

## Permitting reforms, finally

### One bright spot in the debt-ceiling compromise

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#### Introduction

The United States has one of the world's most burdensome, time-consuming, and unpredictable systems for authorizing major infrastructure projects. The centerpiece of that system is the National Environmental Policy Act (NEPA), which since 1971<sup>1</sup> has required agencies to study the environmental impacts of “major federal actions significantly impacting the human environment.”<sup>2</sup> With court rulings in the 1970s that opened the floodgates for litigation, a cottage industry arose, consisting of lavishly funded environmental advocacy groups suing to stop virtually every pipeline and highway and export facility in America over the most minor omissions in Environmental Impact Statements (EISs) that often run into the thousands of pages.

Taking an average of 4.5 years and consuming tens of thousands of agency staff-hours for each EIS,<sup>3</sup> the “NEPA process” has become a major bottleneck, depriving Americans of modern infrastructure, constricting the supply of energy and transportation, and putting any hope of a transition to low-carbon energy sources hopelessly out of reach. A bipartisan consensus is slowly building that the system must be fixed.

After several attempts to enact permitting reform, major changes have finally been enacted in the Fiscal Responsibility Act of 2023, H.R. 3746, which was signed into law on June 3, 2023.<sup>4</sup> The most significant of those changes is a set of amendments to NEPA itself—the first time in its history that NEPA has been significantly amended. The permitting reform title also included legislative approval of the Mountain Valley Pipeline, a study on integration and cross-subsidization of electrical dispatch and transmission, and inclusion of energy storage among the sectors eligible for expedited permitting process under Title 41 of the FAST Act (“FAST-41”).

This OnPoint summarizes and assesses the most important changes.



Sen. Joe Manchin (D, W.V.) tours Mountain Valley Pipeline Distribution Yard in Raleigh County.

#### Key NEPA Provisions

- **EIS drafting requirement now applies only to lead agency.** Under the original version of NEPA, the core requirement to prepare an environmental impact statement (EIS) applied to all agencies: Sec. 102(2)(C) provided that “all agencies of the Federal Government shall [...] include in every [proposal for] major federal actions significantly affecting the quality of the human environment, [an EIS] by the responsible official[....]” H.R. 3746 amends this language so that now the EIS need only come from the agency with the greatest scope of review over a project (lead agency). While every agency must still include an EIS in every proposal for major federal action significantly impacting the environment, only the lead agency is charged with preparing the EIS. Other aspects of H.R. 3746 give the lead agency significant control over the NEPA process.

<sup>1</sup> NEPA.GOV web site, CEQ NEPA Regulations, <https://ceq.doe.gov/laws-regulations/regulations.html> (accessed June 12, 2023)

<sup>2</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq., <https://www.energy.gov/nepa/articles/national-environmental-policy-act-1969> (accessed June 12, 2023).

<sup>3</sup> Council on Environmental Quality. (2020, June 12). Environmental impact statement timelines (2010-2018). Washington, DC: Executive Office of the President.

<sup>4</sup> The Fiscal Responsibility Act of 2023, H.R. 3746, <https://www.congress.gov/bill/118th-congress/house-bill/3746> (accessed June 12, 2023)

- **Reasonably foreseeable standard for impacts that must be studied.** H.R. 3746 also changes NEPA Sec. 102(2)(C) to create a “reasonably foreseeable” standard for the impacts and alternatives that must be studied. This is a significant change, because the biggest expansion in the scope of NEPA in recent years has been a series of court rulings that require agencies to study impacts far upstream and far downstream from the agency action, including climate-related impacts. “Reasonably foreseeable” is a concept borrowed from the law of torts, in which liability for negligence lies when the defendant’s failure in his duty of care was not just the cause-in-fact of the injury but also its proximate cause. Proximate causation is limited to those injuries that are reasonably foreseeable. This is one of several provisions adopted from the 2020 NEPA rule revision and was borrowed from Justice Thomas’s majority opinion in *Department of Transportation v. Public Citizen*.<sup>5</sup> Agencies and developers should now be able to avail themselves of proximate causation as developed in the common law of torts to limit the downstream and upstream effects that must be considered in the NEPA process. CEQ may still be able to issue guidance that requires agencies to account for greenhouse gas emissions, but it will be more difficult for courts to say that any such accounting is required by NEPA – a crucial distinction for the Federal Energy Regulatory Commission (FERC) in the short term, and for all agencies in the long term.
- **Limitation on alternatives that must be considered.** NEPA originally required the agency to study “alternatives” to the proposed agency action but gave little guidance on which alternatives the agency should consider. The result has been a huge waste of time both in the NEPA process and the ensuing litigation. Under the new language in Sec. 102(2)(C) alternatives that the agency is required to consider are those that constitute: (1) a “reasonable number”; (2) are technically and economically feasible; (3) are within the jurisdiction of the agency; (4) meet the purpose and need of the proposed agency action; and (5) meet the goals of the applicant.

