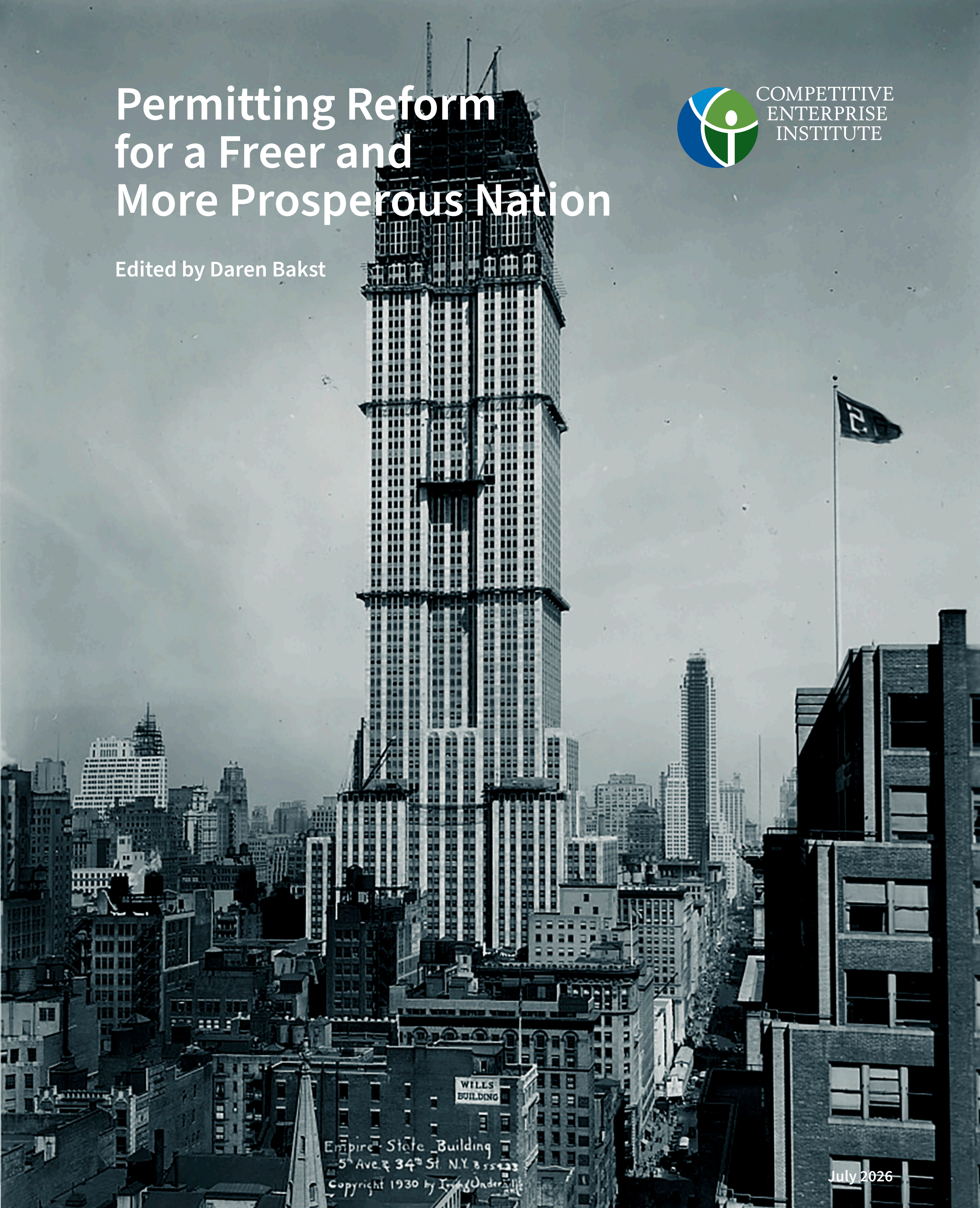

Permitting Reform for a Freer and More Prosperous Nation

Edited by Daren Bakst

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Cover: Empire State Building under construction, ca. 1930. The Empire State Building was built in 410 days from 1930 to 1931. Photograph by Irving Underhill. Library of Congress.

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The Importance of Permitting Reform

For too long, permitting requirements have made it difficult to build and further develop our nation. This has certainly not always been the case. The Empire State Building was built in just 410 days,[1] and the Hoover Dam in about five years.[2] Such results would be a pipe dream now, even though our nation has the know-how to build such projects even faster. The biggest obstacle to achieving these results is the nation's permitting system.

The extent of the red tape is mind-boggling. An interstate natural gas pipeline must be approved by as many as seven federal agencies and comply with up to eight federal statutes.[3] The mining industry reports that securing all the necessary permits for a new mine can take seven to ten years.[4] Many projects never make it to completion. Others are never even proposed because of anticipated permitting costs and delays. Meanwhile, many other nations impose considerably less red tape on such undertakings, undercutting American competitiveness.[5]

This is unacceptable.

Our nation's development and competitiveness, and the well-being of Americans, require critical infrastructure that meets basic needs, such as water and energy projects. However, it is not just major projects that can affect Americans' well-being. For example, the ability of private property owners to freely and productively use their land for ordinary activities is also a must, from farmers growing crops to homebuilders increasing the housing supply.

There is a growing consensus that the federal permitting process is, in many ways, impeding the nation's economic potential. America has vast reserves of energy and minerals that it does not develop, including reserves that could be developed efficiently. We possess both the resources and the know-how to solve most transportation infrastructure challenges, but millions of Americans routinely get stuck in traffic jams. There is no shortage of land, construction materials, or willing homebuilders, yet there is insufficient housing in much of the country. The list of necessary projects goes on. Many are ready to break ground but are delayed or blocked entirely by federal permitting requirements.

Most federal permitting programs are more than 50 years old, and the process has expanded well beyond the original intent. Laudable goals, such as avoiding damage to the environment or to historic sites, have been misused to obstruct projects whose benefits far outweigh any real risks. Anti-project activists talk openly about using delaying tactics, including litigation, as a means to get project developers to simply give up.[6]

The federal permitting process is long overdue for comprehensive reform. Fortunately, federal lawmakers on both sides of the aisle are starting to appreciate the problems with permitting. Currently, there are congressional efforts to advance bipartisan permitting reform. Therefore, now is an opportune time for those concerned about the permitting system to advance genuine and meaningful reforms.

1 "Empire State Building Facts," Empire State Building, accessed June 26, 2026, https://www.esbnyc.com/about/facts-figures; "How the Empire State Building Was Built in Record Time," *History*, October 10, 2024, https://www.history.com/articles/empire-state-building-construction.

2 "The Colorado River and Hoover Dam Facts and Figures," U.S. Bureau of Reclamation, February 7, 2017 [11.4], https://www.usbr.gov/lc/region/pao/faq.html; "Hoover Dam History: When Was Hoover Dam Built?" *Travel Nevada*, accessed June 26, 2026, https://travelnevada.com/hoover-dam/history-and-construction.

3 Interstate Natural Gas Association of America, *Pipeline Permitting*, https://ingaa.org/wp-content/uploads/2019/01/34233.pdf.

4 National Mining Association, "Delays in the U.S. Mine Permitting Process Impair and Discourage Mining at Home," infographic, accessed May 13, 2026, https://nma.org/wp-content/uploads/2021/05/Infographic_SNL_minerals_permitting_5.7_updated.pdf.

5 NationMaster, "United States – Time Needed to Deal with Construction Permits," subsection "How Does United States Rank in Time Needed to Deal with Construction Permits?" accessed May 13, 2026, https://www.nationmaster.com/nmx/timeseries/united-states-time-needed-to-deal-with-construction-permits#country-ranking; National Mining Association, "Delays in the U.S. Mine Permitting Process Impair and Discourage Mining at Home"; and National Association of Manufacturers, "$8 Billion a Year: The Cost of America's Broken Permitting System to Manufacturers," press release, March 19, 2026, https://nam.org/8-billion-a-year-the-cost-of-americas-broken-permitting-system-to-manufacturers-36024.

6 Thomas F. King, *Saving Places That Matter: A Citizen's Guide to the National Historic Preservation Act* (Left Coast Press, Inc., 2007), p. 18. King notes that "the power of Section 106 [of the National Historic Preservation Act] is largely the power to delay a project and make it more costly than its proponents can tolerate."

Such reforms would help ensure federal laws do not unnecessarily delay or block development, including major infrastructure projects, or unreasonably restrict the use of private property.

This report was developed in conjunction with a wide range of experts who are committed to advancing freedom and human prosperity. It is intended to lay out what genuine permitting reform should include in any bipartisan permitting package.

Part 1 lays out 11 principles that should inform permitting reform.

Part 2 details specific reforms of major federal laws affecting permitting.

Finally, Part 3 discusses an issue that, for better or worse, will be part of any permitting reform discussion: electricity transmission reform.

Part 1: 11 Principles for Permitting Reform

11 Principles for Permitting Reform

by Daren Bakst

It is critical to consider the overarching principles that should inform any permitting legislation. There are many ways to package the following principles, and they are by no means exhaustive, but they do provide a useful framework for thinking through reform efforts.

1. Reform should be broad-based in terms of projects and industries

Permitting reform should apply across the economy and not be limited to specific industries or technologies. In other words, the government should not pick winners and losers. Too often, lawmakers want reform, but only for the technologies they favor. Policymakers should remove both government-created obstacles that apply to particular industries and technologies and those that apply across the economy.

Relatedly, permitting reform should not be limited to projects that the government deems critical. This is yet another way to pick winners and losers and is highly subjective. There are plenty of projects that may not be deemed critical to the country but are affected by government-created obstacles. Property owners pursuing such projects should not be unreasonably prevented from developing and using their private property as they deem appropriate.

2. Reform should be broad-based in terms of laws

Too often, permitting reform is conflated with solely reforming the National Environmental Policy Act (NEPA).[7] NEPA reform is a part of the equation—a small part. This is especially true since the US Supreme Court limited many NEPA abuses in the 2025 case, *Seven County Infrastructure Coalition v. Eagle County*.[8] (This case will be discussed in greater detail in the NEPA section of this report.)

NEPA is not a permitting law. It is a procedural statute requiring environmental reviews of federal actions. Federal statutes such as the Clean Water Act (CWA)[9] and the Clean Air Act (CAA)[10] have permitting requirements that trigger NEPA reviews.

Regulated parties must comply with both the underlying requirements of these statutes and the NEPA process. Policymakers need to address these underlying requirements. The key point is that *if the number of triggers can be reduced, then the burden of both the triggering statutes and NEPA can be reduced.*

Numerous statutes beyond NEPA need reform. Those include the CAA, the CWA, the Endangered Species Act (ESA),[11] and the National Historic Preservation Act (NHPA).[12] Each of these statutes can be weaponized against projects, private actions, and even government programs themselves. Reforms must be thorough and expansive to prevent this weaponization. NEPA reforms alone would only encourage those who would stop projects to find new regulations to exploit.

3. Reform should not occur within a vacuum

Reforming permitting laws to make it easier to develop projects is important. However, permitting reform can be undermined if the federal government simultaneously seeks to kill off the specific types of projects that would benefit from permitting reform. For example, permitting reform could make it easier to build new natural gas plants, but this is little comfort if the Environmental Protection Agency (EPA) has promulgated a rule that kills off

7 National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970), https://www.congress.gov/bill/91st-congress/senate-bill/1075/text.

8 *Seven County Infrastructure Coalition v. Eagle County* 605 U.S. 168 (2025).

9 Clean Water Act, Pub. L. 92-500, Stat. 816 (1972), https://www.congress.gov/bill/92nd-congress/senate-bill/2770/text.

10 Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, (1970), https://www.congress.gov/bill/91st-congress/house-bill/17255/text?overview=closed; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977), https://www.congress.gov/bill/95th-congress/house-bill/6161/text; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990), https://www.congress.gov/bill/101st-congress/senate-bill/1630/text; Environmental Protection Agency, "Evolution of the Clean Air Act," last modified October 22, 2025, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act.

11 Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (1973), https://www.congress.gov/bill/93rd-congress/senate-bill/1983.

12 National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966), https://www.congress.gov/bill/89th-congress/senate-bill/3035/titles.

the future of these power plants through infeasible requirements. Such was the Biden administration's 2024 power plant rule.[13]

Reform efforts need to recognize that federal regulatory actions under one law can negate the benefits of reforming another law. Subsidies can also negate the benefits of permitting reform. Federal subsidies can incentivize and disincentivize certain projects. So, even if the permitting system on the surface does not pick winners and losers, subsidies can ensure that the winners and losers are predetermined. Realistically, not all subsidies and regulations that undermine permitting reform can be addressed in a single permitting bill. However, the most egregious policies should be addressed, such as rules that will help kill off industries.

4. Reform should create clear and objective standards and predictability

Many statutes, like the CWA, have created significant problems in large part because they lack clear and objective standards. Subjective and vague interpretations of these laws by agencies lead to inconsistent application of statutes and confusion for regulated parties. Statutory changes should be as clear and objective as possible to limit uncertainty. Congress should establish the criteria for moving projects forward. Lawmakers should limit agencies' discretion, especially to ensure that timely project approval does not depend on the whim of an agency or a regional office or an individual within that agency. These solutions can help increase predictability, which is a must for project development. Without that predictability, businesses and property owners will forgo projects.

