

BACKGROUND

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Time to Repeal the Obsolete National Environmental Policy Act (NEPA)

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Abstract

On February 12, 2018, the Trump Administration unveiled a \$1.5 trillion initiative to repair the nation's roads, bridges, airports, and railways. The first step should be to reduce the regulatory barriers that impede infrastructure projects and vastly inflate their costs. Any new infrastructure funding should be conditional on meaningful regulatory reform—starting with repeal of the outdated National Environmental Policy Act (NEPA). The NEPA requires federal agencies to assess the potential environmental effects of public works projects and other major government actions. Four decades of experience have exposed the NEPA's uncorrectable flaws, including arbitrary standards, politicized enforcement, and protracted litigation.

On February 12, 2018, the Trump Administration unveiled a \$1.5 trillion initiative to repair the nation's roads, bridges, airports, and railways. The first step should be to reduce the regulatory barriers that impede infrastructure projects and vastly inflate their costs. Any new infrastructure funding should be conditional on meaningful regulatory reform—starting with repeal of the National Environmental Policy Act (NEPA) of 1969.¹

Proponents of the initiative claim that an infrastructure spree would create millions of jobs,² accelerate economic growth, and increase productivity. However, work must actually begin in order to yield these supposed benefits, and a raft of federal, state, and local regulations imposes years of delay that serves little purpose except to empower bureaucrats and “green” activists.

Among the most problematic of these regulations is the NEPA, which requires federal agencies to assess the potential environ-

KEY POINTS

- Any new infrastructure funding should be conditional on meaningful regulatory reform—starting with repeal of the National Environmental Policy Act (NEPA) of 1969.
- The NEPA requires federal agencies to assess the potential environmental effects of public works projects and other major government actions. Four decades of experience have exposed the NEPA's uncorrectable flaws, including arbitrary standards, politicized enforcement, and protracted litigation.
- The NEPA is rendered pointless by the vast number of “categorical exclusions” that agencies routinely grant to waive an environmental review. The Federal Highway Administration alone lists more than 50 types of such exclusions.
- There is no fixing the NEPA. It is out of sync with current environmental, political, social, and economic realities, including hundreds of other federal, state, and local regulations to protect the environment.

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The average time to complete a NEPA impact assessment of a transportation project—just one of several permitting hurdles—has expanded from 2.2 years in the 1970s to 4.4 years in the 1980s, to 5.1 years between 1995 and 2001, to 6.6 years in 2011.³ Every day of delay increases project costs and postpones the benefits of modern—and safer—infrastructure for little or no environmental benefit.

Moreover, the NEPA is rendered pointless by the vast number of “categorical exclusions” (CEs) that agencies routinely grant to waive an environmental review. The Federal Highway Administration (FHWA) alone lists more than 50 types of such exclusions,⁴ and a survey by the U.S. Department of Transportation found that waivers constitute between 90 percent and 99 percent of the NEPA decisions involving state transportation programs.⁵ Even the Obama Administration granted waivers to more than 95 percent of the 192,707 projects funded by the American Recovery and Reinvestment Act of 2009.⁶

Any regulation for which 90 percent or more of compliance is waived is a pointless regulation. Congress has tinkered with marginal reforms in several statutes, and the Council on Environmental Quality (CEQ) has issued more than 35 sets of guidelines on NEPA implementation—all of which have made the review process unpredictable and inordinately politicized.

President Donald Trump's infrastructure plan features 15 pages of recommendations to streamline permitting.⁷ The very fact that so many provisions warrant reform illustrates that there is more wrong than right with the NEPA, and thus its repeal is warranted.

There is no shortage of federal and state regulations to protect water and air quality, wetlands and endangered species, and to control run-off, hazardous waste, construction debris, demolition dust, and every other byproduct of infrastructure modernization. As documented in this *Background*, repealing the NEPA would not make a whit of difference to the environment or public health—except to reduce regulatory delays and permitting costs, and expedite the repair of teeth-rattling roads, deteriorating bridges, and timeworn rails and runways.