This is a significant change. One of the biggest contributors to the excessive length of NEPA documents is that agencies spend hundreds of pages studying the impacts of a broad range of alternatives that the developer can readily exclude for business reasons, and that the agency can often readily exclude for policy reasons. But they study them anyway, because of the lack of clarity of what alternatives the law required them to study. A major problem has been the systematic conflation of alternatives to the “agency action” with alternatives to the project itself. NEPA only required the former, but because of the loose wording of CEQ’s 1978 NEPA Regulation,<sup>6</sup> agencies have wasted an enormous amount of time studying the latter. Sometimes the underlying action statute requires the study of project alternatives, but NEPA does not require it. The change to Sec. 102(2)(C) makes this clear.

- **Significantly empowers lead agency.** The legislation requires a lead federal agency to be designated in most cases and gives that agency considerable discretion to designate cooperating agencies, impose permitting timetables on their participation in the NEPA process, and take or not take their comments into account. Together with the change in Sec. 102(2)(C) that makes the core NEPA requirement an obligation of the lead agency rather than every agency, this significantly diminishes the role of cooperating agencies and how much time they will be required to spend on NEPA reviews.<sup>7</sup>
- **Statement of purpose and need.** The legislation requires NEPA documents to contain a statement of purpose and need and clarifies that it is the purpose and need for the agency action, not the purpose and need for the underlying project, that matters in the NEPA process. This helps provide clarity and a crucial limiting principle on the alternatives that need to be considered and could have an immediate impact at FERC, where it might limit the enormous resources that FERC spends studying routing alternatives, system alternatives, etc., to project proposals.

<sup>5</sup> 541 U.S. 752 (2004).

<sup>6</sup> Council on Environmental Quality, Executive Office of the President, “National Environmental Policy Act—Regulations: Implementation of Procedural Provisions,” Final Regulations, 43 Fed. Reg. 55978 <https://ceq.doe.gov/docs/laws-regulations/FR-1978-11-29-43-FR-55978-CEQ-NEPA-Regulations-NOFR.pdf> (accessed June 12, 2023).

<sup>7</sup> H.R. 3746 provides for “One Document”: “[T]he lead and cooperating agencies shall evaluate the proposal in a single environmental document.” This is different than the HR 2811 version of the “One Document” provision and is potentially inconsistent with the other changes that make the lead agency the focus of the EIS requirement.

- **Time limits.** The lead agency must now complete the EIS in two years, and an EA in one year. The clock starts ticking on the earlier of (a) the date that the agency determines that an EIS or EA is required for the proposed action, (b) the date on which the agency notifies the applicant that its application is complete, and (c) the date on which the agency publishes a notice of intent to prepare an EIS or EA.

This is potentially the least workable element of the permitting reform. If the project proponent files even a preliminary permit application, the agency will often know immediately that an EIS is required. Does the two year clock start then? If so, that would require agencies to get through both pre-application and the NEPA process in two years.

The key question will now be: At what point in time is there a “proposed agency action”? That will likely require courts to flesh out the definition of “proposal” for agency action. H.R. 3746 includes a definition of “proposal”, but it is not likely to prove very helpful: “The term ‘proposal’ means a proposed action at a stage when an agency has a goal, is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and can meaningfully evaluate its effects.” On what facts, prior to publication of the notice of intent to publish an EIS, could one argue that the agency “has a goal” or is “actively preparing to make a decision” on alternatives?

The issue with time limits in NEPA is always who controls the starting gun. If it is the agency, then a real time limit is almost impossible to achieve. An effective time limit requires putting the project proponent in charge of when the clock starts ticking.

- **Page limits.** EISs are limited to 150 pages and EAs to 75 pages (350 and 150, respectively for projects of “extraordinary complexity”). These limits do not include appendices. This is a potential weakness in the permitting reform. If the page limits don’t include appendices, then there may be no real page limits. Enforcing the new page limits will require establishing the principle that the sufficiency of the EIS is reinforced by, but does not require, any of the matter in the appendices.

- **Project proponents can prepare their own EISs.** The legislation authorizes project proponents to draft their own EISs, subject to agency verification and adoption. One of the greatest sources of delay and uncertainty in the NEPA process has been the requirement, invented by the 1978 CEQ Regulation, that the agency prepare the EIS. The change allows developers to write the EIS for the agencies where an EIS is required, subject to guidance, verification, and adoption by the agency. This is a substantial improvement, which gives the project proponent much more control over the permitting timetable for any project that requires an EIS. The change brings U.S. environmental assessment procedures in line with the general practice across developed industrial economies.<sup>8</sup> It will also provide a basis for future enhancement of then NEPA process, such imposing time limits on agency responses to EIS draft submissions.