5. Reform should ensure only genuine harms are considered

When examining potential environmental effects of projects, agencies should consider only likely effects that result in concrete harm and are directly connected to the specific project. The alleged harm should not be speculative, distant in time or place (such as something far off in the future or from downstream effects), or otherwise not reasonably foreseeable. The project should be the proximate cause of the alleged harm. And that harm, by itself, should be necessary to address.

6. Reform should be concerned with fairness

Property owners should not face penalties for using their private property without a permit if a reasonable person would not know that a permit is needed. This problem is prevalent with the CWA and is exacerbated by the imposition of unreasonably harsh penalties. The federal government should also not be able to retroactively revoke a lawfully issued permit or pre-judge a permit before an application is even filed.

If third parties can intervene in court regarding permits, there should be reasonable time limits for bringing such actions and for the courts to reach a resolution. These third parties should also be required to show that they would incur genuine, discrete, and concrete injuries connected to a specific project.

7. Reform should respect property rights

As indicated by the words *permitting* and *permit*, property owners must get permission to use their property. This reality should ring alarm bells. Environmental policies can too often ignore serious costs and tradeoffs, including restrictions on private property rights. Environmental policy is not immune from constitutional constraints on governmental powers. These costs and tradeoffs should be given significant weight. Individual rights and freedom should not be trampled to protect the environment.

8. Reform should not prioritize the environment over human welfare

Protecting the environment should not take priority over basic human needs. But environmental policies often ignore those needs, such as when they delay or block the development of critical infrastructure providing clean drinking water or reliable electricity. At a minimum, obvious and major threats to human health and welfare should not be secondary to alleged negative effects on the environment.

9. Reform should respect the role of states

When Congress passed major federal environmental statutes like the CWA and the CAA, it recognized the important role that states play in environmental protection. Yet, too many policymakers currently appear

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[13] Environmental Protection Agency, "New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule," final rule, *Federal Register* 89, no. 91 (May 9, 2024), pp. 39798–40064, https://www.federalregister.gov/documents/2024/05/09/2024-09233/new-source-performance-standards-for-greenhouse-gas-emissions-from-new-modified-and-reconstructed.

to believe that states will not provide adequate environmental protection without federal involvement.

Reform efforts should return to the cooperative federalism approach and recognize that states and local governments are often best positioned to decide which environmental protections best meet their needs. States are also often better than the federal government at achieving positive environmental outcomes and conducting environmental analyses to inform project development. This principle does not mean that states should be allowed to do whatever they want, such as ignoring the rule of law or unnecessarily blocking projects, but it does mean that states should be generally respected.

10. Reform should reduce overlap and costs

Federal permitting should not be the complicated mess of duplicative laws, overlapping requirements, unreasonable delays, and excessive costs that exists now. Speed is a good thing in project development. Efficiency and simplicity can coexist with adequate environmental protection.

A single agency should take the lead on a project, and pre-existing and equivalent environmental analyses regarding the project should be sufficient. The permitting process should not be viewed as a means to block or delay projects. Instead, the permitting process should protect the environment while quickly and inexpensively approving projects.

11. Reform should be meaningful

Achieving *meaningful* permitting reform will be a challenge. It is possible that lawmakers will introduce weak legislation sold as strong permitting reform. This is insufficient since the goal is to get something that makes a real difference. A bill that simply appeases a handful of special interests or does a little bit just to claim something has been done is also insufficient. Meaningful reform certainly does not mean NEPA reforms combined with flawed transmission policy. Meaningful reform will address the flaws in our permitting system consistent with the principles outlined here.

Part 2: Statute-by-Statute Analysis for Permitting Reform

1. Clean Air Act Reforms to Include in Permitting Reform

by Daren Bakst

The Environmental Protection Agency by itself accounts for most of the federal government's monetized regulatory costs—the estimated dollar value of the costs of regulation.[14] Given the large number of federal agencies, this is quite an accomplishment. Almost all of these EPA costs are attributed to the agency's Office of Air and Radiation and its Clean Air Act (CAA) regulations.[15]

A major source of these costs is connected to the National Ambient Air Quality Standards (NAAQS). Every five years, the EPA must review and, if appropriate, revise NAAQS, which are the standards for the six criteria pollutants: carbon monoxide, lead, nitrogen dioxide, ground-level ozone, particulate matter, and sulfur dioxide.[16]

The EPA sets these standards, and then states are required to develop a "State Implementation Plan" (SIP) to attain them. This plan regulates emission sources in the state to ensure the state meets the standards and is not "significantly contributing" to nonattainment in neighboring states.[17] As part of this process, states must impose controls on existing sources to the extent necessary to meet NAAQS and also require state construction permits for new and modified sources.[18]

A major form of permitting under the CAA[19] is through the New Source Review (NSR) program, which covers three different permits. As explained by the EPA:

1. Prevention of Significant Deterioration (PSD) permits are required for new major sources or a major source making a major modification in areas that meet the National Ambient Air Quality Standards;

2. Nonattainment NSR permits which are required for new major sources or major sources making a major modification in areas that do not meet one or more of the National Ambient Air Quality Standards; and

3. Minor source permits.[20]

NAAQS and CAA permitting requirements should be evaluated based on current air quality. The United States has some of the cleanest air in the world.[21] The air is so clean that decreasing criteria pollutants' air concentration levels without incurring unreasonable costs is difficult for the states. In some areas of the country,[22] complying with certain federal standards (such as ozone) may even be impossible because of background levels (the concentration levels that exist due to natural and foreign sources of the pollutants).

Fine particulate matter ($PM_{2.5}$) is a major focus of the NAAQS process (in addition to ozone). Yet in many areas, very little can be done about $PM_{2.5}$ emissions because over 80 percent of these emissions in the United States come from non-point sources like wildfires and road dust.[23]

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14 Daren Bakst, "Modernizing Air Regulation," in *Modernizing the EPA*, ed. Daren Bakst and Marlo Lewis (Competitive Enterprise Institute, March 6, 2025), pp. 90–91, https://cei.org/wp-content/uploads/2025/03/ModernizingtheEPA_v2-chap2.pdf.

15 Bakst, "Modernizing Air Regulation," pp. 90–91.

16 Environmental Protection Agency, "Reviewing National Ambient Air Quality Standards (NAAQS): Scientific and Technical Information," accessed May 4, 2026, https://www.epa.gov/naaqs.

17 The EPA will step in and issue federal implementation plans in certain situations. See: Environmental Protection Agency, "Basic Information about Air Quality FIPs," last modified August 6, 2025, https://www.epa.gov/air-quality-implementation-plans/basic-information-about-air-quality-fips.

18 Bakst, "Modernizing Air Regulation," pp. 104–105, https://cei.org/wp-content/uploads/2025/03/ModernizingtheEPA_v2-chap2.pdf.

19 Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), https://www.congress.gov/bill/91st-congress/house-bill/17255/text?overview=closed; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, (1977), https://www.congress.gov/bill/95th-congress/house-bill/6161/text; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990). https://www.congress.gov/bill/101st-congress/senate-bill/1630/text. To learn more about the history of the Clean Air Act, see EPA, "Evolution of the Clean Air Act."

20 Environmental Protection Agency, "Learn About New Source Review," accessed May 4, 2026, https://www.epa.gov/nsr/learn-about-new-source-review.

21 Daren Bakst, "Modernizing Air Regulation," pp. 85, 88.

22 David D. Parrish, Ian C. Faloona, and Richard G. Derwent, "Maximum Ozone Concentrations in the Southwestern US and Texas: Implications of the Growing Predominance of the Background Contribution," *Atmospheric Chemistry and Physics* 25, no. 1 (January 2025), pp. 263–281, https://doi.org/10.5194/acp-25-263-2025.

23 US Chamber of Commerce, "Here's Why the EPA's Proposed Air Quality Standards Will Cause Permitting Gridlock Across our Economy," fact sheet, November 7, 2023, https://www.uschamber.com/assets/documents/gei/Air-Quality-Fact-Sheet_20US20Chamber20GEI20Final2011.3.23.pdf.

Despite this fact, in 2024 the Biden administration tightened the standards for $PM_{2.5}$ to a far stricter level, reducing it from 12 to 9 micrograms per cubic meter.[24] This standard severely threatens CAA permitting in many areas across the country. CAA expert Lucinda Minton Langworthy, counsel at Hunton, explained before the Biden $PM_{2.5}$ rule was finalized:

> The implications of such permitting restrictions are significant. Economic development would be impeded in much of the country. Infrastructure projects could be delayed, if not halted, even in areas meeting the NAAQS. Manufacturers would be motivated to consider siting their facilities outside of the United States in spite of current policies that promote bringing manufacturing back to the United States.[25]

Marty Durbin, Senior Vice President for Policy at the US Chamber of Commerce, said after the rule was finalized:

> Tightening the NAAQS $PM_{2.5}$ standard will grind permits to a halt for a large portion of our country. EPA's new rule is expected to put 569 counties out of compliance and push many others close to the limit, which threatens economic growth. Compliance with the new standard will be very difficult because 84% of emissions now come from non-industrial sources like wildfires and road dust that are costly and hard to control. While EPA states there are exemptions for wildfires, 70% of those requests haven't been granted in the past, and the process for seeking one is time-consuming and difficult for states to manage.[26]

A three-judge panel of the DC Circuit recently upheld the Biden $PM_{2.5}$ standards,[27] although petitions for rehearing or further review may still be sought. Even if any challenges to the standards were to succeed, there will continue to be regular efforts, depending on the policy and political outlook of the incumbent administration, to make the ozone and $PM_{2.5}$ standards stricter. Those efforts can have devastating effects on infrastructure projects and economic development.

Reform recommendations for Congress

Most of the following recommendations for Congress relate to NAAQS and the NSR program. However, as explained in Permitting Principle 3 (see part I), permitting reform should not be formulated in a vacuum such as by ignoring regulations that would destroy or severely weaken industries that need permits.[28] The first recommendation addresses this specific concern, and the remaining recommendations focus on NAAQS and the NSR program.

Prohibit rules that intentionally or in effect ban or severely reduce types of electricity generation. On the surface, there is wide agreement to avoid picking winners and losers in permitting reform. However, improving a broad environmental review statute like NEPA so that it does not pick winners and losers is not going to mean much for an industry whose very existence is being intentionally targeted by the federal government under more focused statutes. A non-existent industry has little need for permitting reform.

Unfortunately, the EPA has been using the CAA to go after specific industries, such as coal. The Obama Administration's Clean Power Plan sought to change the country's electricity mix by reducing coal's share of electricity generation from 38 percent to 27 percent by 2030.[29] In 2008, President Barack Obama infamously stated in reference to his cap-and-trade plan (not the Clean Power Plan), "If somebody wants to build a coal-fired power plant, they can. It's just that it will bankrupt them."[30]

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24 Environmental Protection Agency, "Reconsideration of the National Ambient Air Quality Standards for Particulate Matter," final rule, *Federal Register* 89, no. 45 (March 6, 2024), pp. 16202–16596, https://www.federalregister.gov/documents/2024/03/06/2024-02637/reconsideration-of-the-national-ambient-air-quality-standards-for-particulate-matter.

25 Lucinda Minton Langworthy, "New Challenges to Permitting Under the Clean Air Act," *The Nickel Report* (blog), Hunton Andrews Kurth, December 4, 2023, https://www.hunton.com/the-nickel-report/new-challenges-to-permitting-under-the-clean-air-act.

26 US Chamber of Commerce, "U.S. Chamber: New Air Quality Regulations Will Cause Permitting Gridlock," news release, February 7, 2024, https://www.uschamber.com/energy/u-s-chamber-says-new-particulate-matter-standards-will-cause-permitting-gridlock.

27 *Commonwealth of Kentucky v. EPA*, No. 24-1050, slip op. at 3 (D.C. Cir. June 26, 2026).

28 It is possible that the agency can impose a requirement as a pretext for destroying or severely weakening an industry without admitting intent (although the agency has often been transparent about its intent). To stop this type of pretextual action, the effect of the rule must be examined and not just the stated intent. There can be specific indicators to show the requisite intent or effect, such as requirements that are so infeasible or costly that they necessitate compliance measures that would lead to killing off an industry or severely weakening it.

29 *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022).

30 Erica Martinson, "Uttered in 2008, Still Haunting Obama," *Politico*, April 5, 2012, https://www.politico.com/story/2012/04/uttered-in-2008-still-haunting-obama-in-2012-074892.

The Biden administration followed the Obama Clean Power Plan with its own rule regulating greenhouse gas emissions from power plants. This rule shifts electricity generation even more aggressively. The agency projected an 89 percent reduction in power-sector coal use in 2045 relative to the current policy baseline.[31]

The EPA claimed that it was merely setting technological requirements and not engaging in intentional generation shifting. Such an argument is disingenuous when the agency knows full well that the standards will necessarily result in killing off coal and the future of new and reconstructed natural gas plants.

Any permitting reform package should include an express prohibition on using the CAA to target specific types of electricity generation. This language would need to recognize that regulatory requirements, like technological standards, can often serve as mere pretexts for targeting specific sources of electricity.

While most rules will have some negative effect on certain industries, that is not what this recommendation concerns, nor does it describe what the Obama and Biden administrations tried to do to the US power generation industry through their final power plant rules. They wanted to use the CAA to kill the coal industry, and the Biden administration wanted to kill the future of new and reconstructed natural gas generation.

Assume NAAQS responsibilities. Congress should codify in statute NAAQS for each criteria pollutant without further agency reevaluations. The standard for $PM_{2.5}$ should be no more stringent than 12 micrograms per cubic meter. That was the standard prior to the Biden administration's new $PM_{2.5}$ rule. States would still be allowed to make their own air quality standards stricter.

