

A scenic mountain landscape featuring a winding asphalt road in the foreground, a large pipeline structure running through a valley, and a dense forest of evergreen trees on the left. In the background, rugged, rocky mountains rise under a cloudy sky. The overall scene is a mix of natural beauty and industrial infrastructure.

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*Permitting*

## PERMITTING REFORM TO MEET AMERICA'S ENERGY NEEDS AND ENVIRONMENTAL GOALS

### Key Takeaways:

- Cost reduction and rapid, wide-scale deployment are two of the most crucial factors for meeting America's energy needs and environmental goals. However, permitting challenges and frivolous lawsuits increase costs and delay the implementation of a wide range of projects.
- Permitting reform would significantly advance mitigation, natural ecosystems, and adaptation projects without sacrificing environmental safeguards or public participation.
- The National Environmental Policy Act (NEPA) stalls projects, including those for clean energy, natural climate solutions, and more resilient infrastructure. NEPA reform would expedite timelines, increase accountability, improve efficiency, and curb excessive litigation.

Entrepreneurs and innovators have developed and continue to develop energy sources and technologies that meet the needs of families and businesses while making progress on climate change. However, economically viable innovations do little good if burdensome, time-consuming regulatory barriers prevent their implementation.

**Cost reduction and rapid, wide scale deployment are two of the most crucial factors for meeting America's energy needs and environmental goals. Turning baby steps on decarbonization into leaps forward will require removing government-imposed barriers to innovation, investment, and deployment.** Efficient permitting, construction, and deployment is critical not just in the United States but around the world, where developing countries will emit the overwhelming majority of future emissions.<sup>1</sup>

### HOW BURDENSOME PERMITTING PROCESSES STUNT CLIMATE SOLUTIONS

Permitting challenges slow projects by increasing costs and delaying timelines to build. Most projects that would reduce emissions, improve the environment, and help communities adapt to climate change would benefit from an improved environmental review and permitting process and expedited judicial review. Next-generation nuclear technologies, new transmission lines, and more resilient infrastructure all face cumbersome and lengthy permitting schedules. Activist organizations may tie up these projects in court for years. Moreover, investments in healthy ecosystems and natural climate solutions often run into onerous permitting and legal challenges. This leads to missed opportunities to thin forests or eradicate invasive species, resulting in much worse environmental and climate outcomes.

**Permitting reform is not a climate silver bullet, but would significantly advance mitigation, healthy ecosystem, and adaptation projects.**

Understanding a project's environmental impact is important, as is engaging affected communities and stakeholders. Projects should meet a set of criteria to minimize environmental risk and protect communities. A predictable, transparent environmental review should accomplish those objectives in a timely fashion; however, the process has only become more bureaucratic and opaque over time.

At the federal level, the National Environmental Policy Act (NEPA) causes regulatory paralysis and opens doors for litigious organizations to block projects even if the environmental assessment deems the project to be safe.

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President Nixon signed NEPA into law more than 50 years ago. Since then, many federal, state, and local environmental laws have been enacted and amended. The result is a complex web of unclear, overlapping, and complex requirements that slow reviews and stifle investment without providing meaningful environmental benefits. Increased NEPA delays occur at the federal, state, and local level and open doors for legal challenges.

As an example: a runway expansion for an airport in Seattle took nineteen years to complete (fifteen for the environmental review and four to build).<sup>2</sup> Unsurprisingly, some of the most ardent supporters of NEPA reform are renewable energy developers. NEPA delayed a wind farm proposal in Nevada for seven years.<sup>3</sup>

*New York Times* columnist Ezra Klein wrote that NEPA is: “part of a broader set of checks on development that have done a lot of good over the years but are doing a lot of harm now. When they were designed, these bills were radical reforms to an intolerable status quo. Now they are, too often, powerful allies of an intolerable status quo, rendering government plodding and ineffectual and making it almost impossible to build green infrastructure at the speed we need.”<sup>4</sup>

Similarly, the *Bloomberg* Editorial Board opined:

*Reviews can run for hundreds of pages. Lawsuits, often brought by activist groups, can extend the process interminably. Green projects aren't immune from this burden: An analysis last year found that of the projects undergoing NEPA review at the Department of Energy, 42% concerned clean energy, transmission or environmental protection, while just 15% were related to fossil fuels. Across the renewables industry, such regulation — state and federal — is impeding progress.*

*Wind power advocates complain of “unreasonable and unnecessary costs and long project delays.” Geothermal projects routinely face permitting hassles for seven to 10 years. Relicensing a hydropower plant can cost \$50 million and take more than a decade. Solar projects often contend with a maze of permitting and certification requirements. Want to build a nuclear reactor? Compliance costs alone might exceed your profit margin.<sup>5</sup>*

Protracted permitting schedules and costly, drawn-out lawsuits particularly harm smaller businesses that may not have the means to fight the fight. Whether big or small, however, regulatory red tape results in companies dedicating more resources to lawyers and lobbyists when that money could be better spent innovating and building.

