

DAY **ONE** **PROJECT**

Improving Environmental Outcomes from Infrastructure by Addressing Permitting Delays

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Summary

With the Biden-Harris Administration and Congress together pursuing major infrastructure investments, there is an important question as to how best maximize potential economic and environmental benefits of new infrastructure. Reforming the National Environmental Policy Act (NEPA) is one of the most straightforward and impactful ways to do so. Currently, many major infrastructure projects are delayed due to significant, NEPA-mandated requirements for environmental-impact review. Such delays are frequently exacerbated by vague statutory requirements and exceptional litigation risks. Updated guidance for environmental reviews under NEPA, coupled with strategic judiciary reforms, could expedite infrastructure approval while improving environmental outcomes.

Congress and the Biden-Harris Administration should strive to clarify environmental regulatory requirements and standing for litigation under NEPA. Specific recommended actions include (i) establishing well-defined and transparent processes for public input on governmental environmental-impact statements, (ii) shortening the statute of limitations for litigation under NEPA from two years to 60–120 days, and (iii) requiring that plaintiffs against governmental records of decision must have previously submitted public input on relevant environmental-impact statements.

Challenge and Opportunity

The median time to complete an Environmental Impact Statement (EIS) under NEPA was estimated at 3.5 years in 2019.¹ Major projects can take even longer: 25% of projects requiring an EIS take more than six years to review, and 9.5% take more than 10 years. Ironically, these multi-year environmental reviews can significantly delay clean-energy projects and other types of environmentally necessary infrastructure. Of the Department of Energy's active NEPA projects, 42% are related to clean energy, electric transmission, or environmental conservation, while only 15% are related to fossil fuels.² Similarly, 24% of the Bureau of Land Management's active EISs under NEPA are related to renewable energy while only 13% are related to fossil fuels.³

Reforming NEPA could accelerate clean-energy growth in the United States. The most commonly cited cause of long NEPA timelines is litigation.⁴ This is because the large scope of litigation permitted under NEPA leads to uncertainty about the potential litigation a project is likely to face and creates an incentive for NEPA documents to be as lengthy and broadly encompassing as possible. 2019 research on NEPA litigation found that longer NEPA documents are more likely to survive court challenges but also take longer to prepare.⁵ Furthermore, because the statute of

¹ Rossetti, P. (2021). [Addressing NEPA-Related Infrastructure Delays](#). R Street Policy Study No. 234, July.

² Ibid.

³ Rossetti, P. (2021). [The Environmental Case for Improving NEPA](#). R Street, July 7.

⁴ Luther, L. (2008). [The National Environmental Policy Act: Background and Implementation](#). Congressional Research Service, February. RL33152.

⁵ Ruple, J.C.; Race, J. (2019). [Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases](#). Wallace Stegner Center for Land, Resources, and the Environment, SJ Quinney College of Law, University of Utah.

limitations under NEPA is two years, some approved infrastructure projects are suspended when a project is litigated against well after public-comment periods have concluded. Finally, the complex nature of NEPA as an umbrella law means that delays are often caused by compliance with non-NEPA statutes, such as the Endangered Species Act.

Clearer guidance for both NEPA compliance and litigation under NEPA would speed review timelines without amending or weakening underlying statutory obligations. Given that major infrastructure investment in the United States is desired by this administration, as well as political ambitions to build out clean-energy infrastructure, it is prudent for policymakers to implement common-sense reforms to infrastructure approval and regulatory processes as soon as possible.

Plan of Action

Congress and the Biden-Harris Administration should pursue the five actions outlined below to improve NEPA compliance timelines, especially for clean-energy projects. Because none of these actions would diminish existing environmental statutes, they present bipartisan opportunities to accelerate infrastructure development in the United States without weakening environmental protections. The overarching goal of these actions is to establish clearer, more standard procedures governing (i) preparation of NEPA documents and (ii) litigation related to government decisions under NEPA.