Imposing stricter NAAQS has vast economic and social consequences. It is therefore the type of decision that a politically accountable Congress should make, not the EPA. Some claim the EPA should make these decisions because the agency makes NAAQS decisions in a non-political way and bases its decisions purely on science and objective factors. This is a fallacy.[32] Even the basic decision of what level of risk is acceptable is inherently subjective. And the Supreme Court itself has recognized that setting NAAQS can be informed by policy considerations, including the effects on industry.[33]

The best solution is for Congress to assume responsibility for setting NAAQS. Short of this ideal, there are other NAAQS reforms that can help, as discussed below.

Reduce the frequency of NAAQS reviews. Currently, the EPA must review and, if appropriate, revise the standards every five years. One simple reform is to make the timeline 10 years or longer. The CLEAR Act (H.R. 4218), introduced by Rep. Buddy Carter (R-GA), would create a 10-year review timeline.[34] An even better reform would allow new reviews only when at least 90 percent of the population lives in areas already meeting the existing standards.

Require proper consideration of costs and tradeoffs. If Congress is not going to make these decisions on issues of vast economic and social importance, then the EPA should be required to give proper consideration to the costs and tradeoffs of making a standard more stringent. Unfortunately, the courts have held that under the CAA, the EPA must set NAAQS based solely on the agency's view of what is "requisite to protect public health with an adequate margin of safety"—without regard to cost.[35] Individuals regularly make simple decisions such as what to eat for dinner by considering both the benefits and costs of those decisions. Americans should expect the EPA to set

31 Competitive Enterprise Institute, Comments on "Repeal of Greenhouse Gas Emission Standards for Fossil Fuel-Fired Electric Generating Units" Environmental Protection Agency, Docket No. EPA–HQ–OAR–2025–0124, August 7, 2025, p. 22, https://cei.org/wp-content/uploads/2025/08/Marlo-Lewis-CEI-Comments-EPA-OAR-HQ-2025-0124-August-7-2025-Final.pdf#page=22; Environmental Protection Agency, *Regulatory Impact Analysis for the New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel–Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel–Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, report no. EPA-452/R-24-006 (Environmental Protection Agency, May 2024), p. 3–22, table 3-8, https://www.regulations.gov/document/EPA-HQ-OAR-2023-0072-8913.

32 Bakst, "Modernizing Air Regulation."

33 Regarding the primary standards, the DC Circuit of Appeals in *Mississippi v. EPA* 744 F.3d 1334 (D.C. Cir. 2014) explained, "In *Lead Industries Association*, we held that the choice of how to set a margin of safety is 'a policy choice of the type that Congress specifically left to the Administrator's judgment.'" In *Whitman v. American Trucking Associations*, 531 U.S. 457, 494 (2001) (Breyer, J., concurring), Justice Breyer wrote, "the statute [CAA], by its express terms, does not compel the elimination of all risk; and it grants the Administrator sufficient flexibility to avoid setting ambient air quality standards ruinous to industry."

34 CLEAR Act, H.R. 4218, 119th Cong. (2025), https://www.congress.gov/bill/119th-congress/house-bill/4218/text. The bill was favorably reported out of the House Energy and Commerce Committee.

35 *Whitman v. American Trucking Associations*, 531 US 457 (2001).

NAAQS—which affect the entire nation—in a similar common-sense manner.

Require feasibility. The EPA should not make standards more stringent if the pollutant's concentration levels are already at background levels in some areas of the country or if more stringent standards are technologically infeasible to meet. The CLEAR Act, to some extent, allows consideration of the likelihood of attainability as well as the adverse effects "which may result from various strategies for attainment and maintenance of such national ambient air quality standard."[36]

Improve the exceptional events process. When determining state compliance with NAAQS, the EPA may, under certain circumstances, disregard air-quality data attributable to exceptional events like wildfires and other natural events. However, under the statute and EPA's longstanding approach, it is too difficult for states to establish that exceptional events are causing problems with compliance. This result needs to change. If a state (or other party) can demonstrate that an exceptional event has occurred and it may reasonably be shown that the event caused or contributed to an exceedance, then the agency should be required to adjust the air quality data accordingly.[37]

The House passed the FENCES Act (H.R. 6409),[38] which helps ensure states are not punished for certain emissions beyond their control, such as foreign emissions, regardless of whether caused by human activities. The House also passed the FIRE Act (H.R. 6387),[39] which helps ensure states are not penalized for wildfire smoke beyond their control or for emissions from prescribed burns.

Remove unreasonable triggers for NSR review. Rep. Morgan Griffith (R-VA) has introduced the New Source Review Permitting Improvement Act (H.R. 161), which has been favorably reported out of the House Energy and Commerce Committee.[40] The bill, among other things, would clarify that certain changes to existing stationary sources, such as those that reduce emissions or improve safety, are not considered a modification under section 111(a) of the CAA and therefore do not trigger NSR permitting.

Specifically, the bill says that, with limited exception,[41] a change to a stationary source is not a modification if it is designed to "reduce the amount of any air pollutant emitted by the source per unit of production" or designed to "restore, maintain, or improve the reliability of operations at, or the safety of, the source."[42]

This is an important common-sense reform. It removes a disincentive for projects to improve reliability and efficiency, including those that would benefit air quality. Chet Thompson, President and CEO of the American Fuel & Petrochemical Manufacturers, nicely captured the importance of reforming the NSR program and adding the clarifications included in the bill:

> One of the reasons the refining and petrochemical industries support permitting reform is because of problems with EPA's New Source Review (NSR) program. It is harder for our facilities to make safety and environmental upgrades under the current NSR regime. Long, drawn-out permitting timelines for these essential projects delay facility upgrades and dramatically increase price tags, diverting capital from projects that protect our workers, communities and environment. These sorts of projects should absolutely be exempted from NSR costs and delays.[43]

Codify the policy easing requirements for certain idle plants. In 2025, the EPA withdrew what had been known as the "Reactivation Policy." As the agency explained:

> Under the Reactivation Policy, EPA presumed that a major stationary source that was idle for two or more years was permanently shut down and thus subject to NSR permitting requirements applicable to a newly constructed source prior to restarting operations. That presumption controlled unless the source could rebut

36 CLEAR Act, H.R. 4218.
37 Bakst, "Modernizing Air Regulation."
38 FENCES Act, H.R. 6409, 119th Cong. (2025), https://www.congress.gov/bill/119th-congress/house-bill/6409.
39 FIRE Act, H.R. 6387, 119th Cong. (2025), https://www.congress.gov/bill/119th-congress/house-bill/6387.
40 New Source Review Permitting Improvement Act, H.R. 161, 119th Cong. (2025), https://www.congress.gov/bill/119th-congress/house-bill/161.
41 There is an exception: "when the change would be a modification as defined in subparagraph (A) and the Administrator determines that the increase in the maximum achievable hourly emission rate of a pollutant from such change would cause an adverse effect on human health or the environment."
42 New Source Review Permitting Improvement Act, H.R. 161.
43 Office of US Rep. Morgan Griffith, "What They Are Saying: Griffith New Source Review Bill in Environment Subcommittee Receives Support," news release, September 16, 2025, quoting Chet Thompson, https://morgangriffith.house.gov/news/documentsingle.aspx?DocumentID=405475.

> the presumption by providing evidence that it intended to restart operations at the time the source went idle.[44]

That policy, the agency said, would no longer apply. Instead:

> [W]here an existing major stationary source that has been idle makes a change in order to enable it to resume operation, EPA will not require the source to obtain an NSR permit unless this change qualifies as a "major modification" under applicable regulations based on the nature of the change and the magnitude of any resulting increase in emissions.[45]

This change will help idle plants restart without costly and unnecessary permitting requirements. However, a future administration could bring back the Reactivation Policy. Therefore, Congress should codify this change in statute.

[44] Environmental Protection Agency, Office of the Administrator, "New Source Review Program 'Reactivation Policy'," memorandum from Lee M. Zeldin to Regional Administrators, September 18, 2025, https://www.epa.gov/system/files/documents/2025-09/nsr-reactivation-policy-memorandum.pdf. See also: Baker Botts, "What You Need to Know About EPA's Recent Changes to Preconstruction Permitting Under the Clean Air Act," *Thought Leadership*, October 13, 2025, https://www.bakerbotts.com/thought-leadership/publications/2025/october/what-you-need-to-know-about-epas-recent-changes.

[45] EPA, "Reactivation Policy Memorandum."

2. Clean Water Act Reforms to Include in Permitting Reform

by Daren Bakst

For decades, the Clean Water Act (CWA)[46] has created obstacles not just for major infrastructure projects but also for ordinary Americans. Many of the problems are connected to how the Environmental Protection Agency and the Army Corps of Engineers (Corps) have gone about the task of implementing the law.

The agencies have regularly tried to expand federal power in ways inconsistent with the statute, Supreme Court rulings, and common sense. Making matters worse, regulated parties have often been faced with vague and subjective regulations that make compliance extremely difficult. This difficulty is especially problematic because the statute provides severe penalties, often imposed on property owners who have no reasonable basis to think they are running afoul of the law.

Brief overview of the Clean Water Act and necessary reforms

The Clean Water Act (CWA)[47] prohibits the discharge of pollutants from point sources[48] into navigable waters, unless authorized by a permit. The term "navigable waters" is defined as the "waters of the United States, including the territorial seas."[49]

There are two types of permits: section 402 National Pollutant Discharge Elimination System (NPDES) permits addressing effluent discharges and section 404 permits addressing dredged and fill materials.

Most of the necessary reforms discussed in this section focus on section 404 permits. These permits do not address pollution as commonly understood but instead address dirt-moving activities. As a result, section 404 permits often affect ordinary Americans engaging in ordinary and productive land use activities such as growing crops or building homes.

Property owners are often surprised to find they are required to secure section 404 permits because they may have no reasonable basis for thinking that an area is regulated as a "navigable water." This is in large part due to the overbroad interpretation of what waters are regulated under the CWA by the EPA and the Corps.

In many instances, what the EPA and the Corps consider to be a "water" is just dry land for most of the year. Many property owners face harsh civil and criminal penalties for running afoul of the CWA, including prison time, even for inadvertent violations.[50]

Problems with section 404 permits should be of concern to lawmakers who want to address housing affordability. President Trump's March 13, 2026, executive order "Removing Regulatory Barriers to Affordable Home Construction" identified section 404 permits as a prime target for reform.[51]

Section 404 permit requirements can also block critical infrastructure projects, including projects related to public safety. For example, section 404 permitting requirements can affect counties that are developing, among other things, public safety water conveyances, drinking water facilities and

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46 Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972), https://www.congress.gov/bill/92nd-congress/senate-bill/2770/text.

47 Clean Water Act, Pub. L. No. 92-500.

48 "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." Clean Water Act, Pub. L. No. 92-500, § 502, 86 Stat. 816, 886 (1972), https://www.epa.gov/cwa-404/clean-water-act-section-502-general-definitions; "Summary of the Clean Water Act – 33 U.S.C. §1251 et seq. (1972)," Environmental Protection Agency, accessed May 4, 2026, https://www.epa.gov/laws-regulations/summary-clean-water-act.

49 Clean Water Act, Pub. L. No. 92-500, § 502, https://www.epa.gov/cwa-404/clean-water-act-section-502-general-definitions.

50 33 U.S.C. § 1319.

51 Exec. Order No. 14394, "Removing Regulatory Barriers to Affordable Home Construction," *Federal Register* 91, no. 53, (March 18, 2026), pp. 13207–13209, https://www.federalregister.gov/documents/2026/03/18/2026-05388/removing-regulatory-barriers-to-affordable-home-construction.

infrastructure, and projects that generate additional water supply.[52]

Protecting our nation's waters is an important objective. Fortunately, the following CWA reforms would not undermine that objective but would create much-needed predictability and fairness. They would remove unnecessary obstacles, helping to get major projects developed in a timely fashion while also protecting the many individual Americans who have been subjected to unreasonable enforcement actions.

Reform recommendations for Congress

It is difficult to address CWA concerns without addressing the question of what waters are "waters of the United States" or WOTUS. This definition determines what waters are regulated under the statute. For decades, the EPA and the Corps have interpreted WOTUS in an egregiously overbroad manner. From 2001 to 2023, the agencies' overreach was struck down by the US Supreme Court three times.[53]

Fortunately, in 2023, the Supreme Court in *Sackett v. EPA* provided much-needed clarity on what waters are regulated consistent with the statute and common sense.[54] Congress should ensure that the agencies interpret the statute consistent with *Sackett*.

The EPA and the Corps have recently proposed a new WOTUS definition. That definition, while a significant improvement over past regulatory definitions, is still problematic. It interprets WOTUS beyond what the Court allows in *Sackett*.[55] For example, per *Sackett*, only waters that are relatively permanent can be regulated,[56] yet the agencies have proposed that *relatively permanent* can include waters with surface water only during the "wet season," which can be as little as four months of the year.[57]

Any final rule should be constrained by the serious concerns regarding this "wet season" concept and implement regulatory policy consistent with *Sackett*.[58] There is no need for yet more long-term litigation over the meaning of WOTUS, especially since the Supreme Court has made it so easy for the agencies to put this issue to rest once and for all.