The pace of environmental reviews, permitting, and judicial review has simply not kept up with the pace of innovation or consumer needs. Worse, these obstacles are delaying innovation and action that would expedite mitigation, natural climate solutions, and adaptation. Some of the significant problems at the federal level include differing interpretations of NEPA requirements, failed interagency coordination, administrative bottlenecks, and outdated requirements that fail to consider a dynamic, ever-changing environment.<sup>6</sup>

## THE NEPA PROCESS AND ATTEMPTS AT REFORM

NEPA requires federal agencies to conduct comprehensive environmental assessments for a wide range of projects, including highways, energy development, projects receiving federal funds, and activities on federal land to name a few.<sup>7</sup> The NEPA process commences when a federal agency proposes a major action that could significantly impact the environment. There are multiple steps in the NEPA process, beginning with an environmental assessment as to whether the proposed action significantly affects the environment. If the project does not, the agency will make a Finding of No Significant Impact determination. If the project does significantly affect the environment, the agency must prepare an Environmental Impact

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Statement (EIS). Following the EIS, the agency offers a Record of Decision which must include:

1. Statement of [agency's] environmental decision.
2. Identification of all alternatives considered by the agency, including the preferred alternative(s).
3. Decision of all factors – economic, social, technical, environmental factors, financial considerations, and other New Starts considerations (23 CFR Part 771.127(a)).<sup>8</sup>
4. Discussion of national policies that were balanced in the decision-making process and how each factor weighed in the decision.
5. Explanation of whether the decision was designed to avoid or minimize environmental harm and, if not, why not.<sup>9</sup>

Categorical exclusions may be granted, which effectively waives NEPA requirements if the agency determines the project to have no significant environmental impacts. Categorical exclusions do not require an environmental assessment or an environmental impact statement. The Obama Administration recognized that NEPA reviews can be expedited to speed up project investment without sacrificing the environment by effectively relinquishing NEPA requirements for projects funded by the American Recovery and Reinvestment Act, better known as the stimulus package. The Obama Administration granted more than 179,000 categorical exclusions for stimulus projects.<sup>10</sup>

A 2018 study from the White House Council on Environmental Quality (CEQ) found that across all federal agencies, the average time to complete an EIS was four and a half years.<sup>11</sup> One quarter of the 1,161 EISs reviewed took more than six years to complete.<sup>12</sup> The average cost to complete a review is \$4.2 million.<sup>13</sup> A 2020 CEQ study cataloged 118 times between 2010-2018 where an agency finished an EIS but failed to issue a decision; on average agencies took five months to issue a Record of Decision after finalizing an EIS.<sup>14</sup>

There has been bipartisan support to improve permitting processes, and both Republican and Democratic administrations have recognized the need to improve NEPA. Congress and several administrations have proposed to improve NEPA, with varying degrees of success. CEQ guidance documents on NEPA over the years may have been well-intentioned but had no teeth and were advisory or optional in practice.

Signed into law by President Obama in December 2015, the Fixing America's Surface Transportation Act (FAST Act) attempted to expedite the environmental review for large infrastructure projects, streamline decision making, shorten judicial review, and improve transparency in the process. Notably, the bill created the Federal Permitting Improvement Steering Council (FPISC) and codified the federal permitting dashboard into law.<sup>15</sup> A 2020 FPISC report to Congress reported an average 45 percent time savings to complete an EIS compared to 2010-2018 times (2.5 years compared to 4.5 years).<sup>16</sup>

In August 2017, President Trump published Executive Order (EO) 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.<sup>17</sup> The EO established a "One Federal Decision" policy that designated a lead agency to manage the NEPA process. The EO aimed to reduce environmental reviews to "not more than an average of approximately two years" and established a Record of Decision deadline of 90 days. In his first day in office, however, President Biden issued Executive Order 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis that charged CEQ to formulate a new NEPA rule.<sup>18</sup> In October 2021, CEQ issued a Notice of Proposed Rulemaking (NPRM) that initiates Phase 1 of two phases of rulemaking.<sup>19</sup> The first phase makes more immediate changes such as removing certain categorical exclusions and reinstating the consideration of cumulative or indirect environmental effects. Phase 2, in which CEQ will issue another NPRM, will include more comprehensive changes.

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In addition to CEQ changes, Congress and the Biden administration reformed NEPA through the Infrastructure Investment and Jobs Act (IIJA). Signed into law in November 2021, the \$1.2 trillion infrastructure bill codifies several notable improvements. Those provisions include:

- Lifting the sunset on FAST-41, thereby making the reforms in the FAST Act permanent.
- Extending FAST-41 provisions to tribal lands.
- Setting a two-year goal for permitting for covered projects.
- Requiring the preparation of a single EIS document and codifying the “One Federal Decision.”
- Allowing for Categorical Exclusions for projects, including for certain activities on federal lands, certain forest management activities, projects that receive limited federal funding (receiving \$6 million or less in federal funding and have overall implementation costs of \$35 million), and for certain oil and gas gathering lines that reduce venting, flaring, or vehicular traffic that service oil and gas wells.<sup>20</sup>

Regrettably, the Biden administration has undone some NEPA improvements that will increase the cost and slow the deployment of projects the administration needs to accomplish its climate objectives.<sup>21</sup>

## POLICY RECOMMENDATIONS FOR MORE EFFICIENT PERMITTING

Two legislative proposals that would properly narrow the scope of NEPA are the Undoing NEPA’s Substantial Harm by Advancing Concepts that Kickstart the Liberation of the Economy Act (UNSHACKLE Act), introduced by Senator Mike Lee (R-UT) and Representative Liz Cheney (R-WY), and the Building United States Infrastructure through Limited Delays and Efficient Reviews Act of 2021 (BUILDER Act), introduced by Representative Garret Graves (R-LA).