Action 1: Congress should shorten the statute of limitations on litigation under NEPA to be more consistent with other governmental decisions. The 2015 Fixing America's Surface Transportation Act (FAST) already shortened the NEPA statute of limitations from six years to two, but even a two-year statute of limitations is excessive: the typical statute of limitations for challenging environmental decisions at the state level is 60 to 120 days.⁶ Fixing the NEPA statute of limitations to half a year or less — as proposed in the BUILDER Act from Representative Garret Graves (R-LA)⁷ — would help ensure that any legitimate legal challenge to an environmental decision happens as soon as possible, thereby limiting the capacity of plaintiffs to interfere with project development by intentionally delaying case filings.

Action 2: Congress should set new rules for standing, requiring any public-interest group bringing a case against a NEPA decision to have submitted input during public-comment periods. Vague NEPA requirements enable public-interest groups to use NEPA litigation to set precedent in defining appropriate statutory compliance with environmental laws. While well intentioned, such litigation can unnecessarily delay infrastructure projects, including projects that would otherwise deliver a net environmental benefit. Requiring any public-interest group filing litigation under NEPA to have previously submitted input during public-comment periods for the

⁶ Luther, L. (2007). [The National Environmental Policy Act: Streamlining NEPA](#). Congressional Research Service, annuary. RL33267.

⁷ [H.R.8333 - Building United States Infrastructure through Limited Delays and Efficient Reviews Act of 2020](#).

project in question would ensure that potential environmental-compliance failures are addressed before a decision on that project is issued.

Action 3: The Biden-Harris Administration should direct the Council on Environmental Quality (CEQ) to revise its NEPA guidance to agencies in ways that clarify and standardize procedures for NEPA document preparation. Reforms to CEQ guidance under the Trump-Pence Administration were viewed by many as an attempt to weaken NEPA compliance. However, the limited authority of the executive office means that the Trump-Pence rules were primarily constrained to directing agencies on the favored interpretations of what constitutes “legal compliance” under NEPA (what fulfills the consideration of project alternatives, how long document preparation should take, who can prepare documents, etc.). In other words, the Trump-Pence reforms provided a way for the administration to clarify and standardize how agencies should act on NEPA’s vaguer statutory obligations — such as the requirement that agencies consider “all reasonable alternatives” to a project component that generates adverse environmental impacts.

A Biden-Harris Administration seeking to shorten NEPA compliance timelines without compromising the rigor of environmental reviews could similarly reform CEQ guidance. Such reforms could, for instance, clarify how incidental environmental impacts (such as climate change) should or should not be considered in NEPA review, the appropriate page length for NEPA-related documents, the appropriate admissibility or substitutability of documents that may reduce burdens on executive staff, what constitutes fulfillment of vague statutes (such as the requirement to consider project alternatives), and so on. Indeed, NEPA document inadequacy is a common reason for successful litigation against NEPA decisions.⁸ Robust guidance would mitigate project delays and avoid unnecessary strain on our nation’s judicial system by proactively ensuring document quality.

Action 4: The Biden-Harris Administration should ensure that opportunities for public input on draft NEPA documents are well advertised, and that all stakeholders are given an appropriate opportunity for input. The administration could, for instance standardize how NEPA projects are advertised across agencies, and/or create supplemental resources such as databases or additional websites that improve information available to stakeholders or comment filers.

Action 5: President Biden should issue an Executive Order directing federal agencies to utilize their existing authority to improve NEPA compliance timelines. There is precedent for such an order: President Trump’s Executive Order 13927, issued on June 4, 2020, directed agencies to utilize existing authority to expedite environmental reviews in the hopes that accelerated infrastructure investment could mitigate the economic harms of the COVID-19 pandemic. Actions that the executive branch has not taken, but could take under such an order, include filling the positions of the Federal Permitting Improvement Steering Council, ensuring that high-value projects are managed appropriately, and ensuring adequate staffing to complete environmental reviews in a timely manner.

⁸ NEPA.gov. (n.d.). [NEPA Litigation Surveys: 2001-2013](#).

