Bipartisan Policy Center

Exploring NEPA Reforms Needed to Unlock Clean Energy Infrastructure

Recent years have seen increased recognition of the importance of permitting reform to accelerate the implementation of clean energy and infrastructure projects. The Fiscal Responsibility Act of 2023 (FRA) makes meaningful progress toward reform in several areas, including by establishing timelines for federal permits, encouraging agencies to coordinate their reviews, clarifying which projects are not subject to the National Environmental Policy Act (NEPA), and promoting expanded use of programmatic reviews and categorical exclusions.[i]

These provisions are an important step in the right direction but additional changes to the federal permitting process are needed to enable more rapid deployment of clean energy technologies and advance critical national goals in terms of cutting emissions of carbon dioxide and other pollutants, reducing energy costs, improving grid reliability, and enhancing energy and supply chain security.

In July 2023, the Bipartisan Policy Center convened the fourth in a series of private roundtables on the topic of permitting reforms. The roundtable brought together experts from across the political spectrum to explore a menu of policy options that build on reforms in the FRA with the aim of further streamlining NEPA reviews and federal permitting processes. Roundtable participants sought to identify specific additional reforms that are still needed to accelerate deployment and to weigh the pros and cons of a variety of specific policy proposals.

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BPC's previous permitting roundtables covered the following topics; each roundtable generated a policy brief that captures highlights from the discussion:

1. Public Engagement Roundtable[ii]
2. Permitting Linear Infrastructure Roundtable (i.e., transmission and pipelines)[iii]
3. Judicial Review Roundtable[iv]

The remainder of this brief summarizes perspectives and insights from the July 2023 roundtable about NEPA reform options that were not included in the FRA but that merit further policy consideration.

OPTION: CLARIFY ACTIONS THAT TRIGGER NEPA REVIEW

Under current law, the determination that a project constitutes or requires a "major federal action" automatically triggers NEPA review. However, it is not always clear what types of projects or actions should be considered "major federal action." The FRA amended NEPA to list, for the first time, categories of federal actions that are specifically *not* considered major federal actions. But there is no language in the law to clarify what types of projects definitely *are* considered major federal actions. Clarifying and refining the definition of a major federal action could reduce the number of projects that are subject to NEPA review, while freeing up resources so that projects that do fall under NEPA are reviewed in a more timely fashion.

In general, roundtable participants felt that there was value in fine-tuning the criteria used to trigger NEPA review. They also discussed various metrics that could be considered in developing these criteria.

Cost trigger

In setting federal regulations, a "major rule" is one that, among other criteria, has "an annual effect on the economy of $100 million or more."[v] Applying the same threshold to "major actions" in the context of NEPA review, one option would be use $100 million of economic impact as a trigger. While there was some support for this approach, however, many participants felt that a monetary trigger would be arbitrary and might not reflect the potential environmental impact of a project or federal action. Yet, projects with a price tag significantly less than $100 million could have greater environmental risks than many more expensive projects, if they are located in environmentally sensitive areas. Further, roundtable participants who were particularly interested in expediting transmission projects noted that few projects of this type would fall below a $100-million threshold and would not benefit from this reform regardless of the risks they present. Some participants favored a threshold based on percentage of federal funding

(as opposed to an absolute dollar figure). But this idea met with similar objections in terms of making the "major action" designation dependent on a single, arbitrary figure.

Federal permit trigger

Some participants proposed that projects that require a federal permit should automatically be defined as major actions. Projects that did not require a federal permit would thus be exempted from NEPA review, including those projects that currently trigger NEPA simply because they receive federal funding. This proposal had broad support from roundtable participants, who recognize the value of distinguishing federal "action" within the broader context of a project. Because most projects require some form of federal permit, however, this approach may have limited impact.

Interstate (cross-border) trigger

Recognizing that a federal role is inevitable when multiple states are involved, or when an international boundary is crossed, another option is to consider whether a project crosses borders, not necessarily as the sole criterion for making a "major federal action" determination, but as one of several criteria to be considered. Most participants agreed that in the context of efforts to narrow the number of projects subject to NEPA review, considering whether a project crosses borders is a reasonable trigger for inclusion under NEPA, with the caveat that this criterion would be part of a larger list of considerations.