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1. National Environmental Policy Act of 1969, 42 U.S. Code 4321-4347, January 1, 1970, <https://ceq.doe.gov/laws-regulations/laws.html> (accessed February 22, 2018).
 2. Researchers at Georgetown University calculated that a \$1 trillion investment in infrastructure spending would create as many as 11 million jobs through 2027. See Anthony P. Carnevale and Nicole Smith, “Trillion Dollar Infrastructure Proposals Could Create Millions of Jobs—Will the New Jobs Lead to Sustainable Careers?” Georgetown University Center on Education and the Workforce, 2017, <https://cew.georgetown.edu/wp-content/uploads/trillion-dollar-infrastructure.pdf> (accessed February 22, 2018). Research by former Heritage Foundation analyst James Sher challenges the claim that increased infrastructure spending would create jobs and boost the economy. According to Sher, “These arguments have little empirical justification. Infrastructure projects require more physical and human capital than brute labor. Consequently, most workers hired on new federal construction projects would come from existing projects—not unemployment lines. Additional infrastructure spending would do little to reduce unemployment.” See James Sher, “Additional Infrastructure Spending Would Employ Few New Workers,” Heritage Foundation *Issue Brief* No. 4081, November 7, 2013, http://thf_media.s3.amazonaws.com/2013/pdf/IB4081.pdf.
 3. AECOM, “40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance,” U.S. Department of the Treasury, 2016, <https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf> (accessed February 22, 2018). The average time to prepare all types of NEPA-related environmental impact statements in 2016 was 5.1 years. See National Association of Environmental Professionals, “NAEP Annual National Environmental Policy Act (NEPA) Report for 2016,” http://www.naep.org/index.php?option=com_content&view=article&id=285:NEPA_2016_Annual_Report&catid=19:site-content&Itemid=241 (accessed February 23, 2018).
 4. “23 CFR 771.117-FHWA categorical exclusions,” Legal Information Institute, <https://www.law.cornell.edu/cfr/text/23/771.117> (accessed February 23, 2018).
 5. U.S. Department of Transportation, “National Environmental Policy Act Categorical Exclusion Survey Review,” November 27, 2012, <https://www.fhwa.dot.gov/map21/reports/sec1318report.pdf> (accessed February 23, 2018).
 6. The White House Council on Environmental Quality, “The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects,” November 2, 2011, https://energy.gov/sites/prod/files/2013/09/f2/CEQ_ARRA_NEPA_Report_Nov_2011.pdf (accessed February 23, 2018).
 7. The White House, “Legislative Outline for Rebuilding Infrastructure in America,” February 12, 2018, <https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf> (accessed February 23, 2018).
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President Trump's Infrastructure Plan

Candidate Trump spoke frequently about improving America's infrastructure, for example, telling the Detroit Economic Club in 2016: "We will build the next generation of roads, bridges, railways, tunnels, seaports and airports that our country deserves."⁸

The President's new "Legislative Outline for Rebuilding Infrastructure in America" calls for "Congress to act soon on an infrastructure bill that will: stimulate at least \$1.5 trillion in new investment over the next 10 years, shorten the process for approving projects to 2 years or less, address unmet rural infrastructure needs, empower State and local authorities, and train the American workforce of the future."⁹

All of these are noble goals, although the notion that America's infrastructure is "crumbling" and in uniquely poor condition is an exaggeration, according to Michael Sargent, an infrastructure expert at The Heritage Foundation.¹⁰ Some repairs and modernization are needed, of course, but a federal spending splurge to address a nonexistent crisis would be counterproductive.

Several other plans are also circulating. Senate Democrats released "A Blueprint to Rebuild America's Infrastructure," which calls for an additional \$1 trillion to be financed by a tax increase on corporations and top individual income earners (predictably).¹¹ The 48-member House Problem Solvers Caucus in January released its plan, "Rebuilding America's Infrastructure,"¹² and the Progressive Caucus has issued a "21st Century New Deal for Jobs," which "aims to do no less than transform the foundations of America's economy."¹³

Whatever the final form of an infrastructure initiative, Congress and the President must eliminate

the NEPA's regulatory hurdles before committing tax dollars or soliciting private investment. Otherwise, a sizable proportion of the funds will be wasted fighting regulatory roadblocks instead of rebuilding the nation's highways.

What Is the NEPA?

The National Environmental Policy Act of 1969 requires federal agencies to assess the potential environmental effects of proposed government actions. Its applicability is broad, encompassing government financing, technical assistance, permitting, regulations, or federal policies and procedures that touch a project. Every executive branch department must comply, and individual projects often include multiple agencies.

As part of assessing the impact on the "environment," agencies are required to consider the aesthetic, historic, cultural, economic, and social effects of proposed actions.¹⁴ This overly broad mandate provides virtually endless opportunities for bureaucrat-ic wrangling and legal challenge.

As set forth by Congress, the purpose of NEPA is to:

[E]ncourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.¹⁵

Such sentiments reflect lawmakers' faith that federal bureaucrats can dispassionately assess their own actions as long as they amass enough data and solicit public comment (including comment from local, state,

8. "Transcript of Donald Trump's Economic Policy Speech to Detroit Economic Club," *The Hill*, August 8, 2016, <http://thehill.com/blogs/pundits-blog/campaign/290777-transcript-of-donald-trumps-economic-policy-speech-to-detroit> (accessed February 23, 2018).