- **Major federal action.** In the years after NEPA was first enacted, there was considerable discussion about whether the word “major” in “major federal action significantly impacting” the environment (under Section 102(2)(C)) created a separate standard that needed to be met apart from “significantly impacting” for NEPA’s core EIS requirement to be triggered. The 1978 CEQ Regulation of NEPA tried to settle the debate by providing that if a federal action had a “significant impact” on the environment, it was ipso facto a “major” federal action. This arguably violated an important canon of construction, which is that words in a statute should not be presumed to mean nothing.

In a new definition of “major federal action” H.R. 3746 makes clear that “major” is a separate standard that must be met independently of “significantly impacting” for NEPA to be triggered: “The term ‘major Federal action’ means an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility.” The legislation appears to give the agency considerable discretion in determining whether an action is “subject to substantial federal control” but the precise language seems somewhat circular. A federal “action” will always be “subject to substantial federal control and responsibility.”

<sup>8</sup> See, e.g., Australia’s Environmental Assessment Process under the Environmental Protection and Biodiversity Act (summarized in “EPBC Act—Environmental Assessment Process” fact sheet, Australian Govt. Department of Sustainability, Environment, Water, Population and Communities, [https://www.agriculture.gov.au/sites/default/files/documents/assessment-process\\_1.pdf](https://www.agriculture.gov.au/sites/default/files/documents/assessment-process_1.pdf) (Accessed June 12), 2023).

It might have made more sense to apply the limitation “subject to substantial Federal control or responsibility” to the underlying project, or better still to the environmental impacts of the action. Agencies may be tempted to argue that “action” is synonymous with “project,” but conflating the federal action with the underlying project has been one of the greatest sources of excessive page length in NEPA documents for decades. The best way to give the new definition of “major federal action” practical effect is to read “action” as comprehending the outcome and impacts of the action. Hence an agency action related to a project whose ultimate outcome or impacts are under the control of a state government would not qualify as a “major federal action.”

## Other provisions

- **Mountain Valley Pipeline.** Requires all necessary federal permits for the Mountain Valley Pipeline to be issued within 21 days after the president signs the legislation into law. This provision was crucial to gain the support of Sen. Joe Manchin (D-WV), head of the powerful U.S. Senate Committee on Environment and Public Works.
- **Interregional electric transmission.** Does not include major transmission provisions from previous legislative proposals (such as last fall’s “Manchin bill”) that would have authorized FERC to accelerate transmission buildout with cross-subsidies.<sup>9</sup> Climate advocates had been pushing for such a scheme to address the lack of sufficient transmission capacity for any net renewable energy transition,<sup>10</sup> which would require at least 600,000 miles of new transmission line miles.<sup>11</sup> Instead, the bill requires a series of studies on capacity transfers among regional grid operators, and legislative recommendations.
- **Energy storage a “Covered Project.”** Includes energy storage projects among the statutory covered sectors under FAST-41.

## Conclusion

The inclusion of permitting reforms in the debt ceiling legislation is a step towards addressing the inefficient systems that have hindered infrastructure development in the United States. The amendments to the National Environmental Policy Act aim to streamline the process by focusing on the lead agency, establishing a reasonably foreseeable standard for impacts, and limiting the alternatives that must be considered. Empowering the lead agency, implementing time limits, and allowing project proponents to draft their own Environmental Impact Statements will further expedite the process. These reforms offer a promising framework for balancing environmental stewardship with the need for modern infrastructure.

<sup>9</sup> See e.g. Senate Committee on Energy and Natural Resources, Democratic News, “Manchin Releases Comprehensive Permitting Reform Text To Be Included In Continuing Resolution,” <https://www.energy.senate.gov/2022/9/manchin-releases-comprehensive-permitting-reform-text-to-be-included-in-continuing-resolution> (accessed June 12, 2023)

<sup>10</sup> Letter to President Joe Biden from Center for American Progress, et al, Dec. 15, 2022, [https://earthjustice.org/wp-content/uploads/transmission\\_principles\\_12.15.22.pdf](https://earthjustice.org/wp-content/uploads/transmission_principles_12.15.22.pdf) (accessed June 12, 2023) .

<sup>11</sup> Mario Loyola, “Unleashing America’s Energy Abundance,” Sept. 29, 2022 (accessed June 12, 2023).



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