Multiple federal action trigger

Instead of NEPA being triggered by a single action or federal investment, a project could be considered major federal action if (and only if) it is legally required to complete multiple authorizations, reviews, or studies by federal law. The idea in this approach is to ensure that projects with relatively minimal federal involvement will be excluded from the major federal action designation. Participants felt that this type of trigger would reduce the number of projects subject to NEPA, while also remaining consistent with the original intent of NEPA, which was to consider the environmental impacts of federal action. Other participants, however, were quick to point out that many environmental and environmental justice advocates would see this as a weakening of NEPA, and warned that the policy could face headwinds in Congress.

OPTION: FURTHER CLARIFY AND NARROW THE DEFINITION OF "EFFECTS"

Participants also discussed current legislative proposals that go beyond changes in the FRA to further clarify and narrow what is meant by "effects" in the context of a NEPA review. Language in the FRA aims to limit the effects an agency is required to consider to those that are "reasonably foreseeable."
Participants discussed current legislative proposals that would further narrow what effects could trigger NEPA review, including limiting consideration to effects that are:

- *not speculative, and not remote in time or geographically remote;*
- *have a reasonably close causal relationship to the action or alternative;*
- *are able to be prevented by a federal agency;*
- *would not occur absent the proposed action or alternative action.*

Advocates for these changes felt they could be implemented in a way that is consistent with the intent of NEPA, which is to establish a clear, common sense understanding of the environmental impacts of a potential action and limit agency discretion to ignore those impacts. In their view, greater clarity about which effects an agency can consider will make the permitting process more certain and more efficient, and promote more effective use of public resources. Other participants agreed that narrowing the definition of "effects" would be beneficial to project developers, increase certainty in the permitting process, and accelerate NEPA review. However, some participants also expressed concern that narrowing language could specifically prohibit agencies from considering greenhouse gas emissions. In addition, many participants felt that this proposal was politically fraught and would be strongly opposed by environmental groups.

Many roundtable participants particularly objected to limiting the definition of "effects" in a way that would not include greenhouse gas emissions. In their view, failure to consider such emissions would be inconsistent with assessing actual climate impact. Others noted that NEPA was intended to provide an understanding of the environmental impact of a project and noted that no single project would likely have a measurable impact on global temperatures. Some suggested that other non-NEPA policies were better suited for considering greenhouse gas emissions. All participants agreed that there is strong disagreement between Democrats and Republicans about whether climate change impacts should be included in NEPA reviews, making this a contentious policy change.

OPTION: EXPAND UTILIZATION OF PROGRAMMATIC REVIEWS

Roundtable participants strongly supported expanding the use of programmatic reviews to eliminate repetitive analyses and allow for more efficient preparation of Environmental Impact Statements (EISs) or Environmental Assessments (EAs). In a programmatic review, the NEPA process would be used to evaluate the environmental impacts of a broad-scale action or a class of routine, repetitive actions within a specific large region, thereby eliminating the need to individually analyze each repeated action.

Require agencies to expand the use of programmatic reviews

Most participants agreed that federal agencies should increase their use of programmatic reviews to increase efficiency and better use staff resources. But some participants cautioned against *requiring* agencies to take this step, out of concern that conducting programmatic reviews without any specific projects in mind could consume a lot of time and agency resources and end up being unnecessary or moot. Their view was that programmatic reviews should be tied to specific projects, which would then benefit from expedited review or limited judicial review.

Conduct programmatic reviews to pre-approve uses of federal land for particular types of projects

Another idea that received strong support was using programmatic reviews to pre-approve federal lands for clean infrastructure projects that would then be eligible for categorical exclusions. Participants discussed which regions should be considered for review. Some worried that the federal government may prefer specific regions for certain types of development, but these preferences may not align with the needs of project developers and fail to attract proposals. These participants stressed the need to ensure that pre-approved regions will be economically and geographically attractive for project developers. Many favored establishing an advisory group that includes public and private sector perspectives to help guide decisions and recognize what is needed to deliver value to project investors. The idea of an advisory group prompted a related concern that outsized industry input could outweigh community input, which might mean that additional measures are needed to ensure that community engagement receives strong consideration when deciding which regions to review.

An alternative approach for specially designated federal regions would be to establish a process wherein states and local communities identify and pre-approve sites for projects that would enjoy streamlined and expedited approval. This bottom-up approach appealed to many participants, both in terms of ensuring project desirability as well as guaranteeing community involvement.