9. The White House, "Legislative Outline for Rebuilding Infrastructure in America."

10. Michael Sargent, "Building on Victory: An Infrastructure Agenda for the New Administration," Heritage Foundation *Issue Brief* No. 4629, November 21, 2016, <https://www.heritage.org/transportation/report/building-victory-infrastructure-agenda-the-new-administration>.

11. Democratic Policy and Communications Committee, "A Blueprint to Rebuild America's Infrastructure," U.S. Senate, January 24, 2017, <https://www.dpcc.senate.gov/files/documents/ABlueprinttoRebuildAmericasInfrastructure1.24.17.pdf> (accessed February 23, 2018).

12. House Problem Solvers Caucus, "Rebuilding America's Infrastructure," January 2018, https://reed.house.gov/uploadedfiles/psc_infrastructure_report.pdf (accessed February 23, 2018).

13. Congressional Progressive Caucus, "A 21st Century New Deal for Jobs," May 25, 2017, <https://cpc-grijalva.house.gov/21st-century-new-deal-for-jobs/> (accessed February 23, 2018).

14. Council on Environmental Quality, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," 40 CFR Parts 1500-1508, 2005, https://energy.gov/sites/prod/files/NEPA-40CFR1500_1508.pdf (accessed February 23, 2018).

15. National Environmental Policy Act of 1969.

municipal, and tribal authorities).¹⁶ But the NEPA predates the Environmental Protection Agency (EPA) and virtually all of the nation's other environmental statutes, and thus its architects were relatively naive about the machinations of bureaucratic self-interest, the distortions of policy wrought by judicial activism, and the limits of environmental science—all of which have rendered the NEPA process costly, time-consuming, and riddled with conflict.

The text of NEPA is relatively brief—3,200 words—but compliance is a complex affair. For example, *The NEPA Book: A Step-by-Step Guide on How to Comply with the National Environmental Policy Act*, runs 475 pages long.¹⁷ Compliance is rendered all the more difficult by the fact that each federal department and agency prepares its own NEPA procedures to address compliance in relation to its particular mission.¹⁸

Unlike many other environmental statutes, the NEPA is not a “substantive” law; rather than mandate specific outcomes, it imposes procedural obligations on federal agencies. The CEQ within the Executive Office of the President *guides* (and only guides) agencies’ implementation of the NEPA. However, each agency decides on its own assessment model and dictates whether or how to modify projects based on their interpretation of the NEPA.

There are several steps in the process:

- **Categorical Exclusion (CE).** A CE constitutes a type of NEPA waiver for a category of actions that do not significantly affect the human environment either individually or cumulatively.¹⁹ An action that qualifies for a CE is not required to prepare an environmental assessment or an environmental impact statement.
- **Environmental Assessment (EA).** An EA determines whether the proposed federal action will significantly affect the environment. If the

assessment indicates that the impacts will not be significant, the agency next prepares a Finding of No Significant Impact” (see below). If the impact is likely to be significant, the agency must prepare an “environmental impact statement.”

- **Finding of No Significant Impact (FONSI).** This is the determination by the agency that a proposed action will not have a significant impact on the environment and therefore does not require further action under the NEPA.
- **Mitigated FONSI.** This is a determination by the agency that a proposed action will not require further action under the NEPA if specific mitigation requirements (such as erosion controls) are met.
- **Environmental Impact Statement (EIS).** An EIS is a thorough analysis of a proposed action’s effect on the “human environment,” as well as an evaluation of alternatives to the proposed action. As mandated by the Clean Air Act, the EPA reviews and comments on all environmental impact statements prepared under the NEPA.²⁰
- **Record of Decision (ROD).** A ROD refers to the agency’s rationale for choosing a specific course of action, including an account of the factors considered by the agency and the alternatives evaluated, a description of any mitigation measures to be implemented, and an explanation of any monitoring requirements.

Private parties whose projects are required to undergo an environmental review must provide reams of documentation to various government agencies and, in some cases, pay a third party to prepare the analysis. For example, a developer seeking a permit to construct a pipeline that crosses federal lands may be required

16. Daniel R. Mandelker, “The National Environmental Policy Act: A Review of Its Experience and Problems,” *Journal of Law & Policy*, Vol. 32, No. 293 (2010), pp. 293–312.

17. Ronald E. Bass, Albert I. Herson, and Kenneth M. Bogdan, *The NEPA Book: A Step-by-Step Guide on How to Comply with the National Environmental Policy Act* (Point Arena, CA: Solano Press, 2001).

