



Bipartisan Policy Center

# Reforming Judicial Review for Clean Infrastructure: A Bipartisan Approach

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For the United States to drastically cut greenhouse gas emissions, reduce energy costs, and bolster its supply chains, the nation needs to undertake clean energy and infrastructure projects at a historic pace. Meeting this challenge requires re-evaluating the litigation process for these projects. Current law provides opponents of a project continuous opportunities to sue. Regardless of how many cases the project developer might win, another lawsuit to stall development is always hanging over their head.

Judicial review is the means by which the federal government's actions are subject to legal challenges under the courts' authority: The judiciary can confirm, alter, or invalidate the action of agencies, including those related to permitting or siting under a federal statute. Currently, there are few restrictions on who can initiate legal action against a project, why the legal action can be initiated, or how many times legal action can be taken against a project.

According to a [forthcoming study](#) of 355 of the largest energy and transportation projects between 2010 and 2018, solar energy projects experienced the highest litigation rate, with nearly two-thirds facing a claimed National Environmental Policy Act (NEPA) violation.<sup>1</sup> Transmission and wind energy projects similarly face higher-than-average rates of litigation, as well as light-rail transit projects. Maintaining opportunities for people to file meritorious lawsuits against projects that have the potential to unduly harm the environment or communities is vital. Nevertheless, the status quo prevents the accelerated build-out of desperately needed infrastructure, all while increasing costs and discouraging investment.

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In June 2023, the Bipartisan Policy Center convened a private roundtable under the Chatham House Rule with experts from across the political spectrum to explore ways to streamline the judicial review process while maintaining individual rights and providing certainty that the process would conclude in a reasonable amount of time.

This roundtable was the third in a series on permitting. The [first roundtable focused on public engagement](#),<sup>2</sup> and the [second focused on permitting linear infrastructure](#) (i.e., transmission and pipelines).<sup>3</sup> The goal of this roundtable was to foster robust discussions on reforming the judicial review process related to permitting, with participants weighing the pros and cons of a variety of policy proposals from across the political spectrum.

### **Option: Reduce the Statute of Limitations**

Under current law, initial lawsuits can be filed for up to six years after final permitting decisions. Participants generally agreed on the value of reducing that time frame. Once the specified time frame has passed, parties could no longer bring lawsuits against the permitting decision. There is precedent for such limitations: The Fixing America's Surface Transportation Act of 2015 reduced the statute of limitations for projects using the "FAST-41" process to two years, and the bipartisan Infrastructure Investment and Jobs Act (IIJA) reduced the statute of limitations for transportation projects to two years.

Providing specific time limitations will add a level of certainty for projects. This change will not only expedite projects but also reduce project costs associated with delays. One participant noted that uncertainty can increase costs by forcing the renegotiation of labor contracts or potentially losing seasonal construction opportunities. An additional risk, others pointed out, is facing higher interest rates on loans due to delays, increasing the cost and making some projects unviable.

Current proposals in Congress vary for placing time restrictions on legal challenges, ranging from 60 days up to three years. Some participants advocated shorter time limits, while others wanted to ensure that affected communities would have a longer period to file lawsuits. Although no consensus on a specific time frame was reached, the majority felt that a deadline of two years or less to file suit was acceptable, and most were comfortable with a statute of limitations under one year.

### **Option: Reduce Standing**

Legal standing is the requirement that a person or group must be sufficiently impacted or connected to an action to file a lawsuit. Before litigation related to a project can move forward on the merits, standing must first be determined. Reducing standing ultimately limits parties not directly impacted by a project from filing lawsuits while preserving opportunities for litigation in cases involving potentially harmed communities. Some participants argued that this change would result in fewer frivolous lawsuits being filed against projects.

One proposal raised by participants, similar to a provision in [H.R. 1](#) passed by the House of Representatives earlier this year, is to limit eligibility to those who raised concerns during the public comment period in the administrative process:<sup>4</sup> If a person or group did not express their concern during the process designed to receive such comment, then they would not be able to petition the courts after the administrative process ended. Some participants expressed concern that such limitations could shut persons out directly affected by a project but were not aware or able to participate in the administrative process. Participants also noted that if this change were adopted, agencies would need to do a better job advertising and make the public comment process accessible.

### **Option: Eliminate Judicial Review for Categorical Exclusion Designations**

A categorical exclusion (CE) is a form of NEPA compliance for certain actions that a federal agency has determined do not have a significant impact on the environment. Those actions are therefore excluded from requiring further review in the form of an Environmental Assessment or Environmental Impact Statement. Participants discussed not allowing litigation for actions that receive a CE, providing these projects with certainty but eliminating the public's ability to sue. Participants were generally lukewarm about this proposal and did not think it should be prioritized, given the fact that projects that receive a CE are already less likely to face challenges. Some participants commented that the proposal's impact might grow if agencies create more CEs. However, others expressed concerns about granting excessive power to agencies to create CEs and shield projects from litigation.

### **Option: Elevate Litigation Filed after Final Agency Actions Directly to U.S. Courts of Appeals**

One proposal that received near unanimous support at the roundtable was to elevate litigation directly to an appeals court following the administrative process. This option would speed up the entire litigation process by bypassing district courts and eliminating a step in the judicial process. Because litigation under NEPA is essentially an appeal of a government agency decision, participants agreed that moving directly to a court of appeals would streamline the process without undermining the rigor or thoroughness of judicial review.

### **Option: Establish a Technical Court with Jurisdiction Over Federal Permitting Decisions**

Another proposal that received general backing is the establishment of a single technical federal court with jurisdiction over American Procedure Act reviews and NEPA decisions. This court would have the expertise to address these cases in an effective and timely manner. Participants noted that the U.S. Court of Appeals for the D.C. Circuit already has environmental

review expertise and could play this role well. Participants also noted that sending appeals directly to a single technical court would solve the issue of court shopping. Overall, participants agreed that this would be an effective solution that would provide certainty to project developers and appropriate judicial review.