OPTION: EXPAND UTILIZATION OF CATEGORICAL EXCLUSIONS

Expanded use of categorical exclusions (CEs) would help expedite permitting and ensure that staff resources are focused on projects of significant impact. There was broad consensus among roundtable participants that agencies should be required to seek ways to establish new CEs, including by issuing requests for information (RFIs) to solicit ideas for new CEs and by reviewing CEs on a periodic basis. There was also agreement about the need to update CEs to keep pace with new developments, such as expanding existing CEs for oil and gas projects so that they can be applied to geothermal projects. Participants noted that there is more of an appetite in Congress for legislating targeted CEs than there is for making broader definitional changes in the NEPA statute.

OPTION: REFORM ENVIRONMENTAL ASSESSMENT REQUIREMENTS

For a project to be approved without undergoing a full EIS, it must receive a "Finding of No Significant Impact" (FONSI). However, an EA must first be conducted to make a FONSI determination. EAs are a significant procedural undertaking, yet they produce a FONSI determination in more than 99% of cases.[vi]

One proposal discussed at the roundtable was to allow agencies to issue a FONSI determination without preparing a formal EA document. This would give agencies the option to base FONSI determinations on internal deliberations while avoiding the public process requirements of a formal EA. Roundtable participants were generally open to reforms that reduce paperwork delays in permitting. However, some pointed out that the EA itself is what allows an agency to avoid a full EIS and helps agency decisions withstand legal challenges. Additionally, participants questioned whether this proposal would have a significant impact. Even if a FONSI determination is made as an internal agency decision rather than on the basis of an EA, agencies may still need to utilize an internal process similar to an EA so that their determinations stand up to legal scrutiny. Ultimately, many participants felt that this proposal needed to be refined further.

OPTION: NEPA DELEGATION TO STATES

Another idea discussed at the roundtable was to broaden NEPA assignments to states, similar to the mechanism that is already available for highway projects under federal statute. Generally speaking, the Secretary of Transportation, at a state's request, can assign the NEPA responsibilities of

the Federal Highway Administration (FHWA) to the requesting state. The state then assumes responsibility for project review in exchange for a faster federal review. These agreements are executed through a renewable five-year Memorandum of Understanding and the FHWA conducts audits to ensure that states are in compliance with the MOU. This option could be expanded beyond transportation projects to energy and other infrastructure projects. Participants largely agreed that the idea has potential and expressed support for state delegation if it comes with appropriate criteria and oversight. But participants also questioned whether states would be interested in assuming responsibility for NEPA review. Currently, only a small handful of states have a NEPA Assignment from FHWA, so there may not be significant interest in broadening the use of this delegation. One example of such delegation in the energy space is state primacy for Class VI well review for underground carbon dioxide sequestration. Two states currently have primacy for Class VI well review and others have applied. Funding to help more states set up and apply for Class VI primacy was authorized in the Bipartisan Infrastructure Law.

OPTION: COMPETITIVE GRANT PROGRAM FOR STATES (CARROT)

Roundtable participants discussed the merits of a carrot approach to permitting reform – in this case, using federal grants to incentivize states to increase the efficiency of their permitting systems and align more closely with the federal system. If grants were tied to outcomes, then states would benefit from improving permitting processes and performance, likely leading to accelerated deployment of projects. Financial incentives could also be designed to require alignment of state and federal processes and timelines, reductions in redundant permitting requirements, and a sustained pace of review. While there was strong support for this concept in principle, participants expressed concern that it would require significant funding to ensure that grants are sizable enough to motivate states to rework their own permitting procedures.

OPTION: RESTRICT FEDERAL FUNDING FROM STATES (STICK)

As an alternative to competitive grants to create positive incentives for permitting reform, the federal government could take a punitive approach by denying resources to states that fail to act. Roundtable participants conceded that a "stick" approach could be effective but were broadly skeptical of this idea. Most noted that it was unlikely to be politically viable in Congress. Participants also pointed out that developers often try to avoid states with difficult permitting processes anyway, so additional federal disincentives might not prompt these states to change in any case.

OPTION: DEADLINE ENFORCEMENT

Participants also discussed options for better enforcing statutory or administrative timelines for completing permitting processes. The new enforcement mechanism, which was newly created along with such timelines as part of the FRA relies on a "right of action" by project developers to take federal agencies to court to compel compliance with permitting deadlines. Some suggested this mechanism might have limited impact, especially if developers are reluctant to sue the agencies that they rely on to issue permits.