18. Dinah Bear, “NEPA at 19: A Primer on an ‘Old’ Law with Solutions to New Problems,” *Environmental Law Reporter*, 19 ELR, February 1989, pp. 10060–10069, https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-DinahBearArticle.pdf (accessed February 23, 2018).

19. Council on Environmental Quality, “Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.”

20. In the event that EPA officials regard an agency’s review as “unsatisfactory from the standpoint of public health or welfare or environmental quality,” the case is referred to the White House CEQ. However, the lead agency is not obligated to alter its proposed course of action in the face of objections from either the EPA or the CEQ.

to underwrite the environmental review, but the government maintains control of its scope and content.

The EPA is required to review the adequacy of each draft EIS and the proposed actions therein. If EPA officials deem the review unsatisfactory, the case is referred to the CEQ. (The EPA also publishes notices in the *Federal Register* soliciting public review and comment on pending EISs.)²¹

There is no centralized tracking of NEPA costs, which vary dramatically based on project type. Nor is there any comparison of costs to benefits of the process. Few agencies conduct retrospective reviews to determine the accuracy of the EIS forecasts that drive project design. (A 1987 study of 239 EISs found that forecasts were generally “not inaccurate,” although many were “accurate” solely by virtue of vagueness and generalities.”²²)

The NEPA in Practice

Congress intended the NEPA to be a planning tool for “integrat[ing] environmental concerns directly into policies and programs.” In actuality, the process has become an administrative contrivance; agencies often conduct assessments—if they are undertaken at all—well after project planning is underway and too late for the results to influence strategic choices as Congress intended.

Agencies control the result of a NEPA analysis by shaping its “scope,” that is, delineating the purpose of and need for a project. This “scoping” will define the assessment parameters as well as the project alternatives that must be considered.²³ But researchers have documented that bureaucrats tend to ignore information that does not comport with the prevailing view of the agency’s mission.²⁴ Consequently, the agencies effectively control the outcome of the NEPA review through deliberate scoping.

The result of this process is unavoidably political in nature, and not scientific.

NEPA procedures vary from agency to agency, which means that permit applicants are potentially faced with multiple sets of NEPA rules. For example, a NEPA review for a road project will differ depending on which of seven agencies within the Department of Transportation is involved.

The very heart of the NEPA—the Environmental Impact Statement (EIS)—is based on a conceptual view of the environment as static and predictable.

As noted, a CE exempts a project from detailed analysis under the NEPA. However, there is significant variation in the documentation necessary to obtain the exemption depending on the agency and the environmental issues of primary importance in any particular region. And, just because a project obtains an exemption from one agency, there is no guarantee that other agencies will likewise grant one.

The very heart of the NEPA—the EIS—is based on a conceptual view of the environment as static and predictable. Agencies construct a baseline measure of environmental conditions and *model* the anticipated impact of a project. This approach disregards the resilience and dynamism of ecosystems.²⁵

In reality, perfect information about the environment does not exist, nor can scientists accurately forecast how complex environmental systems will respond to ever-changing conditions over time. Therefore, the impact analyses are largely comprised of assumptions with weak predictive value. As noted by CEQ researchers in a study of NEPA effectiveness: “(W)e often cannot predict with precision how components of an ecosystem will react to disturbance and stress over time.”²⁶

21. The EPA maintains a database of EISes: Environmental Protection Agency, “Environmental Impact Statement (EIS) Database,” <https://cdxnodengn.epa.gov/cdx-enepa-ll/public/action/eis/search> (accessed February 23, 2018).

22. Bear, “NEPA at 19.”

23. Mandelker, “The National Environmental Policy Act.”

24. Holly Doremus, “Through Another’s Eyes: Getting the Benefit of Outside Perspectives in Environmental Review,” *Boston College Environmental Affairs Law Review*, Vol. 38, No. 2 (2011), pp. 245–278, <http://ssrn.com/abstract=1735748> (accessed February 28, 2018).

25. Sam Kalen, “The Devolution of NEPA: How the APA Transformed the Nation’s Environmental Policy,” *William & Mary Environmental Law and Policy Review*, Vol. 33, No. 2 (2009), <http://scholarship.law.wm.edu/wmelpr/vol33/iss2/4> (accessed February 28, 2018).

26. Council on Environmental Quality, “The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years,” January 1997, <http://digital.library.unt.edu/ark:/67531/metadc31142/m1/1/> (accessed February 23, 2018).

Public meetings and hearings are held throughout the review process, and every procedural step is open to legal challenge. Consequently, environmental purists have considerable opportunities to delay projects or to extort mitigation commitments.