Last year, the House passed the PERMIT Act (H.R. 3898),[59] which includes many important CWA reforms. The bill codifies some exceptions to what the statute considers regulable water. This codification is worthwhile, but the bill text as currently drafted could unintentionally suggest waters not expressly listed as exceptions are WOTUS. That interpretation would, in effect, expand the definition beyond that provided in *Sackett*. Such a concern would be addressed easily by stating in express terms that the WOTUS definition, at its broadest, is no broader than what the Court provided in *Sackett*.

Some specific CWA reforms that should be included in a permitting bill include:

Eliminate section 401 abuse. Section 401 of the CWA gives states a role in the permitting process to ensure that federally licensed or permitted projects do not hurt water quality. A permit may be issued only if a state issues a section 401 certification or

52 *America's Water Infrastructure Needs and Challenges: Hearing Before the Senate Committee on Environment and Public Works*, 115th Cong., 2nd sess., January 10, 2018 (testimony of Julie A. Ufner, National Association of Counties), https://www.epw.senate.gov/public/_cache/files/2/c/2ccae-a3c-97b9-4dad-81f5-2fd3de1841c3/5884BA1AF2758B1DD921458D96470F00E083A4A92C04A9846957D63285E67792.ufner-naco-testimony-01.10.2018.pdf.

53 *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 US 159 (2001); *Rapanos v. United States*, 547 US 715 (2006); *Sackett v. EPA*, 598 US 651 (2023).

54 *Sackett v. EPA*, 598 US 651 (2023).

55 Environmental Protection Agency, "Updated Definition of 'Waters of the United States'," final rule, *Federal Register* 90, no. 222 (November 20, 2025), pp. 52498–52546, https://www.federalregister.gov/documents/2025/11/20/2025-20402/updated-definition-of-waters-of-the-united-states.

56 *Sackett v. EPA*, 598 US 651 (2023). The Court in *Sackett* explained:

> In sum, we hold that the CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] … 'water[s] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

57 EPA, "Updated Definition of 'Waters of the United States'."

58 Daren Bakst, "New WOTUS Rule Has a Problem: The Use of 'Wet Season'," *OpenMarket* (blog), Competitive Enterprise Institute, February 23, 2026, https://cei.org/blog/new-wotus-rule-has-a-problem-the-use-of-wet-season; Daren Bakst, Comments on "Updated Definition of 'Waters of the United States'," Environmental Protection Agency and US Army Corps of Engineers, Docket ID No. EPA-HQ-OW-2025-0322, January 5, 2026, Competitive Enterprise Institute, https://cei.org/regulatory_comments/cei-submits-comment-to-properly-define-regulated-waters-under-the-cwa/; Pacific Legal Foundation, Comments on "Updated Definition of 'Waters of the United States'," Environmental Protection Agency and US Army Corps of Engineers, Docket ID No. EPA-HQ-OW-2025-0322, 2026, https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0285.

59 PERMIT Act, H.R. 3898, 119th Cong. (2025), https://www.congress.gov/bill/119th-congress/house-bill/3898.

waives the requirement.[60] This layer of review gives states a role consistent with the cooperative-federalism framework of the statute.

Unfortunately, some states have used this certification process to veto projects for reasons unrelated to water quality. For example, the state of Washington blocked a proposed coal export facility, the Millennium Bulk Terminal project, for asserted reasons such as vehicle traffic and rail noise.[61]

The CWA is focused on discharges from point sources into navigable waters. Yet the Biden administration's section 401 rule, which the Trump administration's EPA has proposed to reform,[62] would allow states to block projects that have nothing to do with discharges, point sources, or navigable waters.[63] The Biden rule would define the scope of section 401 certification to cover the *activity* subject to a federal license or permit, not the potential discharges.[64] This "activity as a whole" approach as opposed to a "discharge only" approach allows states to go well beyond the statutory limits of the CWA. It allows them to impose conditions on projects to address issues such as "construction of public access for fishing," and "construction of recreation facilities to support designated uses (e.g., whitewater release for kayakers, canoe portages, parking spaces)."[65]

Congress should eliminate state abuses that go beyond water quality and ensure that states use a discharge-only approach. States should not be allowed to block projects for reasons that are not limited to the foundational requirements of the statute: discharges, point sources, and navigable waters. The PERMIT Act includes language that would address these concerns.

Prohibit retroactive and preemptive section 404 vetoes. The Corps issues section 404 permits, but the EPA under section 404(c) has the final say on the permits. Fortunately, this veto power has been used sparingly.[66] Nonetheless, this power can be egregiously abused as it was by the Obama administration.

The Pebble Mine in Alaska has the potential to be America's largest mine in decades, with vast amounts of copper, gold, molybdenum, and critical minerals.[67] In 2014, the Obama EPA issued a proposed determination to preemptively veto the project—in other words, to veto it prior to an application being submitted to the government.[68] This is an example of a policy choice replacing a permitting process. The federal government can hardly have carefully considered the application for a permit when it had already decided on the project before the permit was even submitted.

60 Environmental Protection Agency, "Overview of CWA Section 401 Certification," accessed May 4, 2026, https://www.epa.gov/cwa-401/overview-cwa-section-401-certification.

61 Daren Bakst, "Some States Abuse This Provision to Block Critical Projects. Here's What Congress Can Do," The Heritage Foundation, March 13, 2019, https://www.heritage.org/agriculture/commentary/some-states-abuse-provision-block-critical-projects-heres-what-congress-can; Senate Committee on Environment and Public Works, "Barrasso: Using Clean Water Act to Delay Projects Was Not What Congress Had In Mind When Law Passed," news release, August 16, 2018, https://www.epw.senate.gov/public/index.cfm/2018/8/barrasso-using-clean-water-act-to-delay-projects-was-not-what-congress-had-in-mind-when-law-passed.

62 Environmental Protection Agency, "Updating the Water Quality Certification Regulations," proposed rule, *Federal Register* 91, no. 10 (January 15, 2026), pp. 2008–2042, https://www.federalregister.gov/documents/2026/01/15/2026-00754/updating-the-water-quality-certification-regulations.

63 Environmental Protection Agency, "Clean Water Act Section 401 Water Quality Certification Improvement Rule," final rule, *Federal Register* 88, no. 186 (September 27, 2023), pp. 66558–66666, https://www.federalregister.gov/documents/2023/09/27/2023-20219/clean-water-act-section-401-water-quality-certification-improvement-rule.

64 Environmental Protection Agency, "Clean Water Act Section 401 Water Quality Certification Improvement Rule"; Daren Bakst, Comments on "Establishment Public Docket and Listening Sessions on Implementation Challenges Associated with Clean Water Act Section 401," Environmental Protection Agency, Docket ID No. EPA-HQ-OW-2025-0272, August 6, 2025, Competitive Enterprise Institute and Pacific Legal Foundation, https://cei.org/wp-content/uploads/2025/08/BakstSection401CommentCEIPLF-1.pdf.

65 EPA, "Clean Water Act Section 401 Water Quality Certification Improvement Rule"; Bakst, Comments on Docket ID No. EPA-HQ-OW-2025-0272. The proposed rule that preceded the final 2023 rule is instructive on what is envisioned to be covered by "water quality-related impacts." The EPA pointed to public access to a river for recreational purposes as being appropriate for states to address in the certification process. The agency highlighted imposing conditions like "construction of public access for fishing," and "construction of recreation facilities to support designated uses (e.g., whitewater release for kayakers, canoe portages, parking spaces)."

66 Environmental Protection Agency, "Chronology of CWA Section 404(c) Actions," accessed May 5, 2026, https://www.epa.gov/cwa-404/chronology-cwa-section-404c-actions.

67 Northern Dynasty Mineral Ltd., "President Trump Signs Executive Order to Increase America's Mineral Production," news release, March 24, 2025, https://northerndynastyminerals.com/news/news-releases/2025/northern-dynasty-president-trump-signs-executive-order-to-increase-americas-mineral-production; A.J. Roan, "Pebble Metals Align with US Critical Needs," *North of 60 Mining News*, January 2, 2026, https://www.miningnewsnorth.com/story/2026/01/02/news/pebble-metals-align-with-us-critical-needs/9421.html.

68 Environmental Protection Agency, Region 10, *Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act Pebble Deposit Area, Southwest Alaska*, (Environmental Protection Agency, July 2014), https://www.epa.gov/sites/default/files/2014-07/documents/pebble_es_pd_071714_final.pdf; Juliet Eilperin, "Obama Administration Proposes Restrictions on Massive Alaskan Mine," *Washington Post*, July 18, 2024, https://www.washingtonpost.com/politics/obama-administration-proposes-restrictions-on-massive-alaskan-mine/2014/07/18/320e20fc-0e8b-11e4-b8e5-d0de80767fc2_story.html; US Congress, Congressional Western Caucus, "Pebble Mine Preemptive Veto Scrapped, Obama Tool of Tyranny No More," news release, July 30, 2019, https://westerncaucus.house.gov/news/documentsingle.aspx?DocumentID=3148#:~:text=Developing%20the%20Pebble%20Mine%20requires,for%20a%20Section%20404%20permit.

In 2011, the Obama EPA vetoed a lawfully issued Corps permit *four years* after it was issued to Mingo Logan Coal for the Spruce 1 Coal Mine in West Virginia.[69] Such retroactive actions can make it difficult for companies to plan projects and make investments. After all, nobody can place any faith in a lawfully issued permit when that permit cannot truly be deemed to be finalized.

Congress should eliminate EPA's veto power. There is no need for this additional layer of bureaucracy and uncertainty. The PERMIT Act does not eliminate the veto power, but it at least addresses preemptive and retroactive vetoes by ensuring that the EPA may not veto projects before an application is completed or after the Corps has issued a permit.[70]

Reform section 404 nationwide permits. Under section 404(e) of the CWA, the Corps can reduce the burden of securing individual section 404 permits through what are known as nationwide permits, which are a type of general permit[71] issued on a nationwide basis. As explained by the EPA, the Corps "can issue general permits to authorize activities that have minimal individual and cumulative adverse environmental effects."[72]

Nationwide permits are "off the shelf" permits for many routine activities that include common-sense environmental protections for the activities while also recognizing the importance and frequency of these activities for everyday life and the economy.

Yet the value created by these permits is unnecessarily limited. The permits are valid for only five-year periods and cover limited acreage. For example, nationwide permits for homebuilding are limited to half-acre projects,[73] which is inadequate for producing multi-family and single-family housing where it is needed. Further, the term *nationwide* can be misleading. The Corps states that nationwide permits can be "specifically limited through regional conditions or revoked by division or district engineers."[74]

These limitations should be addressed. The PERMIT Act extends the length of permits from five to ten years. It also expands acreage thresholds.[75] Congress should also prohibit the application of different regional conditions on nationwide permits. Those conditions can make nationwide permits excessively difficult to obtain.

Address unreasonable financial penalties under section 404. Penalties under section 404 are unreasonably high. As of 2025, the maximum *daily* penalty is $68,445.[76] Penalty levels increase annually based on inflation levels. And they apply "per day for each violation." The EPA and the Corps take the position that a daily penalty is appropriate for alleged fill violations for each day that the fill remains in place, as though each day is itself a new discharge of fill.

Congress should eliminate the annual inflation increases and clarify that a civil penalty for a fill event applies only for the day of that fill event. The penalties should not accrue daily just because the fill remains in place. Ironically, if a property owner wanted to remove the fill, this itself could potentially create a new violation under section 404.

Give property owners due process protections. In most instances, the CWA does not require the EPA or the Corps to provide property owners any due process before issuing administrative orders (e.g., compliance orders, cease-and-desist orders, and clean-up-and-abatement orders). These orders routinely threaten massive civil and even criminal penalties, including multi-year prison terms, for refusing to comply.

Congress should fix this lack of due process by enacting a statutory requirement for hearings before such orders are finalized. This fix can be

69 Steptoe, "EPA's Retroactive Veto of CWA Permit Upheld by DC Circuit," July 29, 2016, https://www.steptoe.com/en/news-publications/epa-s-retroactive-veto-of-cwa-permit-upheld-by-dc-circuit.html.

70 PERMIT Act, H.R. 3898.

71 A general permit can be issued on a state, regional, or nationwide basis. See: Environmental Protection Agency, "Permit Program under CWA Section 404," accessed May 5, 2026, https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404.

72 Environmental Protection Agency, "Nationwide Permits Chronology and Related Materials under CWA Section 404," accessed May 5, 2026, https://www.epa.gov/cwa-404/nationwide-permits-chronology-and-related-materials-under-cwa-section-404.

73 Army Corps of Engineers, "2026 Nationwide Permits," p. 20, accessed May 5, 2026, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/3209#page=20.

74 Army Corps of Engineers, "U.S. Army Corps of Engineers Permitting Process Information," accessed May 5, 2026, https://www.nan.usace.army.mil/Portals/37/PermittingProcessInformation.pdf.

75 PERMIT Act, H.R. 3898; National Association of Home Builders, "House Passes NAHB-Supported PERMIT Act," NAHBNow (blog), December 11, 2025, https://www.nahb.org/blog/2025/12/house-passes-permit-act.

76 Crowell & Moring, "Alert! Yes – Inflation Affects Everything: EPA Increases Fines for Civil Non-Compliance," *Insights & Alerts*, January 23, 2025, https://www.crowell.com/en/insights/client-alerts/alert-yes-inflation-affects-everything-epa-increases-fines-for-civil-non-compliance.

accomplished simply by inserting the words "after a hearing" into relevant provisions of section 309 and section 404.[77]

This reform gives property owners a chance to have a voice in the process before final agency decisions are made regarding the issuance of administrative orders. And it would require the government to at least make out a colorable basis for its case against a landowner before the issuance of an administrative order—which, as noted earlier, is not a trivial event. This reform would enhance both agency decision-making and a property owner's ability to successfully challenge final agency decisions in court.