Fee paid to project sponsor

Another option discussed at the roundtable would be to set a fine, of a specified amount, that would be paid to the project sponsor by the permitting agency for every day that elapses post-deadline without an agency action/decision. While some participants saw the logic of compensating project sponsors for delays, which are often costly, there was also recognition that fines might not have much of an impact on agency decisions unless the fines are taken directly from the permitting budget. That, however, would have the effect of reducing the resources available for permitting, which could further slow the process.

Automatic approval

Another idea that some participants endorsed was to deem a project approved if an agency misses a permitting deadline. This option carries obvious risks and would require significant safeguards so that applicants, and agencies who want to avoid conflict, do not game the system or deliberately slow-walk the process. While some felt this idea was worth vetting, most participants felt its risks outweighed its potential benefits. Even supporters recognized that automatic permitting is probably impractical and very unlikely to garner enough congressional support to become law.

Increased transparency

The FRA now requires that agencies submit a report to Congress if they miss a deadline, detailing why the deadline was not met. Recognizing that deadlines are difficult to enforce, participants agreed that increased transparency and further reforms could be effective in reducing delays. One idea was to require agencies to provide frequent reports to Congress on their performance in meeting deadlines. This would shine a light on poor performers and give legislators an opportunity, through the appropriations process for example, to take action to address continued poor performance. There was broad support among participants for increased transparency and reporting as initial steps to encourage improved performance.

OPTION: PROVIDE AGENCIES WITH ADDITIONAL RESOURCES AND FUNDING

Participants discussed the need to ensure that agencies have adequate funding, resources, staff, and technology to efficiently review all projects that require permitting. There was strong agreement that agencies must have sufficient resources to keep up with growing demands on the permitting process. However, some participants felt that resources should be contingent on reform and performance. These participants had concerns about simply throwing more funding at the current federal permitting system. But they could support the provision of resources in conjunction with the implementation of permitting reforms, recognizing that support for an effective permitting system is a worthwhile investment.

Conclusion

Momentum for improving the federal permitting system is undeniably strong, with bipartisan support for reforms that would reduce delays and costs without compromising protections for the environment or communities. Looking ahead, the importance of building on reforms introduced in the Fiscal Responsibility Act of 2023 to address urgent infrastructure needs and meet ever-growing demand for clean energy is clear.

BPC remains dedicated to fostering meaningful discussions and collaborations in the area of permitting reform. Our ongoing roundtable series will continue to provide a forum for vigorous debate and dialogue on the best steps forward. The next issue brief in this series will focus on permitting reforms that specifically target certain types of technologies, rather than reforms that are generalizable across a wide variety of energy infrastructure projects.

Endnotes

i Fishman, X., Jacobs, J., & Minott, O. (2023, June 02). How Does the Fiscal Responsibility Act Reform Permitting and Environmental Review? Bipartisan Policy Center. Available at: https://bipartisanpolicy.org/blog/fiscal-responsibility-act-permit-reform/.

ii Fishman, X., Jacobs, J., Minott, O., Tesfaye, M., & Winkler, A. (2023, May 09). Empowering Communities while Streamlining Clean Infrastructure Permitting. Bipartisan Policy Center. Available at: https://bipartisanpolicy.org/blog/clean-infrastructure-permitting/.

iii Fishman, X., Hall, M., Jacobs, J., & Pickford, L. J. (2023, July 24). Linear Infrastructure: Options for Efficient Permitting of Transmission and Pipeline Infrastructure. Bipartisan Policy Center. Available at: https://bipartisanpolicy.org/explainer/efficient-permitting-of-linear-infrastructure/.

iv Fishman, X., Hall, M., Jacobs, J., Minott, O. (2023, Sept. 18). Reforming Judicial Review for Clean Infrastructure: A Bipartisan Approach. Bipartisan Policy Center. Available at: https://bipartisanpolicy.org/explainer/reforming-judicial-review-for-clean-infrastructure-a-bipartisan-approach/.

v Congressional Review Act. (n.d.). U.S. Government Accountability Office. Available at: https://www.gao.gov/legal/other-legal-work/congressional-review-act#:~:text=The%20CRA%20defines%20a%20major,%3B%20or%20(3)%20significant%20adverse.

vi Mackenzie, A. (2023, May 9). Environmental Assessment Reform. Institute for Progress. Available at: https://progress.institute/environmental-assessment-reform/.