Activists for years have used judicial review to challenge (and delay) development. The Government Accountability Office (GAO) has reported that the mere filing of a lawsuit and the project delays that result are often as important to plaintiffs as whether they ultimately prevail in court.²⁷

Consequently, agencies seek to prepare litigation-proof analyses in hopes of staking a defensible position (and avoiding public embarrassment). Exhaustive demands for data and other information raise project costs and create years of delay. Companies trying to secure a federal permit are hardly in a position to complain.

As noted by scholar Francis Fukuyama, the NEPA is particularly susceptible to the “vetocracy,” that is, the interest groups that seek to “stop the government from doing things.”²⁸

“Agencies understand that they might be second-guessed by the courts on procedural grounds, and therefore are punctilious in minimizing risk by dotting every “i” and crossing every “t” in paperwork preparation. This leads to bloated and lengthy EISs and EAs, and greatly extends the amount of time it takes to generate them.”

The complexity of the NEPA is magnified to the extent that projects require interagency coordination. Federal agencies are constantly embroiled in political skirmishes, simultaneously called to account by Congress, the White House, courts, and activists. Few, if any, observe deadlines.

Under limited circumstances,²⁹ some states are allowed to assume authority for administering the NEPA review.³⁰ To date, the FHWA has authorized six states to prepare NEPA documentation for

highway projects: Alaska, California, Florida, Ohio, Texas, and Utah. Federal officials monitor a state’s actions and perform audits to ensure compliance with a memorandum of understanding between the state and federal governments.

Devolving NEPA administration to the states is certainly better than continuing the federal bureaucracy. But whether the states or the feds are calling the shots, the entire NEPA regime is redundant. Under the Clean Air Act, for example, federal, state, and even local regulators control demolition dust, emissions from construction equipment, and airborne debris from clearing land. State laws and the Clean Water Act regulate runoff from site surfaces as well as wetlands protection. The Endangered Species Act governs the effects of development on habitat and wildlife, and waste disposal is controlled under local and state statutes as well as by the federal Resource Conservation and Recovery Act—to name a few.

These and other regulatory mechanisms all provide opportunities for the government to impose the same mitigation actions available through the NEPA.

There is no telling whether a project or permit will be authorized as planned. Each agency and various states have authority to dictate permit conditions regardless of whether the applicant approves or is equipped to carry them out.

Failures to Fixing NEPA

Since its passage in 1969, the NEPA has persisted despite dramatic changes in America’s economic, social, political, and environmental landscapes—and despite the enactment of countless other federal, state, and local regulations. Consequently, the NEPA is an anachronism that unduly complicates federal projects, encourages judicial activism, politicizes rulemaking, and blurs distinctions between environmental risks.

27. Government Accountability Office, “National Environmental Policy Act: Little Information Exists on NEPA Analyses,” April 2014, <https://www.gao.gov/assets/670/662543.pdf> (accessed February 23, 2018).

28. Francis Fukuyama, “Too Much Law and Too Little Infrastructure,” *The American Interest*, November 8, 2016, <https://www.the-american-interest.com/2016/11/08/too-much-law-and-too-little-infrastructure/> (accessed February 23, 2018).

29. States must apply to the Department of Transportation’s FHWA or the Federal Transit Authority, which review the state’s suitability to assume the authority based on meeting regulatory requirements. States must sign a memorandum of understanding (MOU) with the federal agency and consent to the jurisdiction of federal courts by waiving sovereign immunity for any responsibility assumed for the NEPA. The MOU is for a term of not more than five years and may be renewed.

30. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU); the Moving Ahead for Progress in the 21st Century (MAP-21) Act; and the Fixing America’s Surface Transportation (Fast) Act.

The CEQ last revised its NEPA guidance in March 2012. But the revisions were largely hollow, such as encouraging agencies to be “concise” and to “concentrate on relevant analysis.”³¹ All told, the CEQ has issued more than 35 separate guidance documents upon which agency-specific requirements are based. However, guidance is purely advisory in nature, and Congress has had virtually no say in the NEPA regulatory framework despite its application to a wide variety of federal actions.

Congress has enacted dozens of provisions to streamline the NEPA process for highway and transit projects in three transportation authorization bills since 2005.³² Some of them might seem useful, such as limiting the comments of participating agencies to subject matter within its expertise or jurisdiction, or barring claims for judicial review of a federal permit for highway projects unless they are filed within 150 days of final agency action.

The NEPA is an anachronism that unduly complicates federal projects, encourages judicial activism, politicizes rulemaking, and blurs distinctions between environmental risks.