Section 404(s)(1) provides an example of how the "after a hearing" language would work. Currently, the section says, "Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section … [.]"[78]

To provide due process protection, the language should state "Whenever *after a hearing* the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section … [.]" [Emphasis added.]

As has been discussed, many property owners have no reasonable basis to know they are even violating the law because an ordinary person would not think that a water (which can be dry land for most of the year) is a WOTUS. Hopefully, a new final WOTUS rule consistent with *Sackett* will minimize these problems affecting innocent landowners, but to date this is still a significant issue.

To help address this problem, Congress should amend section 309(d) that details the factors that judges should consider when determining civil penalties. One factor that should be added is whether an ordinary person would know that he is violating the law.[79]

77 33 U.S.C. §§ 1319, 1344.
78 33 U.S.C. § 1344(s)(1).
79 33 U.S.C. § 1319(d).

3. Endangered Species Act Reforms to Include in Permitting Reform

by Jacob Tomasulo

More than 50 years ago, the Endangered Species Act (ESA) of 1973 became law.[80] The statute tasks the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) with identifying species that are at risk of extinction or will be at risk in the foreseeable future and putting those species on either the endangered or threatened list, respectively. These listings trigger regulations and other provisions that aim to recover a species to the point where it can be delisted.[81]

Unfortunately, the law has failed to achieve this goal. Only 3 percent of listed species have been delisted because of recovery.[82] Not only that, but the law often delays and prevents important projects, even when potential threats to listed species or critical habitat are non-existent or negligible. In fact, the ESA has counterintuitively prevented projects that would contribute to species conservation.[83]

Many of the problems with the ESA, including unnecessary project costs and delays, stem from how the FWS and the NMFS have implemented the law. There are strong arguments that many ESA regulatory actions are inconsistent with the statute. As such, several of the law's provisions have, in practice, expanded beyond the scope authorized in statute and intended by Congress.

Scope

Congress has set limits on what activities the agencies may regulate to further the purposes of the ESA. Yet, those limits are often ignored by the agencies, inappropriately expanding the scope of the law. This has implications for project development because it means that obstacles such as the "take" prohibition and section 7 consultation will apply more frequently.

Take. Broader application of the law means that more actions trigger the law's permitting requirements. This problem includes the broad application of the take prohibition.

The statute defines *take* as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[84] The ESA automatically applies the take prohibition to endangered species and, under certain conditions, allows the agencies to apply the take prohibition to threatened species.

If non-federal actors wish to engage in otherwise lawful activities that may result in the taking of such a species, they can seek an incidental take permit (ITP). The Pacific Legal Foundation explains that an ITP is "a permit that insulates property owners from liability for taking a species—if certain conditions are met."[85] Unfortunately, obtaining an ITP is tedious and costly.[86]

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[80] Endangered Species Act of 1973, Pub. L. No. 93-205 87 Stat. 884 (1973). https://www.congress.gov/bill/93rd-congress/senate-bill/1983.

[81] Hannah Downey et al., *A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species – and What to Do About It*, (Property and Environment Research Center [PERC], September 20, 2023), p. 5, https://www.perc.org/wp-content/uploads/2023/09/PERC_Field-Guide-for-Wildlife-Recovery.pdf.

[82] Jacob Tomasulo, *The ESA Amendments Act of 2025 Will Help Species*, OnPoint No. 307, (Competitive Enterprise Institute, April 2026), https://cei.org/wp-content/uploads/2026/04/OnPoint-307_FINAL.pdf.

[83] "Perversely, even some activities that would actually help endangered and threatened species—such as thinning forests and reducing fuels buildup to prevent catastrophic wildfires are blocked by extreme litigious groups on the grounds that these actions would modify the habitat of a listed species and thereby constitute 'take.' "For example, one thinning project on the Klamath National Forest in Northern California was held up for more than a decade by activists who claimed they wanted to protect endangered spotted owls. In the meantime, a wildfire burned the owl habitat to the ground in 2021. A few years earlier, a similar story played out on the Helena–Lewis and Clark National Forest in Montana, when wildlife habitat went up in flames after a forest treatment project spent seven years bound up in litigation and agency red tape." See Family Farm Alliance, et al., Comments on "Rescinding the Definition of 'Harm' Under the Endangered Species Act," US Fish and Wildlife Service and National Marine Fisheries Service, Docket No. FWS-HQ-ES-2025-0034, May 19, 2025, p. 3, https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-212976.

[84] 16 U.S.C. § 1532(19).

[85] Pacific Legal Foundation, Comments on "Rescinding the Definition of 'Harm' Under the Endangered Species Act," US Fish and Wildlife Service and National Marine Fisheries Service, Docket No. FWS-HQ-ES-2025-0034, May 19, 2025, https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-232862.

[86] Pacific Legal Foundation, Comments on Docket No. FWS-HQ-ES-2025-0034, p. 5 n. 20.

As a result of the agencies' overbroad approach to take, landowners are effectively coerced into costly permitting even if the action is unlikely to harm the species or its habitat.

Section 7 consultation. Whenever a federal agency is sufficiently involved with a project as defined by the statute[87] and the project may affect listed species or critical habitat, the agency, known as the "action agency," must undergo consultation with the FWS or the NMFS.[88] The purpose of the consultation is to ensure that the project is not likely to jeopardize the species' continued existence or adversely modify its critical habitat.[89]

Section 7 consultation is a commonly cited cause of delays for infrastructure projects, but such delays are often unlikely to yield benefits for species. Jonathan Wood of the Property and Environment Research Center (PERC), discussing a Defenders of Wildlife report, stated:

> Another way to interpret the results is that, during the first seven years of the Obama administration, nearly 100,000 projects had to undergo time-consuming and expensive consultation even though none of them would likely jeopardize a listed species or its habitat. Making matters worse, nearly 1,300 major projects were delayed for more time than the law permits, even though they too would not likely jeopardize a species or its habitat.[90]

Reform recommendations for Congress

Congress should amend the ESA to address the triggers that require permitting and consultation, as well as other burdens connected to project development. Specifically, Congress should:

Rescind the blanket 4(d) rule. Section 9 of the ESA automatically applies the take prohibition to endangered species, but not to threatened species.[91] Section 4(d) gives the agencies the authority to apply some (or all) of the section 9 take prohibitions to threatened species under certain conditions and on a species-by-species basis.[92] However, for most of the ESA's history, the FWS has also applied section 9 take prohibitions by default to threatened species.[93]

This policy, known as the blanket 4(d) rule, ignores Congress' intentional distinction between the two categories of species. As a result, the FWS' application of section 9 is identical for threatened species and endangered species alike. Therefore, projects that have the potential to "take" a threatened species also require a take authorization.[94] This requirement increases the number of projects that could be delayed or abandoned because of the ESA.

Endangered species face an immediate threat of extinction and might benefit from section 9 prohibitions and resulting permitting requirements. Threatened species, on the other hand, do not face the same magnitude of threats and are less likely to benefit from the strict permitting requirements associated with the prohibition of take.[95]

Congress should rescind the blanket 4(d) rule so that threatened and endangered species are regulated differently, commensurate with the threats they each face. This approach is consistent with the statute and reflects the distinction Congress intended.

87 "Section 7(a)(2) of the ESA applies to all actions federal agencies fund, authorize, permit, or carry out in which there is discretionary federal involvement or control." See US Fish and Wildlife Service, "ESA Section 7 Consultation," accessed May 5, 2025, https://www.fws.gov/service/esa-section-7-consultation.

88 Pervaze A. Sheikh and Erin H. Ward, *Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects*, report no. R46867 (Congressional Research Service, August 4, 2021), https://www.congress.gov/crs-product/R46867.

89 16 U.S.C. § 1536(a)(2).

90 *ESA Consultation Impediments to Economic and Infrastructure Development: Hearing Before the House Committee on Natural Resources, Subcommittee on Oversight and Investigations*, 115th Cong., 1st sess., March 28, 2017 (testimony of Jonathan Wood, Pacific Legal Foundation), https://www.congress.gov/115/meeting/house/105808/witnesses/HHRG-115-II15-Wstate-WoodJ-20170328.pdf.

91 16 U.S.C. § 1538(a).

92 16 U.S.C. § 1533(d).

93 The blanket 4(d) protections for wildlife were first implemented pursuant to US Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants Reclassification of American Alligator and Other Amendments," final rule, *Federal Register* 40, no. 118 (September 26, 1975), p. 44425, https://www.fws.gov/sites/default/files/federal_register_document/FR-1975-09-26.pdf#page=115. The blanket 4(d) protections for plants were first implemented pursuant to US Fish and Wildlife Service, "General Provisions, General Permit Procedures and Endangered and Threatened Wildlife and Plants," final rule, *Federal Register* 42, no. 122 (June 24, 1977), p. 32380, https://www.govinfo.gov/content/pkg/FR-1977-06-24/pdf/FR-1977-06-24.pdf#page=148.

94 The goal of a section 7 consultation from the perspective of the permittee is to obtain a biological opinion that includes an incidental take statement (ITS). While an ITS is similar in nature to an ITP in that it authorizes the taking of a species, it is not a permit. The "take authorization" language used here is intended to capture both ITPs and ITSs.

95 "The two levels of classification facilitate regulations that are tailored to the needs of the animal while minimizing the use of the most stringent prohibitions. … Federal prohibitions against taking must be absolutely enforced only for those species on the brink of extinction." See Judy L. Shephard and William C. Jolly, *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980* (Congressional Research Service, February 1982).

In fact, the NMFS has taken this approach and has achieved better conservation outcomes than the FWS. The NMFS has a species recovery rate of 6.7 percent, double that of the FWS. While many factors contributed to these outcomes, the difference in the agencies' approaches under section 4(d) is likely one of them.[96]

Clarify that the agencies must consider the costs and benefits of regulating the taking of threatened species. To apply the section 9 take prohibition to threatened species, section 4(d) requires the FWS or the NMFS to determine that doing so is "necessary and advisable."[97] This language indicates that costs must be considered. After all, cost and economic considerations are required to properly ascertain whether the regulations are "necessary and advisable." This language is comparable to the "appropriate and necessary" language under section 112 of the Clean Air Act.[98] In *Michigan v. EPA* the Supreme Court held that this language requires consideration of costs.[99] Congress should clarify in statute that "necessary and advisable" requires economic considerations. (This would also codify a recent federal district court case, *Kansas Natural Resources Coalition v. U.S. Fish and Wildlife Service*.[100])

Codify a new definition of *harm*. Included within the statutory definition of *take* is the term *harm*.[101] Therefore, harming a species is a subset of taking a species. In 1975, the FWS promulgated a regulatory definition of *harm*[102] that was subsequently amended in 1981.[103] Under the amended definition, actions that "may include significant habitat modification or degradation"[104] are considered harm, and consequently a form of take.

Habitat modification or degradation is the most prevalent form of take regulated by the agencies,[105] triggering the need for a take authorization even where the presence of species is uncertain or any effects are minimal. Congress should amend the ESA to define *harm* so that it clearly does not include such actions.[106] Rather, only actions that have an immediate, direct negative effect on species should be considered harm.

Address frivolous critical habitat designations. Section 4 of the ESA requires critical habitat to be designated concurrently with species listing.[107] Put simply, critical habitat is specific areas essential to a species' conservation.[108]

Addressing frivolous critical habitat designations is an important aspect of comprehensive ESA permitting reform, largely for two reasons. First, section 7 consultation is required for actions with a federal nexus that modify critical habitat.[109] Second, actions taken by private property owners on areas designated as critical habitat are often considered take and require an ITP.[110]

The agencies have often abused their power to designate critical habitat by designating areas where neither the species nor the features necessary to support the species are present. Such designations are often not beneficial for species yet impose costs on property owners. For example, a 2012 critical

96 Property and Environment Research Center (PERC), Comments on "Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants," US Fish and Wildlife Service, Docket No. FWS-HQ-ES-2023-0018, August 21, 2023, https://www.perc.org/wp-content/uploads/2023/08/PERC-4dComment-8212023.pdf.

97 16 U.S.C. § 1533(d).

98 42 U.S.C. § 7412(n)(1)(A).

99 *Michigan v. EPA*, 576 US 743 (2015).

100 *Kansas Natural Resources Coalition v. US Department of Interior*, 971 F.3d 1222 (10th Cir. 2020).

101 16 U.S.C. § 1532(19).

102 US Fish and Wildlife Service, "Reclassification of the American Alligator and Other Amendments," final rule, *Federal Register* 40, no. 188 (September 26, 1975), p. 44416, https://archives.federalregister.gov/issue_slice/1975/9/26/44371-44471.pdf#page=28.

103 US Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Final Redefinition of 'Harm'," *Federal Register* 46, no. 213 (November 4, 1981), p. 54750, https://archives.federalregister.gov/issue_slice/1981/11/4/54746-54750.pdf#page=5.

104 US Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Final Redefinition of 'Harm'."

105 Best Best and Krieger LLP, "Federal Wildlife Agencies Propose Rescinding Definition of 'Harm' Under Endangered Species Act," Legal Alerts, May 1, 2025, https://bbklaw.com/resources/la-0501325-federal-wildlife-agencies-propose-rescinding-definition-harm-under-endangered-species-act.

