orders-us-stop-financing-carbon-intense-overseas-fuel-projects-2021-12-10/>) world events conspired to increase such investments, and any Administration can usually reverse any non-statutory duty. A restored and enhanced NEPA applied to US government actions overseas could at least reveal or better yet, require, better long term and multiple alternatives than simply supporting oil and gas expansion overseas via the U.S. Export Import Bank, for example.
- 2) Therefore, 2023, Kate DeAngelis, Friends of the Earth United States, said: "The world is waiting for the U.S. to fulfill its pledges as a leader on climate, particularly through the U.S. Export-Import Bank. Biden cannot promote a renewable energy transition at home while bankrolling fossil fuels abroad. It's time to take our global responsibility seriously and fund an equitable, renewable energy future." – See, Over 175 organizations launch proposal for the OECD to end export finance support for oil and gas--  
<https://priceofoil.org/2023/02/27/over-175-organizations-launch-proposal-for-the-oecd-to-end-export-finance-support-for-oil-and-gas/>
- 3) "The [debt ceiling] bill also drastically limits environmental review under the National Environmental Policy Act to projects that are under the "substantial" control and responsibility of the federal government. The bill further limits the public's ability to provide input on fossil fuel projects and other destructive developments that would harm the communities most burdened by pollution, while allowing corporate polluters to effectively rubberstamp the projects they're proposing." <https://biologicaldiversity.org/w/news/press-releases/biden-sacrifices-environment-low-income-households-in-debt-ceiling-compromise-2023-05-28/> (accessed again on 6-15-23, but web page was missing as of March 7, 2024).
- 4) The Sierra Club joined six Gulf and five other national environmental groups submitting a petition on July 12, 2023 to the Bureau of Ocean Energy Management (BOEM) within the Department of the Interior calling on the agency to end a routine practice of fast-tracking approval for offshore oil and gas projects in the Gulf of Mexico. The Interior Department first adopted a "categorical exclusion" for oil and gas activities in 1981, allowing exploration and development plans to win approval for much of the Gulf of Mexico without undergoing the site-specific analysis normally required by the National Environmental Policy Act (NEPA).

For more than 40 years, the repeated invocation of this exclusion has contributed to lax governmental oversight and a failure to grapple with the harmful effects of long-term resource extraction in the Gulf. In fact, BOEM relied on this same exclusion to approve BP's exploration plans for the Deepwater Horizon oil drilling project, which caused the largest oil

spill in U.S. history. Although the National commission that investigated the causes of the BP disaster concluded that use of this categorical exclusion contributed to a systemic breakdown in BOEM's environmental review process, the agency has not stopped invoking it on a routine basis. In the last five years, BOEM approved about 560 out of the 600 development plans submitted using the exclusion and about 90 out of the 400 exploration plans submitted. – From a joint news release issued by EarthJustice:

July 12, 2023

Gulf and Environmental Groups Call on Interior Department to End Routine Fast-Tracking of Offshore Oil Drilling Projects

Petition outlines how decades-old use of “categorical exclusion” allows companies to skip over risk assessments in oil and gas “sacrifice zone” ...

*Approved by the Sierra Club Board, January 16, 2025*