However, 22 of 34 highway project provisions and 17 of 29 transit provisions were optional. (See Appendix A.)³³ An analysis by the GAO found that some state officials reported that the revisions were ineffective because they had already developed sim-

ilar processes, either through agreements with the U.S. Department of Transportation or at their own initiative. As a result, those states did not realize any new time savings from the amendments.³⁴

Congress in 2005³⁵ also established a pilot program to allow five states (specified as Alaska, Ohio, Oklahoma, Texas, and California) to apply to the Department of Transportation to assume all environmental review responsibilities under the NEPA for highway projects. The program was opened to all states in 2012.³⁶

Only California and Texas have exercised NEPA authority long enough to report results, according to the GAO.³⁷ California officials reported that state-administered environmental impact statements now take about six years to approve, which officials say is a 10-year improvement over the 15.9 years baseline the state established upon assuming NEPA responsibilities. For environmental assessments, California reported completion times of about 3.5 years, which is a one-year improvement over the state’s baseline.

Texas has not completed an environmental impact statement review since assuming NEPA authority but reported that its environmental assessments have taken about 1.5 years compared to the state’s baseline of nearly 2.5 years.

However, the GAO concluded that the reported time savings were “questionable” because the comparisons did not isolate the effect of the states assuming NEPA authority. In other words, any number of other factors may have been responsible for the shorter time span for environmental reviews.

In some instances, the reforms actually slowed the NEPA review process, according to the GAO analysis.³⁸ For example, eight states reported that

31. Council on Environmental Quality, “Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act,” *Federal Register*, March 12, 2012, <https://www.gpo.gov/fdsys/pkg/FR-2012-03-12/pdf/2012-5812.pdf> (accessed February 23, 2018).

32. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (2005), Public Law 109-59; Moving Ahead for Progress in the 21st Century (2012), Public Law 112-141; Fixing America’s Surface Transportation Act (2015), Public Law 114-94.

33. Government Accountability Office, “Highway and Transit Projects: Evaluation Guidance Needed for States with National Environmental Policy Act Authority,” January 2018, <https://www.gao.gov/assets/690/689705.pdf> (accessed February 23, 2018).

34. *Ibid.*

35. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Public Law 109-59, <https://www.gpo.gov/fdsys/pkg/PLAW-109publ59/pdf/PLAW-109publ59.pdf> (accessed February 23, 2018).

36. Moving Ahead for Progress in the 21st Century (2012), Public Law 112-141.

37. Government Accountability Office, “Highway and Transit Projects: Evaluation Guidance Needed for States with National Environmental Policy Act Authority.”

38. *Ibid.*

the Coordination Plan for Public and Agency Participation provision (part of SAFETEA-LU) delayed projects by formalizing consultations that had been occurring voluntarily between federal and state agencies.

Trump Administration Reform Efforts

President Trump has likewise sought to streamline the NEPA beginning in his first month in office. Executive Order (EO) 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, directed agencies to designate select infrastructure projects as “high priority” for the purpose of expediting permitting reviews.³⁹

EO 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure,⁴⁰ instituted a policy of “One Federal Decision.” The executive order calls for designating a “lead” agency for each major project to navigate NEPA reviews. Relevant agencies will compile reviews into a single ROD (unless the project sponsor requests otherwise).

The executive order also calls for reducing the processing time for environmental reviews to “not more than an average of approximately two years.” Once an ROD is issued, permit decisions should be completed within 90 days.⁴¹

In his order, the President stated: “Inefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations, have delayed infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment.”

Meanwhile, on September 14, 2017, the CEQ published an initial list of actions it plans to take to further implementation of EO 13807.⁴²

The President’s infrastructure plan features numerous proposals to reform the NEPA and eliminate other regulatory barriers to permitting.⁴³ The most notable is the proposal to “Expand Department of Transportation NEPA Assignment Program to Other Agencies.”

Current law allows only the Department of Transportation’s FHWA and Federal Transit Authority to authorize states to administer NEPA reviews. The President is proposing to allow other agencies to do the same for other types of infrastructure projects. In addition, the President is proposing to allow states to make permit determinations required by the Clean Air Act⁴⁴ and for flood plain protections and noise abatement for transit and highway projects.

Other significant reform recommendations in the infrastructure plan include:

- **One Agency, One Decision.** The President is proposing that a lead agency be required to develop a single NEPA review document to be used by all agencies and a single ROD to be signed by all cooperating agencies (similar to the “One Federal Decision” directive in EO 13807). The proposal also calls for a firm deadline of 21 months for lead agencies to complete their environmental reviews and issue either a FONSI or ROD and a firm deadline of three months thereafter to approve or reject the permit application.
- **Performance-based pilot projects.** The President is proposing to use environmental performance measures in place of environmental

39. The White House, “Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects,” January 24, 2017, <https://www.whitehouse.gov/presidential-actions/executive-order-expediting-environmental-reviews-approvals-high-priority-infrastructure-projects/> (accessed February 23, 2018).