106 Congress should also amend the statute to provide some clarity on this issue. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the Supreme Court upheld the FWS's regulatory definition. However, it is extremely important to note that *Sweet Home* resolved a question of statutory interpretation under the deferential *Chevron* framework. It held that the agency's reading was *permissible*, not that it was the *best* reading of the statute.

107 16 U.S.C. § 1533(a)(1)(3).

108 16 U.S.C. § 1532(5).

109 Congressional Research Service, *Endangered Species Act (ESA) Section 7 Consultation*, In Focus IF12423, (Congressional Research Service, June 7, 2023), https://www.congress.gov/crs-product/IF12423.

110 Since the term *harm* within the definition of *take* has been defined to include incidental habitat modification, actions by private property owners that modify critical habitat are often considered harm and therefore take.

habitat designation for the dusky gopher frog on 1,544 acres of private property in Louisiana[111] was expected to bar development and deprive the property owners of a whopping $33.9 million.[112] The dusky gopher frog had not been seen in Louisiana since 1965.[113] The FWS itself has characterized the designation of critical habitat under the ESA "as the most costly and least effective class of regulatory actions undertaken by the Service."[114]

In *Weyerhaeuser v. Fish and Wildlife Service*, the US Supreme Court found that for an area to be eligible for a critical habitat designation, it must first be considered habitat,[115] a term that is not defined in the statute. Congress should reflect this decision in statute by codifying a definition of habitat that limits agencies' ability to frivolously designate areas as critical habitat that cannot realistically support a species.

Create a reasonable trigger for section 7 consultation. An action agency must determine whether a proposed action may affect any listed species or critical habitat.[116] This "may affect" threshold is very low and therefore easy to meet. If the agency finds that there will be no effect, then a no-effect determination is made, and section 7 consultation with the FWS or the NMFS is not required.[117]

If the action agency determines that there may be an effect, the process then moves to either informal or formal consultation. Formal consultation with the FWS or the NMFS, which is more time-consuming than informal consultation, is required when the proposed action is likely to "adversely affect" listed species or critical habitat.[118]

The vast majority of consultations are informal. According to the Congressional Research Service, "from 2008 to 2015, 81,461 informal consultations were completed, compared with 6,829 formal consultations."[119] Completed informal consultations are those in which the action agency and the FWS or the NMFS concur that the proposed action is not likely to adversely affect a listed species or critical habitat. So, none of the completed informal consultations for those 81,461 projects found the requisite adverse effect. Yet, for each of those actions, the action agency, the FWS or the NMFS, and the project applicant had to devote resources to the informal consultation.

Congress should ensure that there is a more reasonable threshold for determining when an action agency must consult with the FWS or the NMFS. Instead of the current "may affect" threshold, the action agency should determine whether the proposed action is likely to affect listed species or critical habitat. This would reduce the large number of informal consultations and make the threshold consistent with the ESA.[120] Section 7(a)(3) of the statute says, "a Federal agency shall consult with the Secretary ... if the applicant has reason to believe ... that implementation of such action will *likely* affect such species."[121] [Emphasis added.] The agencies have inappropriately turned *likely* into *may*. This reform would address this problem.

Clarify state flexibility with take. States often possess local knowledge that the federal government lacks. That situation is especially common in species management. State wildlife agencies specialize in the species and ecosystems that they manage. They may also possess a better understanding of how species conservation efforts affect nearby communities. Recognizing this, Congress gave states a significant role under the ESA, yet the implementing regulations do not give sufficient weight to this expertise.

The ESA acknowledges the important role that states play in species conservation by directing the FWS and the NMFS to enter into cooperative agreements with states. A state is eligible for a cooperative agreement when it has an existing "adequate and active program for the conservation of endangered

111 US Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog)," final rule, *Federal Register* 77, no. 113 (June 12, 2012), pp. 35118–35161, https://www.federalregister.gov/documents/2012/06/12/2012-13488/endangered-and-threatened-wildlife-and-plants-designation-of-critical-habitat-for-dusky-gopher-frog.

112 *Weyerhaeuser Co. v. United States Fish and Wildlife Service*, 586 U.S. 9, 9 (2018).

113 US Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog)."

114 *Regarding H.R. 2933, the Critical Habitat Reform Act of 2003: Hearing Before the House Committee on Resources*, 108th Cong., 2nd sess., April 28, 2004 (testimony of Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, US Department of the Interior), https://www.fws.gov/testimony/hr-2933-critical-habitat-reform-act.

115 *Weyerhaeuser Co. v. United States Fish and Wildlife Service*, 586 U.S. 9 (2018).

116 Sheikh and Ward, *Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects*.

117 Sheikh and Ward, *Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects*.

118 Sheikh and Ward, *Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects*.

119 Sheikh and Ward, *Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects*.

120 Formal consultation would still be required when the proposed action is likely to *adversely* affect listed species or critical habitat.

121 16 U.S.C. § 1536(a)(3).

species and threatened species." Section 6 of the statute says that the purpose of the agreement is to provide a means for the FWS or the NMFS to assist the state in implementing its program.[122] However, this purpose is not the primary benefit of cooperative agreements.

As PERC explains, "[t]he primary benefit of a state obtaining a cooperative agreement is that federal take prohibitions cannot apply with respect to any domestic species unless the state formally adopts those prohibitions. Indeed, this power for states to approve (or not) federal regulations appears not once but twice in the statute."[123]

Unfortunately, although the statute makes adopting federal take prohibitions optional for states with cooperative agreements, the implementing regulations do not provide an opt-out choice. Rather, the ESA's implementing regulations for section 9 merely exempt the taking of species "as part of a research or conservation program covered by a cooperative agreement."[124] Congress should clarify what is already in statute by ensuring that states may decide for themselves whether to adopt federal take prohibitions when they have obtained a cooperative agreement.

[122] 16 U.S.C. § 1535(c)(1).

[123] Property and Environment Research Center (PERC), Comments on "Regulations to the Endangered Species Act's Federalism Provisions," US Fish and Wildlife Service, June 2025, p. 2, https://www.perc.org/wp-content/uploads/2025/06/FINAL-PERC_6.18.2025_Comment_3.ESAFederalism.pdf.

[124] Property and Environment Research Center (PERC), Comments on "Regulations to the Endangered Species Act's Federalism Provisions," p. 3.

4. National Environmental Policy Act Reforms to Include in Permitting Reform

by Megan Jenkins and Josh T. Smith[125]

The United States faces a paradox. At a moment of rising energy demand, technological opportunity, and geopolitical competition, the country struggles to build the infrastructure needed to sustain growth. From reservoirs to nuclear plants to wildfire mitigation projects, the barrier is rarely a lack of capital or expertise. Instead, it is a permitting system that slows everything down—anchored by the National Environmental Policy Act (NEPA).[126]

Passed in 1969 and signed into law in 1970, NEPA was intended to ensure that federal agencies considered environmental impacts before undertaking major actions.[127] NEPA was conceived as a procedural statute—a tool for informed decision-making, not a mechanism for halting development.

Over the past 50 years, however, NEPA has instead become a litigation-driven process that delays, deters, and derails critical projects of all kinds. Congress should act swiftly to eliminate NEPA's misuse. The right changes will unlock America's ample resources and enable human flourishing.

NEPA is a vestigial organ in American policy

NEPA's original vision was modest. Its architects emphasized transparency, planning, and public engagement. The law itself is only a few pages long. Over time, however, judicial decisions, agency rules, and litigation strategies transformed NEPA into a complex procedural regime. Environmental reviews expanded from concise disclosures into thousands of pages of analysis, often taking years to complete. NEPA no longer serves a useful purpose. Today, NEPA is a vestigial organ—unnecessary for prudent policymaking.

One reason for this result is that the United States has implemented a wide swath of environmental laws and rules, themselves in need of serious reform. The Clean Air Act (CAA), the Clean Water Act (CWA), and the Endangered Species Act (ESA) are three foundational examples. Today, NEPA is redundant with those laws.

A second reason for this vestigial status is that NEPA is only procedural. NEPA rightfully does not limit the types of projects that can be approved to only those that are environmentally friendly. Any controversial project—such as offshore wind or offshore oil and gas development—can be approved as long as the required thousand-page reports sufficiently detail the project's various environmental impacts. Today, there are many substantive standards of environmental quality, such as those provided by the ESA, the CWA, and the CAA. These standards make NEPA's procedural requirements deadweight.

A core issue is the weaponization of NEPA against politically unpopular projects. This problem is bigger than lengthy permitting timelines. The most intensive form of review (an Environmental Impact Statement or EIS)[128] takes an average of 3.8 years and a median of 2.2 years. The average is higher than the median because certain projects take an extremely long period of time, thereby driving up the average. Almost two out of three reviews miss the two-year deadline mandated by the Fiscal Responsibility Act. Those that require decades inflate the average.[129] For example, despite replacing an existing bridge and serving as a critical evacuation route, the Marc Basnight Bridge in North Carolina took roughly 25 years from planning to construction. Repeated environmental reviews and successive NEPA lawsuits

[125] The inclusion of the authors' work in this report does not necessarily indicate their or their organization's support for the entire report or any other part of this report.

[126] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970), https://www.congress.gov/bill/91st-congress/senate-bill/1075/text.

[127] Environmental Protection Agency, "What Is the National Environmental Policy Act?" accessed April 10, 2026, https://www.epa.gov/nepa/what-national-environmental-policy-act.

[128] Council on Environmental Quality, *Environmental Impact Statement Timelines (2010–2018)* (Executive Office of the President, June 12, 2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

[129] Josh T. Smith, "Facilitate an All-of-the-Above Energy Strategy for Energy Abundance," Abundance Institute, April 15, 2025, https://abundance.institute/our-work/all-of-the-above-energy.

delayed the necessary project.[130] Outliers like this pull up the average and suggest a form of weaponization of NEPA.[131]

This weaponization deters and delays projects. A recent Breakthrough Institute analysis of NEPA litigation shows that environmental groups are involved in roughly 75 percent of NEPA cases. Yet they lose almost every time. Approximately three out of four cases resolve in favor of the permitting agency. Even when they lose in the courtroom, environmental groups can win by delaying the projects they oppose. The same Breakthrough report found that projects spend an average of 19 months in litigation, with 7 percent of projects stuck in legal challenges for over six years.[132]

Recent changes to NEPA and bipartisan support for reforms

Recent court decisions have reined in NEPA's application and clarified limits for reviews.[133] Congress should capitalize on these developments by taking further steps toward making NEPA a more rational law.[134]

Most notably, in 2025 the Supreme Court limited the reach of NEPA in *Seven County Infrastructure Coalition v. Eagle County*. This case marked a significant shift in how NEPA is interpreted and applied. In an 8–0 ruling, the Court held that agencies are not required to analyze upstream or downstream environmental effects that are separate in time and place from the project under review. The Court also emphasized that judges must show substantial deference to agency decisions about the scope of environmental review. As Justice Kavanaugh wrote in the majority opinion, "Simply stated, NEPA is a procedural cross-check, not a substantive roadblock."[135] This decision narrows the scope of NEPA review and limits one of the primary avenues through which litigation has expanded project timelines.

In Congress, there is also a growing bipartisan consensus that NEPA requires reform. Legislative proposals such as the SPEED Act (Standardizing Permitting and Expediting Economic Development Act) would codify many of the principles reinforced in *Seven County*. Co-sponsored by House Natural Resources Committee Chairman Bruce Westerman (R-AR) and Rep. Jared Golden (D-ME), the SPEED Act passed the House in December 2025 and is being considered by the Senate. The SPEED Act would narrow the definition of *major federal actions*, impose clearer timelines, and reduce litigation risk by clarifying the procedural nature of NEPA review.[136]

Support for such reforms has emerged from across the political spectrum. Together, the Court's decision and legislative efforts signal a meaningful shift: policymakers increasingly recognize that NEPA, as currently implemented, imposes costs that outweigh its benefits—and that reform is both necessary and politically achievable.

Reform recommendations for Congress

Repeal or, at minimum, defang NEPA. Given the redundancy of NEPA in today's environmental policy, Congress should repeal NEPA. The burden NEPA places on the US economy is massive, while its environmental benefits are limited and hard to quantify.[137] The cumulative result of NEPA is a permitting system that is unpredictable, slow, and biased against building. The act does little more than raise energy costs, deter beneficial activities, and increase the costs of public works of all kinds. It also causes environmental harm by delaying or preventing investment in new and cleaner infrastructure. Eliminating NEPA would not remove environmental safeguards. Those protections are already embedded in other laws.

[130] WSP, "Marc Basnight Bridge Provides Reliable Crossing for Outer Banks Traffic," *WSP Insights*, May 13, 2019, https://www.wsp.com/en-us/insights/basnight-bridge-opens-in-outer-banks-north-carolina; Jennifer Allen, "NEPA Redo Would Speed Drilling Approval," *Coastal Review Online*, January 13, 2020, https://coastalreview.org/2020/01/nepa-redo-would-speed-drilling-approval. Even considering the proximity of the project to a national refuge, this is a case of NEPA delaying an evacuation route for more than two decades.

[131] An alternative explanation is that projects are incredibly complex, but this claim is contradicted by the fact that many cases are filed by the same environmental organizations and by previous testimony that the US Congress has heard on NEPA. See *The Weaponization of the National Environmental Policy Act: Hearing Before the House Committee on Natural Resources*, 115th Cong., 2nd sess., April 25, 2018 (testimony of Laura Watt and James Coleman), https://www.congress.gov/event/115th-congress/house-event/108215.

[132] Alex Trembath et al., *The Procedural Hangover: How NEPA Litigation Obstructs Critical Projects*, (The Breakthrough Institute, July 24, 2025), https://thebreakthrough.org/issues/energy/the-procedural-hangover.