Conclusion

Reforming the existing regulatory processes for approving new infrastructure — especially clean-energy infrastructure — is an outstanding opportunity to deliver environmental benefits without new spending or regulation. While many are wary of reforming environmental regulations for fear of eroding environmental protections, the most common reasons for delays under NEPA are related to document preparation and litigation, not to the environmental impacts of a given project. Clarifying NEPA's statutory obligations and implementing reforms to bring the statute of limitations and standing requirements for NEPA-related litigation in line with other environmental legislation will ensure that fundamentally sound infrastructure is constructed as soon as possible, avoid unnecessary strain on our nation's judicial system, and reduce taxpayer-funded administrative burdens on federal agencies — all without compromising environmental standards.

Frequently Asked Questions

1. Why can't NEPA timelines be shortened through mandated deadlines?

The problem with this approach is that agencies preparing NEPA documents still have a statutory obligation that must be fulfilled. Mandating shorter timelines for delivery of the same product(s) may result in lower-quality documents that are easier to defeat in court, worsening infrastructure delays in the long term.

2. Would changing the statute of limitations or rules for litigation under NEPA standing weaken environmental protections?

Requiring that potential plaintiffs at least voice concern about infrastructure projects through public comments prior to filing lawsuits under NEPA does not diminish in any way the statutory obligations of agencies to protect the environment, nor the likelihood of court victory for plaintiffs challenging agencies. This requirement would simply give agencies better knowledge of what public concerns they must address in issuing environmental-review decisions.

3. Won't enabling faster infrastructure construction in the United States harm the environment?

In many cases, the opposite is true. Delays in constructing new infrastructure increase the time that dirtier incumbent infrastructure remains in service. Delayed construction of new electric transmission lines for renewable energy, for example, is a major reason for continued reliance on older fossil-fuel-based power plants.⁹

4. Why shouldn't policymakers simply rescind or amend existing regulations to make NEPA compliance easier?

⁹ Walton, R. (2020). [Propelling the transition: New and better transmission is key to zero carbon](#); here's what's driving it. Utility Dive, August 19.

NEPA is an “umbrella law,” meaning that its purpose is to streamline and strengthen compliance with other environmental laws, such as the Endangered Species Act, rather than to add a new layer of environmental protection. Rescinding NEPA would make environmental compliance more difficult and time-consuming. For instance, NEPA designates a “lead agency” to oversee environmental compliance for a given project. Absent NEPA, compliance management would be split across multiple state and federal agencies — leading to confusion and delays.

Moreover, the executive branch is required to fulfill the statutory obligations set before it by Congress. Amending major environmental regulations tied to NEPA would require Congressional action, which in turn would require a level bipartisan agreement that is highly unlikely in the near term.

5. Wouldn't expediting NEPA compliance result in more fossil-fuel infrastructure, like pipelines or liquid natural gas (LNG) terminals?

Potentially yes, but this does not mean that there would be more pollution. The demand for fossil fuels is already very high, and deficiencies in fossil-fuel delivery infrastructure can actually worsen pollution. Insufficient oil-transport infrastructure (e.g., pipelines) often exacerbates pollution by increasing reliance on trucks or rail transport for oil delivery.¹⁰ The New England Independent System Operator has noted that insufficient infrastructure for natural gas in New England has increased reliance on oil and worsened emissions.¹¹ The National Energy Technology Laboratory has confirmed that natural-gas exports reduce global emissions by enabling natural gas to displace coal.¹² It is a common misperception that more fossil-fuel infrastructure always results in more pollution because the counterfactual of energy-demand fulfillment is not always considered.

6. Why can't we just create exclusions from NEPA for environmentally beneficial infrastructure?

While categorical exclusions can be offered for some minor projects where environmental impacts are already known or insignificant, attempting to expand those exclusions for major infrastructure efforts could be legally problematic. Even if legal, selective application of environmental laws could, like selective application of any law, engender abuse.

¹⁰ Lydersen, K. (2017). [Crude oil by rail or pipeline? New studies explore the question](#). Energy News Network, September 28.

¹¹ ISO New England Inc. (n.d.). [Natural Gas Infrastructure Constraints](#).

¹² Roman-White, S.; et al. (2019). [Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States: 2019 Update](#). National Energy Technology Laboratory, September. DOE/NETL-2019/2041.

About the Author



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