40. The White House, “Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure,” Executive Order 13807, August 15, 2017, <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-discipline-accountability-environmental-review-permitting-process-infrastructure/> (accessed February 23, 2018).

41. EO 13807 also calls for the director of the Office of Management and Budget to establish a “performance accountability system” to score agencies on the efficiency of their infrastructure permitting. The OMB Director will consider each agency’s scorecard during budget formulation and determine whether penalties are appropriate.

42. Council on Environmental Quality, “Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process,” *Federal Register*, September 14, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-09-14/pdf/2017-19425.pdf> (accessed February 23, 2018).

43. The White House, “Legislative Outline for Rebuilding Infrastructure in America.”

44. This provision would not change the EPA’s responsibilities under the Clean Air Act.

reviews for up to 10 projects (based on project size, national or regional significance, and opportunities for environmental enhancements). The project sponsor would agree to design the project to meet performance standards and permitting parameters established by the lead federal agency (and public comment) in lieu of an environmental review.

A second pilot would authorize the Secretary of Transportation (or other infrastructure agencies) to negotiate mitigation agreements that address project impacts in lieu of NEPA review. The mitigation could include the purchase of offsets, avoidance of anticipated impacts, and an in-lieu fee dedicated to an advanced mitigation fund.

- **Revise statute of limitations for infrastructure permits or decisions.** Under current law, legal challenges to infrastructure permits may be filed up to six years after the decision has been issued.⁴⁵ The President is proposing to revise the statute of limitations to 150 days.

Conclusion

Useful as such proposed reforms may seem, there is no fixing the NEPA. Predating the EPA, the NEPA was at one time the legislative vanguard for environmental law and regulation. But that was nearly 40 years ago, and it is now out of sync with current environmental, political, social, and economic realities. In fact, the intended goal of environmental stewardship is actually thwarted by agencies' circumvention of the NEPA reviews, the project delays, and the higher costs imposed by the redundant regime as well as by the politicization of science and the influence of special interests.

Simply put, the NEPA cannot be fixed, it must be rescinded.

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45. When states assume NEPA administration, the statute of limitations is two years. A statute of limitations of 150 days would be consistent with the statute of limitations Congress already has enacted for surface transportation projects.

Appendix A: Congressional Reforms to the NEPA

The Moving Ahead for Progress in the 21st Century (MAP-21) Act

- Allows the Transportation Department to use categorical exclusions across departments for multimodal projects. (Optional)
- Authorizes the repair, reconstruction, restoration, retrofitting, or replacement of any road, highway, bridge, tunnel, or transit facility damaged by an emergency as a categorical exclusion. (Optional)
- Designates a project within an existing operational right-of-way as a categorical exclusion. (Optional)
- Authorizes a categorical exclusion for projects receiving less than \$5 million in federal funds, or less than 15 percent federal funds for a project under \$30 million—subject to annual inflation adjustments. (Optional)
- Authorizes a categorical exclusion for geotechnical and archeological investigations to provide information for preliminary design of highway projects. (Optional)
- Authorizes a categorical exclusion for environmental restoration and pollution abatement actions to minimize or mitigate the impact of existing transportation facilities in highway projects. (Optional)
- Designates, for highway modernization projects, resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes as a categorical exclusion that does not require documentation or prior FHWA approval. (Optional)
- Designates, for highway projects, highway safety or traffic operations improvement projects as categorical exclusions that do not require documentation or prior FHWA approval. (Optional)
- Authorizes a categorical exclusion for highway projects involving bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings without documentation or prior FHWA approval. (Optional)
- Authorizes, for FHWA-funded projects, a categorical exclusion for the purchase, construction, replacement, or rehabilitation of ferry vessels that would not require a change in the function of ferry terminals. (Optional)
- Authorizes, for FHWA-funded projects, a categorical exclusion for the rehabilitation or reconstruction of existing ferry facilities that do not substantially enlarge the footprint or capacity. (Optional)
- Designates bridge removal and bridge-removal-related activities, such as in-channel work, and disposal of materials and debris as a categorical exclusion. (Optional)
- Designates preventative maintenance, including safety treatments, to culverts and channels within and adjacent to transportation right-of-way as a categorical exclusion. (Optional)
- Authorizes as a categorical exclusion geotechnical and archeological investigations to provide information for preliminary design, environmental analyses, and permitting of transit projects. (Optional)
- Designates minor transportation facility realignment for rail safety reasons as a categorical exclusion. (Optional)
- Authorizes a categorical exclusion for modernization or minor expansions of transit structures and facilities outside existing right-of-way. (Optional)