[133] Paige Gilliard and Megan Jenkins, *The Case for Ending the National Environmental Policy Act*, Policy Explainer SR-1627, (Pacific Legal Foundation, December 2025), https://pacificlegal.org/wp-content/uploads/2025/12/SR-1627-Gilliard-and-Jenkins-Policy-Explainer-NEPA-Policy-Explainer-v1.pdf.

[134] Bipartisan Policy Center, "What's in the SPEED Act?" December 19, 2025, https://bipartisanpolicy.org/issue-brief/whats-in-the-speed-act.

[135] *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. ___ (2025), p. 2.

[136] Bipartisan Policy Center, "What's in the SPEED Act?"

[137] Gilliard and Jenkins, *The Case for Ending the National Environmental Policy Act*.

Short of full repeal, the following reforms would help.

Require NEPA reviews only for the most complex projects. A key problem with NEPA is its overapplication. Substantive permitting statutes like the CWA and the CAA trigger NEPA reviews. Those laws should be reformed to limit NEPA reviews.

Receiving a single dollar of federal funds can also trigger a review. Congress should reset NEPA so that it applies only to complicated reviews involving many different environmental concerns. This reset can be done by clarifying and narrowing the definition of *major federal action*.

Congress should redefine *major federal action* to mean only those actions where agencies (1) use meaningful discretion rather than simply verify compliance with other rules and (2) exercise substantial control.[138] Substantial federal control could be defined as:

1. greater than 50 percent of the funding comes from the federal government,[139] or
2. an exercise of eminent domain authority.

Congress should also consider importing its definitions of *major* from the Congressional Review Act.[140] So, an agency's action should be considered major only if it:

1. has an annual effect on the economy of $100 million or more;
2. creates a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or
3. has significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[141]

A robust reform that may defang but not repeal NEPA would be requiring that any federal action meet all these requirements to qualify as a major federal action.

Expand and encourage the use of categorical exclusions for ordinary actions. Congress should dramatically expand categorical exclusions (CX). A CX is not an *exemption* from NEPA but rather streamlined permitting requirements. The CX process recognizes that many actions are both routine and low-impact and therefore do not require a detailed environmental analysis.[142] These activities do not pose a threat to the environment, and resources spent reviewing them are a wasteful distraction for agencies. As the University of Michigan's Nicholas Bagley quipped about the CX for picnics, "If you need a special exception to make the lawyers comfortable with picnics, maybe you've gone too far?"[143]

Congress should create categorical exclusions for any project that:

1. will be reviewed by any state under the state's own environmental protection acts or similar legislation;
2. is similar to actions that have been approved by agencies in the past as having no significant effect on the environment;[144]
3. has been found, based on similar projects approved in the past few years, to have no significant impact;[145] or

138 Aidan Mackenzie and Thomas Hochman, *How the White House Can Reform NEPA*, (Foundation for American Innovation and Institute for Progress), accessed February 2025, https://cdn.sanity.io/files/d8lrla4f/staging/1f0e33da4efc2c9820f81b6e349aa832c6739fce.pdf.

139 Mackenzie and Hochman propose 25 percent, which is how corporate ownership law defines *substantial control* over a company. A higher percentage standard is appropriate because the analogy between government and private corporations is imperfect. Still, even this standard represents a clear improvement to current definitions of major federal actions.

140 Congressional Review Act, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 847, 868 (1996) (codified as amended at 5 U.S.C. §§ 801–808).

141 These definitions are taken from Josh T. Smith and Eli Dourado, *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, Public Interest Comment, (The Center for Growth and Opportunity, March 10, 2020), https://www.thecgo.org/research/update-to-the-regulations-implementing-the-procedural-provisions-of-the-national-environmental-policy-act.

142 National Telecommunications and Information Administration, "NEPA Review: Categorical Exclusions," February 2023, https://broadbandusa.ntia.gov/sites/default/files/2023-03/NEPA_Review_Categorical_Exclusions.pdf.

143 Nicholas Bagley, "A number of federal agencies have categorical exclusions from NEPA for … picnics," X (formerly Twitter), April 8, 2024, https://x.com/nicholas_bagley/status/1776955844267028761.

144 Smith and Dourado, *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*; Thomas Hochman, *Redesigning NEPA Regulation to Unleash American Energy*, (Rebuilding.tech, May 6, 2025), https://www.rebuilding.tech/posts/redesigning-nepa-regulation-to-unleash-american-energy.

145 For example, the law could specify that a project receive a CX when more than 50 percent of similar projects have been found to have no significant impact. See Hochman, *Redesigning NEPA Regulation to Unleash American Energy*, Hochman proposes a higher and likely more justifiable 70 percent threshold. Defining actions that "normally" are not significant for the environment is not simple. Any and all improvements to categorical exemptions are helpful. Congress could consider anything greater than 50 percent or set another standard, though we urge as low as possible.

4. has been given similar categorical exclusions by other agencies.

It is also necessary to improve the current CX process by:

1. requiring annual reporting on how long it takes to obtain a categorical exclusion by agency;
2. providing automatic approval, as in by-right development, if an agency does not act on a CX within 30 days;
3. setting clear CX application page and determination time limits such as no more than 30 pages and 30 days;[146]
4. convening public hearings (that include industry and applicants) on improving CXs—especially for new and emerging technologies such as advanced transmission technologies, geothermal, and small modular reactors; and
5. ensuring that agency staff see CX as an acceptable default and not a legal liability.

Recent efforts by the Trump administration to digitize and centralize CX information will streamline NEPA compliance.[147] Congress can make these reforms durable via statutory changes.

Make the losers pay: Shift legal fees to unsuccessful NEPA litigators. About three in four NEPA-related cases result in an affirmation of the original agency's decision. Yet, as the Breakthrough Institute notes, "[w]hen plaintiffs lose NEPA lawsuits—and they usually do—they face little consequence, while agencies and developers bear the cost of defending often frivolous or marginal claims."[148] Requiring plaintiffs to bear the costs when they lose would discourage frivolous lawsuits whose purpose is to delay and block projects the plaintiffs dislike rather than to address actual environmental harms and legal deficiencies.

End duplicative reviews: Leverage state-level NEPA equivalents and previous reviews. The SPEED Act ends duplicative reviews across agencies at both the state and federal levels. States often have their own review processes. And in many cases agencies themselves already have performed extensive reviews of similar projects. Federal agencies should avoid duplicating their own past work and the work of state-level agencies. That reform will reduce NEPA's regulatory burdens.

As the Bipartisan Policy Center describes this provision, it allows a lead agency to use "an earlier environmental review—whether prepared by the same agency, another federal agency, or a project sponsor under federal supervision—if it determines that the new proposed action and its effects are substantially the same as those analyzed in the earlier document."[149] Even when the action is not substantially the same, the agency should be able to extend and enhance existing information rather than re-collect or start from scratch.

Congress should ensure that agencies augment rather than duplicate in reviews:

1. Agencies should perform simple housekeeping so that previous and related reviews are easily found and applied to new actions. One way to do this is to create a cross-agency government repository and deploy artificial intelligence to match their new work to their own and others' prior work.

2. Agencies should have clear direction from Congress about when they must collect new data instead of relying on existing or commercial sources. There should be no expectation that agencies wait for new studies or reconsider decisions after a notice of intent is issued or an application is received.

3. Agencies should be cautious about replication, preferring cumulative and integrated approaches that avoid redundancy. Congress should make it clear that agencies have wide latitude to grant categorical exclusions and should prefer the least intensive reviews possible.

Congress should consider waiving NEPA in cases where a state performs its own review. Another positive step would be to remove the requirement of using only federal reviews or requiring federal oversight. There is no need for a federal agency to look over a state agency's shoulder as projects proceed through review. Scholars and tradespeople all use information they learn merely by reading over it.

[146] Limitations like these do not seem to work. But they create an embarrassing headline: even the tools meant to speed paperwork require months and hundreds of pages.

[147] The White House, "CEQ Issues Guidance on Categorical Exclusions," April 9, 2026, https://www.whitehouse.gov/releases/2026/04/ceq-issues-guidance-on-categorical-exclusions.

[148] Trembath et al., *The Procedural Hangover*.

[149] Bipartisan Policy Center, "What's in the SPEED Act?"

When performing NEPA analyses, there is no need for a higher standard in governmental reviews than in academia and business.

Allow only parties who are directly harmed and involved early to make legal challenges. A major reason NEPA can be weaponized is its long statute of limitations and expansive consideration of legal standing. Taken together, these allow plaintiffs to sue at any point within six years, even if they are only tenuously affected by the agency's action.[150] The SPEED Act makes major improvements to address these problems, such as barring lawsuits against agencies when they establish new categorical exclusions.[151]

In addition, the SPEED Act effectively limits standing to those who have engaged in the process in good faith. It does so by limiting plaintiffs to those who have submitted unique and substantive comments in the public process before turning to the courts. Plaintiffs would be required to show how they are directly harmed by an action that an agency is considering.[152]

Too many interest groups have attempted to use the NEPA process itself as a weapon against building homes and even against prudent land management. Congress should narrowly define statutory causes of action and require plaintiffs to demonstrate a direct, concrete, and particularized injury resulting from the challenged action. Congress should, for example, require that an objector owns an adjacent property and prohibit claims of merely aesthetic harms. These steps can be taken while upholding the standing requirements set forth in Article III of the Constitution, namely, injury in fact, causation, and redressability.[153]

Limit reviews to the directly and obviously foreseeable. Congress should clarify that NEPA review is limited to reasonably foreseeable, direct environmental effects—not speculative or highly attenuated possibilities. As current practice shows, the absence of clear limits has encouraged agencies to include increasingly remote and hypothetical impacts in their analyses, largely to guard against litigation. That trend, in turn, has contributed to the production of sprawling environmental documents that are less useful for decision-making and more vulnerable to procedural challenge.

A more disciplined standard—such as that reflected in the SPEED Act and reinforced by *Seven County*—would exclude from consideration speculative upstream and downstream effects that are separated in time, geography, or causal chain from the project at hand. This same principle should apply to cumulative effects analysis. While cumulative impacts can be relevant, NEPA should not require agencies to evaluate broad, economy-wide, or global phenomena untethered from the project itself. Considering only those cumulative effects that are concrete, proximate, and reasonably foreseeable would reduce opportunities for delay while preserving meaningful environmental review.[154]

Give deference to other statutory compliance. The SPEED Act allows compliance with other federal environmental statutes to satisfy NEPA. That reform is necessary and overdue. As currently implemented, NEPA often duplicates analysis already required under substantive laws like the Clean Air Act, Clean Water Act, and Endangered Species Act. This redundancy imposes additional costs and delays without improving environmental outcomes.[155]

Allowing agencies to rely on compliance with these statutes to fulfill NEPA obligations would eliminate duplicative review and better align NEPA with its original procedural purpose. Where Congress has already established clear environmental standards through other laws, agencies should not be required to reanalyze the same impacts under NEPA. This reform would streamline permitting, reduce litigation risk, and focus agency resources on substantive environmental protection rather than repetitive paperwork.

Ensure narrow, direct reviews and deference to agencies. Environmental reviews should be limited in scope, focused on direct impacts, and completed

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150 Smith, "Facilitate an All-of-the-Above Energy Strategy for Energy Abundance"; Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It*, (Federalist Society, October 16, 2018), https://rtp.fedsoc.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-National-Environmental-Policy-Act.pdf.

151 Bipartisan Policy Center, "What's in the SPEED Act?"

152 Bipartisan Policy Center, "What's in the SPEED Act?"

153 Language can be drawn from similar state-level rules. See: Pacific Legal Foundation, "Third-Party Challenges to Development Permits Act," accessed May 13, 2026, https://pacificlegal.org/wp-content/uploads/2024/08/Third-Party-Permit-Challenges.pdf; Pacific Legal Foundation, "Right to Use State Lands Act," accessed May 13, 2026, https://pacificlegal.org/wp-content/uploads/2026/03/2026-Model-Policy-Right-To-Use-State-Lands-Act.pdf.

154 Smith and Dourado, *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*.

155 Gilliard and Jenkins, *The Case for Ending the National Environmental Policy Act*.

within clear boundaries. Agencies should not be required to analyze alternatives that do not serve the project's basic purpose or needs, including those that conflict with the project sponsor's core objectives. Requiring analysis of alternatives beyond the sponsor's intent invites unnecessary delay and transforms NEPA into a tool for reshaping or blocking projects rather than evaluating them.

At the same time, once an agency completes a properly scoped review, its determinations should receive strong deference. This deference should function to eliminate veto points—not create new ones. While much attention is rightly placed on third-party litigation, agencies themselves can become sources of delay when they face unclear standards or incentives to overanalyze. Congress should ensure that NEPA constrains agency discretion as well as outside challenges, creating a system where reviews are predictable, bounded, and final.

Limit judicial remedies to requiring that agencies fix deficiencies. Congress should reform NEPA to ensure that judicial remedies are appropriate to the statute's procedural nature. When a court identifies a deficiency in an environmental review, the default remedy should be to correct it. This means a remand to the agency with instructions to correct the error. Courts should not vacate the underlying project approval or stop ongoing activity.