The UNSHACKLE Act aggregates four NEPA reform bills to expedite timelines, increase accountability, improve efficiency, and curb excessive litigation. The bill includes the:

- **NEPA Agency Process Accountability Act**
  - Mandates only one Environmental Impact Statement (EIS) and Environmental Assessment (EA) for each project.
  - Mandates that agencies must re-use relevant environmental research from related prior projects and cannot offer alternatives that are not economically feasible.
  - Allows agencies to use state environmental documents for proposed projects.
- **NEPA Accountability and Enforcement Act**
  - Requires federal agencies to complete the NEPA process in two years for proposed projects that need an EIS.
  - Imposes a one-year deadline for agencies to issue a Categorical Exclusion (CE) and complete the NEPA process for projects with an EA.
  - Requires agencies to approve or deny permits within 90 days of completion of the NEPA process.
- **NEPA State Assignment Expansion Act**
  - Expands the NEPA assignment program to let federal agencies delegate NEPA review authority to relevant state entities, which can carry out NEPA review on the agency’s behalf, under the supervision of the agency.
- **NEPA Legal Reform Act**
  - Clarifies requirements necessary to receive judicial review for NEPA-related claims.



- Sets a 150-day statute of limitations for NEPA-related claims.
  - Reforms the evidentiary standards and requirements for a court to consider when granting injunctive relief for a NEPA-related claim.
- **NEPA Data Transparency Act**
    - Requires agencies to report to Congress the number of CEs, EISs, and EAs issued in the past year, and the time it took to process proposed projects.
    - Requires the Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ) to develop a way to calculate the comprehensive cost of the NEPA process, and federal agencies to report the costs of NEPA processes they've completed.<sup>22</sup>

The major provisions of the BUILDER Act<sup>23</sup> include:

- **Statutory Clarity and Section 102 of NEPA.** This bill amends NEPA to clarify and narrow agency considerations to "reasonably foreseeable environmental impacts with a reasonably close causal relationship to the proposed action," "reasonably foreseeable adverse environmental effects," and "a reasonable number of alternatives to the proposed action that are technically and economically feasible, are within the jurisdiction of the agency, meet the purpose and need of the proposed action, and, where applicable, meet the goals of the applicant."
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- **Interagency Coordination and Timely Reviews.** This bill codifies key elements of the One Federal Decision Framework, including development by the lead agency of a joint schedule, procedures to elevate delays or disputes, preparation of a single Environmental Impact Statement (EIS) and joint Record of Decision (ROD) to the extent practicable, reasonable time limits for environmental reviews, and paper reduction measures.
  - **NEPA Thresholds and Streamlining.** This bill includes threshold considerations for agencies assessing whether NEPA applies to a proposed activity or is otherwise fulfilled through another statute. This recognizes that the application of NEPA by Congress and the courts has evolved over the last four decades in light of numerous other statutory requirements implemented by federal agencies. The bill also includes provisions facilitating adoption of categorical exclusions where the action is substantially the same as an action previously categorically excluded by another agency.
  - **Project Sponsor Preparation.** This bill permits a project sponsor to assist agencies in conducting environmental reviews to help speed up the process and to resolve issues without taking control or authority away from the lead agency.
  - **Major Federal Action.** This bill amends NEPA and clarifies that a major federal action is limited to those which are "subject to Federal control and responsibility." It establishes a threshold consideration that is independent of the significance of impacts that may follow. It includes examples of actions that are not "major Federal actions."
  - **Transparency and Data.** To address data gaps relating to the administrative costs of NEPA compliance, this bill requires agencies to provide the estimated total cost of preparing an EIS, including full-time equivalent personnel hours, contractor costs, and other direct costs.
  - **Scientific Accuracy and Modern Technology.** This bill includes provisions requiring agencies to use reliable existing data sources and clarifies NEPA does not require undertaking new scientific and technical research to inform analyses.
  - **Recognition of the Sovereign Rights, Expertise of Tribes.** To ensure consultation with tribal entities and reaffirm existing NEPA practice to coordinate or consult with affected tribal governments, this bill amends NEPA to add "tribal" to the phrase "state and local" throughout the statute and the addition of new sections.
  - **Judicial Review.** Requires those who have abused or weaponized NEPA in the past to have participated meaningfully in the NEPA process before filing suit and provides a reasonable timeline to file those lawsuits.<sup>24</sup>



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