- Authorizes the lead agency for a project to use planning products, such as planning decisions, analysis, or studies, in the environmental review process.⁴⁶ (Optional)
- Requires any federal agency responsible for environmental review to give substantial weight to the recommendations in a state or metropolitan mitigation plan developed as part of the transportation planning process when carrying out responsibilities under NEPA or other environmental law.⁴⁷ **(Required)**
- Requires, at the request of a project sponsor or a governor, the Department of Transportation to provide additional technical assistance when an EIS review has taken two years and to establish a schedule for completion within four years. **(Required)**
- Requires the Department of Transportation to seek opportunities with states to carry out environmental and other project reviews.⁴⁸ **(Required)**
- Encourages early cooperation between the Department of Transportation and other agencies, including states or local planning agencies, in the review process. (Optional)
- Authorizes states to acquire real property interests for a project before completion of the NEPA process. (Optional)
- Authorizes the awarding of two-phase contracts with preconstruction services and preliminary design of a project using a competitive selection process before completion of the NEPA process. (Optional)

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)

- Authorizes a historic site, parkland, or refuge to be used for a transportation program or project if it is determined that “de minimis” impact would result.⁴⁹
- Bars claims for judicial review of a federal permit, license, or approval for highway projects unless they are filed within 150 days of notice in the *Federal Register* announcing the final agency action or unless a shorter time is specified in the federal law under which the judicial review is allowed.⁵⁰ **(Required)**
- Allows a public entity to use federal highway or transit funds to support a federal or state agency or Indian tribe participating in the environmental review process on activities that directly contribute to expediting and improving project planning and delivery.⁵¹ (Optional)
- Establishes procedures to resolve issues between state transportation departments and relevant agencies.⁵² **(Required)**
- Requires a coordination plan for public and agency participation in the review process within 90 days of notice of intent or the initiation of an EA, including a schedule for completion of the review.⁵³ **(Required)**
- Permits states or local transportation agencies to release requests for proposals and award design-build contracts prior to the completion of the NEPA process. A contractor is precluded

46. As amended by the FAST Act, § 1305 (codified at 23 U.S. Code § 168(b)) 23 CFR Part 450.

47. As amended by the FAST Act, § 1306 (codified at 23 U.S. Code § 169(f)).

48. Also FAST Act, § 1304(b).

49. As amended by the FAST Act, §§ 1301-1303 (codified at 23 U.S. Code § 138(b)).

50. As amended by MAP-21, § 1308 (codified at 23 U.S. Code § 139(l)).

51. As amended by MAP-21, § 1307, and FAST Act, § 1304(i) (codified at 23 U.S. Code § 139(j)).

52. As amended by MAP-21, § 1306, and FAST Act, § 1304(h) (codified at 23 U.S. Code § 139(h)).

53. As amended by MAP-21, § 1305, and FAST Act, § 1304(g)(1) (codified at 23 U.S. Code § 139(g)(1)(A) and (B)).

from proceeding with final design or construction before completion of the NEPA process. (Optional)

- Authorizes the Department of Transportation to assign a state to assume responsibility for determining if projects can be categorically excluded from NEPA review.⁵⁴ (Optional)
- Authorizes the Department of Transportation to assign a state to assume many federal environmental review responsibilities for highway, public transportation, and railroad projects to be administered in accordance with a written agreement between the department and the state.⁵⁵ (Optional)

The Fixing America's Surface Transportation (FAST) Act

- Decrees that, to the maximum extent practicable, the lead agency shall combine the final EIS and record of decision in certain cases. **(Required)**
- Authorizes the Department of Transportation to adopt a draft EIS, environmental assessment, or final EIS of another division without recirculating the document for public review if the proposed action is substantially the same as the project considered in the document to be adopted. (Optional)

- Establishes a 45-day limit after the notice of intent date for a lead agency to identify other agencies to participate in the environmental review process on EIS projects. **(Required)**
- Requires, to the maximum extent practicable and consistent with federal law, the EIS project lead agency to develop a single NEPA document to satisfy the requirements for federal approval or other federal action, including permits. **(Required)**
- Authorizes the lead agency to eliminate from detailed consideration an alternative proposed in an EIS if the alternative was proposed in a planning process or state environmental review process. (Optional)
- Limits the comments of participating agencies to subject matter areas within the special expertise or jurisdiction of the agency. **(Required)**
- Decrees that issues that are resolved by the lead agency with concurrence from stakeholders cannot be reconsidered unless there is significant new information or new circumstances arise. **(Required)**

54. As amended by MAP-21, § 1312, and FAST Act, § 1307 (codified at 23 U.S. Code § 326).

55. As amended by MAP-21, § 1313, and FAST Act, § 1308 (codified at 23 U.S. Code § 327).