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Permitting

Permitting Reform is Critical to Meeting America's Energy
Needs and Environmental Goals

NEPA PERMITTING REFORM IS CRITICAL TO MEETING 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. 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 account for the overwhelming majority of future emissions.¹

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. Activist organizations may tie up these projects in court for years. Moreover, investments in healthy ecosystems such as forest management often run into onerous permitting and legal challenges.

Permitting reform is not the only climate solution, but it 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.

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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. Since President Nixon signed NEPA into law more than 50 years ago, 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).² 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.³

The *Bloomberg* Editorial Board explained the challenges of NEPA:

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. ⁴

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.⁵

THE NEPA PROCESS AND ATTEMPTS AT REFORM

NEPA requires federal agencies to conduct comprehensive environmental assessments for projects that receive federal funding including highways, energy development, and activities on federal land, to name a few.⁶ 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 Statement (EIS). Following the EIS, the agency offers a Record of Decision.

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.

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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.⁷ One quarter of the 1,161 EISs reviewed took more than six years to complete.⁸ The average cost to complete a review is \$4.2 million.⁹ 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.¹⁰

There is bipartisan support for improving the 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.¹¹

POLICY RECOMMENDATIONS FOR MORE EFFICIENT PERMITTING

One of the most comprehensive attempts to modernize NEPA is the Lower Energy Costs Act of 2023 (H.R.1). The bedrock of H.R.1's permitting reforms is the Building United States Infrastructure through Limited Delays and Efficient Reviews Act of 2023 (BUILDER Act), introduced by Representative Garret Graves (R-LA).

The major permitting provisions of H.R.1 include:¹²

- Limiting the page length of an EA and EIS to 75 pages and 120 pages, respectively.
- Limiting the time to complete an EA and EIS to one year and two years, respectively.
- Designating one federal agency as the lead agency to conduct a NEPA review for each project and reducing the statute of limitations on lawsuits to 120 days (currently 6 years).
- Directing the Secretary of a lead agency to use previously conducted EAs and EISs for projects that are "substantially the same."
- Bolstering domestic mining operations by streamlining the approval of actions such as feasibility studies, mine waste reclamation, and modernization of mining processing facilities.

In June, President Biden signed the Fiscal Responsibility Act (FRA) into law which included several meaningful components of the BUILDER Act. The FRA limits page lengths and the timeframe of EAs and EISs and establishes one federal agency to conduct NEPA reviews. Under FRA, federal agencies and developers can also use past NEPA reviews for similar projects to speed up the permitting process. Notably, the law allows project developments to take agencies to court if they fail to fulfill their statutory obligations. Other permitting bills, including one introduced by Senator John Barrasso (R-WY) and one by Senator Shelley Moore Capito (R-WV) would build on that success.¹³

While the FRA made some significant strides, it did not address one of the most problematic aspects of the federal permitting process: excessive litigation. Obstructionist activists can hold up projects for years in court, despite the reality that these projects would often yield better economic and environmental outcomes. Reducing the statute of limitations for NEPA-related lawsuits and limiting those who have standing to individuals and groups that have submitted comments would improve judicial review. Furthermore, policymakers could improve the federal permitting process by:

- Expanding the time period for public comment under NEPA. Working with local stakeholders initially would reduce litigation in the future and garner trust with the community.
- Repealing or reforming New Source Review, which disincentivizes investments in new technologies, plant upgrades and more efficient equipment.
- Prohibiting pre-emptive and retroactive vetoes under Section 404 of the Clean Water Act, which will provide more certainty for mining activities.
- Allowing state-led environmental reviews or even private sector created environmental reviews (with proper oversight and accountability).
- Establishing an efficient, technology neutral framework for licensing and permitting new nuclear reactors at the Nuclear Regulatory Commission.
- Repealing the Foreign Dredge Act, which inhibits more cost-effective upgrades to America's ports.
- Putting geothermal on equal footing with oil and gas projects on federal lands by including geothermal activities in the same set for categorical exclusions.
- Expediting permits for liquefied natural gas exports by making a determination that all LNG exports are in America's national interest because of the economic, geopolitical and environmental benefits of American LNG.
- Streamlining the process for states to receive primacy to regulate Class VI injection wells (which stored captured carbon from captured CCUS projects). Primacy, which is granted by the federal government, allows a state, rather than the EPA, to permit and regulate injection wells under stricter environmental standards and with less federal red tape and oversight.



ENDNOTES

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