### **Option: Establish a Permitting Review Board for Energy Projects**

Similar to the Environmental Protection Agency's [Environmental Appeals Board](#), an independent technical appeals board consisting of judges would act as a forum for parties to appeal permitting decisions for energy projects.<sup>5</sup> After a final permitting decision is issued, rather than filing an appeal with district courts, litigants could appeal to a review board that attempts to resolve disputes between the parties. If the board is unable to resolve a dispute, the appealing party can raise their concerns to U.S. Circuit Courts of Appeals. The review board could help concentrate permitting expertise in a single independent body and expeditiously resolve disputes. However, some roundtable participants added that appointments to this board would need to be handled with care to avoid it becoming politicized.

### **Option: Setting Court Deadlines**

A proposal that participants found appealing was to set deadlines for court actions, such as requiring court decisions on federal permitting challenges within a time frame designated in statute. However, there was skepticism as to whether the legislative branch's decision to place time restrictions on the judiciary would withstand constitutional scrutiny, or whether the deadline would be enforceable.

### **Option: Setting Deadlines on Agency Remand**

Some participants proposed requiring courts to set deadlines for agency action when the judges remanded a decision. (A remand is when the courts send the decision back to the agency for further consideration, or when a judge vacates a permit, which means the courts invalidated or canceled the permit.) In these cases, deadlines for agency action would provide needed certainty on the timeline for next steps for developers. However, as with the previous option, participants questioned whether requiring courts to set agency deadlines would withstand constitutional scrutiny. Congress could, however, set agency deadlines for agency action following remand, though a deadline set in statute would have less flexibility than one set by a court for a specific action under review.

### **Option: Narrowing the Scope of Decisions**

Participants broadly supported narrowing judicial outcomes by directing the courts to specify aspects of review requiring additional analysis, revision, or remand. By specifying the particular aspects requiring attention, agencies

can focus their efforts on rectifying specific deficiencies without the need to entirely vacate permits. This would streamline the process and promote more efficient decision-making. The familiarity of this procedure to the D.C. Circuit also garnered support, as it builds upon existing practices that have proven to be effective in addressing complex regulatory challenges.

### **Option: Direct CEQ or the Permitting Council to Develop a Public Database of NEPA Lawsuits**

Roundtable support was strong for the Council on Environmental Quality (CEQ) or the [Permitting Council](#) to establish a public database of NEPA lawsuits that would include information about timelines for both filing of initial claims and total length of the judicial review process.<sup>6</sup> [CEQ previously tracked such data](#), but it stopped doing so in 2013.<sup>7</sup> One participant stressed that transparency is critical for accountability.

## **CONCLUSION**

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Among participants, there was broad, bipartisan recognition that unfettered judicial review can, and does, delay permitting and construction of clean energy projects and associated infrastructure. These delays harm efforts to rapidly lower emissions, reduce reliance on foreign adversaries, and accelerate the transition to cleaner energy. Participants also expressed a clear desire to preserve access to courts for those directly affected by projects where legitimate issues require judiciary involvement.

Although the [Fiscal Responsibility Act](#) included important permitting reforms, it did not address judicial review—which will be a necessary component of a more comprehensive bipartisan deal to help the nation meet its climate goals.<sup>8</sup> A comprehensive bipartisan permitting deal should include reforms to appropriately balance affected stakeholders’ rights to sue with the need for a predictable timeline over which the process can come to a timely conclusion. BPC will continue to play a constructive role in bringing all sides together to meet this challenge. Our next roundtable in this series focuses on additional reforms to NEPA or general administrative bureaucracy that were not included in the Fiscal Responsibility Act.

# Endnotes

- 1 M. Bennon and D. Wilson, “Environmental Litigation on Large Energy and Transport Infrastructure Projects in the United States,” *Environmental Law Reporter*, Forthcoming, 2023. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4498938](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4498938).
- 2 X. Fishman, J. Jacobs, et al., “Empowering Communities while Streamlining Clean Infrastructure Permitting,” *Bipartisan Policy Center*, May 9, 2023. Available at: <https://bipartisanpolicy.org/blog/clean-infrastructure-permitting/>.
- 3 X. Fishman, M. Hall, et al., “Linear Infrastructure: Options for Efficient Permitting of Transmission and Pipeline Infrastructure,” *Bipartisan Policy Center*, July 24, 2023. Available at: <https://bipartisanpolicy.org/explainer/efficient-permitting-of-linear-infrastructure/>.
- 4 H.R.1 – Lower Energy Costs Act. (2023-2024), 118<sup>th</sup> Congress. Available at: <https://www.congress.gov/bill/118th-congress/house-bill/1>.
- 5 Environmental Appeals Board (EAB), U.S. Environmental Protection Agency. Available at: <https://www.epa.gov/aboutepa/about-environmental-appeals-board-eab>.
- 6 Federal Permitting Improvement Steering Council, U.S. Permitting Dashboard. Available at: <https://www.permits.performance.gov/fpisc-content/federal-permitting-improvement-steering-council>.
- 7 NEPA Litigation, National Environmental Protection Act. Available at: <https://ceq.doe.gov/ceq-reports/litigation.html>.
- 8 X. Fishman, J. Jacobs, O. Minott, “How Does the Fiscal Responsibility Act Reform Permitting and Environmental Review?” *Bipartisan Policy Center*, June 2, 2023. Available at: <https://bipartisanpolicy.org/blog/fiscal-responsibility-act-permit-reform/>.