Remember, agencies are vindicated by courts in almost every case. In three out of four rulings, roughly, judges defer to agencies. Only in a minority of cases are agencies required to redo or revise an analysis.[156]

The remedial framework creates a litigation doom loop in which projects are repeatedly halted, vacated, and re-reviewed. Even so, agencies almost always ultimately prevail, and the project proceeds unchanged. This mismatch between procedural violations and sweeping remedies imposes significant costs, delays, and uncertainty across infrastructure development. To be clear, projects that will ultimately be approved are nonetheless stopped for years because of minor errors. Rather than allow the litigation doom loop to continue, Congress should ensure courts respect the purely procedural nature of NEPA and require only that errors be corrected.[157]

The SPEED Act appropriately addresses this problem by requiring courts to remand agency actions without vacatur or injunction, allowing projects to continue while agencies fix identified deficiencies. This approach should be reinforced and extended. At a minimum, Congress should establish remand without vacatur as the default remedy, reserving project-stopping relief only for exceptional circumstances. Exceptional circumstances should be defined as those in which a project poses immediate, irreparable environmental harm that cannot be mitigated. Congress should make clear that these are rare conditions and that their intent is to prevent a return to NEPA's history of paralysis by analysis.

This reform would align NEPA remedies with the Supreme Court's guidance in *Seven County*, which suggests that procedural deficiencies should not halt projects. It would also ensure that good-faith agency reviews are not invalidated by minor oversights. Courts should not be empowered to stop projects that will proceed regardless of additional paperwork. Instead, they should ensure that agencies complete their analyses while allowing development to continue.

By limiting remedies to correction rather than cancellation, Congress can preserve NEPA's informational function while preventing it from being used as a tool to delay or derail projects indefinitely.

NEPA is one of many barriers to an abundant future

Recent growth in electricity demand has brought an even greater focus to NEPA. The purely procedural nature of the act has not prevented it from becoming a litigation magnet for delay and degrowth activism. In today's regulatory environment, NEPA is a vestigial organ rather than a vital part of a prudential resource management plan. Extensive reforms to NEPA are needed to unlock America's vast stores of natural resources and human ingenuity, which will enable growth for the entire economy.

156 Trembath et al., *The Procedural Hangover*.

157 James W. Coleman and Arnab Datta, "How to Prevent Federal Judges From Killing New Energy Projects," *City Journal*, January 2025, https://www.city-journal.org/article/energy-projects-infrastructure-permitting-reform; James W. Coleman and Arnab Datta, "We Must End the Litigation Doom Loop," American Enterprise Institute, April 28, 2024, https://www.aei.org/op-eds/we-must-end-the-litigation-doom-loop; Ben Schifman, *Breaking the NEPA Litigation Doom Loop: By Reforming Remedies in NEPA Cases*, (Institute for Progress, February 19, 2026), https://ifp.org/breaking-the-nepa-litigation-doom-loop.

5. National Historic Preservation Act Reforms to Include in Permitting Reform

by Ben Lieberman

There are many similarities between the National Environmental Policy Act of 1970 (NEPA) and the National Historic Preservation Act of 1966 (NHPA).[158] Both endeavored to ensure that federal actions would not cause unanticipated damage, either to the environment in the case of NEPA or to the nation's historic heritage in the case of the NHPA. Both originally required that the federal government take stock of any such concerns but did not explicitly restrict the economic activity under review. But both have been subjected to expansive interpretations over the decades and have reached a point where they are routinely used to obstruct projects for reasons beyond the original statutory intent.

The NHPA established a new federal agency, the Advisory Council on Historic Preservation. It also set up the National Register of Historic Places as well as state and tribal-level historic preservation programs.[159] Relevant here, however, is the requirement that any federal action that may adversely affect a historic site must come under review. These provisions are in section 106 of the NHPA and are commonly referred to as the section 106 review process.[160] It is administered by the Advisory Council on Historic Preservation.

Section 106 encompasses any federal action, including the granting of necessary federal permits for private economic activity. And since the need for such permits has grown considerably, section 106 routinely applies to many proposed undertakings, including domestic energy production or infrastructure projects. Projects potentially affecting federal lands or receiving federal funds are also included.

Section 106 is, at least ostensibly, a procedural provision requiring only that the potential impacts of a federal action on historic sites be taken into consideration. In the words of one federal court, it "mandates a review process that does not dictate particular decisional outcomes, but merely prohibits uninformed—rather than unwise—agency action."[161] This entails the agency responsible for the federal action engaging in consultations with state and tribal officials, the Advisory Council on Historic Preservation, and project developers. There are multiple opportunities for interested citizens and activist organizations to weigh in.

The first step under section 106 involves identifying the geographic area potentially affected by the project subject to federal action. Then, a determination is made on whether this area encompasses any of the properties listed among the 95,000 in the National Register of Historic Places[162] or any historic site considered eligible for listing. Next, an assessment of the potential adverse impacts on these historic resources is conducted. If such impacts are found, the parties must consider ways to ameliorate them, and document they have done so in a memorandum of agreement.

Each step in the process has been expansively interpreted by those seeking to block economic activities, often for reasons that have little if anything to do with historic preservation. This includes efforts during the Biden administration to use section 106 as a climate policy tool, for example by requiring that possible climate change risks to historic sites be taken into consideration.[163] At the same time it was injecting these and other climate-related complications into many project reviews, the Biden administration also stated that "clean energy projects and climate-friendly transportation infrastructure projects should be expedited through

158 National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966), https://www.congress.gov/bill/89th-congress/senate-bill/3035/titles.

159 Mark K. DeSantis, *The Federal Role in Historic Preservation: An Overview*, CRS Report No. R45800 (Congressional Research Service, March 22, 2024), https://www.congress.gov/crs_external_products/R/PDF/R45800/R45800.7.pdf.

160 DeSantis, *The Federal Role in Historic Preservation*, p. 4.

161 *United Keetowah Band of Cherokee Indians v. FCC*, 933 F.3d 728, 734 (D.C. Cir. 2019).

162 National Park Service, "National Register Database and Research," accessed May 13, 2026, https://www.nps.gov/subjects/nationalregister/database-research.htm.

163 American Council on Historic Preservation, "ACHP Climate Change and Historic Preservation Policy Statement," June 16, 2023, https://www.achp.gov/sites/default/files/policies/2023-06/Climate%20Change%20Policy%20Statement-final-_0.pdf.

efficient and effective permitting processes and environmental reviews (including section 106 reviews)."[164]

Litigation is common, typically challenging whether every statutory requirement has been met and whether every conceivable impact on listed or eligible historic sites has been taken into consideration.[165]

Reform recommendations for Congress

Repeal section 106. The NHPA is nearing its 60th anniversary, and at this point repealing section 106 is well justified. The risk of neglect to the nation's historic heritage has subsided considerably since 1966, and indeed the track record shows that proposed new activities rarely pose any appreciable risk.[166] The benefits of the section 106 process are modest compared to its widespread abuse for delaying or preventing needed economic development. It should also be noted that private companies have, for the most part, demonstrated a willingness to work with state, local, and tribal governments to address any actual concerns, often outside of the statute. And, of course, if Congress is concerned that a particular historic site is not adequately protected, then it can always create a new historical designation through specific legislation. Such bills are common.[167]

Set time limits on the process. In lieu of repeal, section 106 should be streamlined. Most of the damage is done by delays caused by the section 106 review process and subsequent litigation. In the words of one how-to guide on the use of the NHPA, "the power of Section 106 is largely the power to delay a project and make it more costly than its proponents can tolerate."[168] While some steps have time limits, others do not. Thus, imposing reasonable time limits for the entirety of the process—perhaps 60 days from beginning to end, and 30 days to file any litigation on it—would curtail a good deal of the harm caused by anti-development activists without compromising the goal of historic preservation.

Clarify that climate change plays no role. It should go without saying that the NHPA is not a climate statute and that the section 106 process should focus on historic preservation. But efforts to the contrary during the Biden administration may necessitate a policy statement that climate change considerations cannot be used to evaluate any project under review.

Set reasonable boundaries for the area of potential effects. The area of potential effects is prone to exaggeration and is sometimes interpreted so as to encompass historic properties that are not really in harm's way. Thus, requiring more realistic boundaries would help curb abuses under the statute.[169] This reform could entail legislation limiting the area of potential effects to those directly affected by the project rather than merely those affected indirectly. It would also help to clarify that the area of potential effects should be defined by the federal action itself, not by the entire project. These reforms would be especially helpful for linear projects like pipelines and transmission lines that traverse long distances but whose direct effects encompass only a narrow band near the project and for which only parts of the distance covered have a federal nexus.[170]

Limit the review to historic sites already listed. The inclusion of sites not on the National Register of Historic Places but merely deemed eligible for it has proven to be an invitation for abuse by project opponents.[171] The consideration of eligible sites may have made sense decades ago when the National Register of Historic Places was in its infancy, but no longer does. Indeed, given that the number of listed sites is nearing 100,000, it is reasonable to question the historical value of anything not yet listed. Thus, this requirement should be eliminated.

164 American Council on Historic Preservation, "ACHP Climate Change and Historic Preservation Policy Statement," p. 5.
165 *Examining Impacts of Federal Natural Resources Gone Astray, Part II, Hearing before the House Committee on Natural Resources*, 115th Cong., 1st sess., July 18, 2017 (testimony of Amos J. Loveday), https://naturalresources.house.gov/uploadedfiles/testimony_loveday.pdf.
166 Kristina Alexander, *A Section 106 Review Under the National Historic Preservation Act (NHPA): How it Works*, CRS Report No. R42538 (Congressional Research Service, May 16, 2012), p. 3, https://www.everycrsreport.com/files/20120516_R42538_c8affaef238bbb3de2a318b910901b8d24d9ee02.pdf.
167 DeSantis, *The Federal Role in Historic Preservation*, p. 29.
168 King, *Saving Places That Matter*, p. 18.
169 Alexander, *A Section 106 Review*, pp. 7–8.
170 *Improving Predictability and Certainty in the Section 106 Review Process, Hearing before the Senate Committee on Energy and Natural Resources*, 119th Cong., 1st sess., October 29, 2025 (testimony of Andy McDonald), https://www.energy.senate.gov/services/files/F5C0E64C-D6E1-4419-A905-D515859ECE6C.
171 Loveday testimony.

Part 3: Electricity Transmission Principles and Reforms for Permitting Legislation

1. Electricity Transmission: Overview

by Paige Lambermont

Transmission lines, the high-voltage power lines that move power over large distances, are an important part of the bulk power system in the United States. But as wind and solar power projects seek to connect to the grid, usually in remote areas, there has been a growing push by renewable developers to expand the build-out of transmission lines. Moreover, certain states have adopted renewable and clean energy goals mandating a growing share of renewables to serve customers. However, these renewable developers and various states do not want to pay the full cost of the expansion. They want their costs socialized across all American power consumers, requiring those who do not benefit to pay for this new infrastructure.

Transmission is also an important part of ensuring service for new power users, such as AI data centers. As Congress considers permitting reform, it should ensure that those who request the new transmission will pay for it. This step is especially important because transmission costs are a significant and growing portion of customers' electric bills.[172]

Encroaching federal power

Historically, states had sole permitting and siting authority for electricity transmission.[173] Over time, pursuant to the Federal Power Act, the Federal Energy Regulatory Commission (FERC) would regulate the rates for transmission service. But planning was still done by the local utilities and subject to state review. In 2011, FERC issued Order 1000, which directed regional transmission planning by regional transmission organizations (RTOs) and similar entities.[174] Under Order 1000, major transmission projects were to be developed and were required to consider public policy goals, including state renewable requirements, among other things. Order 1000 also required that transmission costs be allocated in a manner that is "at least roughly commensurate with the benefits." In the abstract, that requirement sounds reasonable. But in practice, the benefits are counted in a way that does not necessarily tie them to those demanding the new transmission.

In 2024, FERC issued Order 1920, which went even further to require transmission planning that incorporates public policy needs (along with other needs).[175] It then requires cost allocation not based on who wanted the transmission, but to those who gained any benefit. (Most transmission can provide some benefit, but the question is whether that transmission is the right transmission and most cost effective.)

To a lesser extent, the Department of Energy can participate in some transmission planning. Under the Energy Policy Act of 2005[176] and expanded by the 2021 Infrastructure Investment and Jobs Act,[177] the DOE has the authority to designate certain geographic areas as National Interest Electric Transmission Corridors (NIETC).[178] FERC plays a role, too. It has the authority to issue permits, in limited

[172] Callie Patteson, "Breaking Down Rising Electricity Prices: The Role of Transmission Lines," *Washington Examiner*, December 23, 2025, https://www.washingtonexaminer.com/policy/energy-and-environment/4051186/breaking-down-rising-electricity-prices-role-transmission-lines.

[173] Federal Energy Regulatory Commission, "Commissioner Christie's Concurrence to Transmission Backstop Siting NOPR," December 15, 2022, https://www.ferc.gov/news-events/news/commissioner-christies-concurrence-transmission-backstop-siting-nopr.

[174] Federal Energy Regulatory Commission, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, (2011), https://www.ferc.gov/sites/default/files/2020-04/OrderNo.1000.pdf.

[175] Federal Energy Regulatory Commission, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation,* Order No. 1920, 187 FERC ¶ 61,068 (May 13, 2024), https://www.ferc.gov/media/e1-rm21-17-000. Note: The Commission has clarified and updated this order in subsequent orders. Federal Energy Regulatory Commission, "Order No. 1920 Compliance Filings Schedule," June 16, 2025, https://www.ferc.gov/news-events/news/order-no-1920-compliance-filings-schedule.

[176] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), https://www.congress.gov/bill/109th-congress/house-bill/6.

[177] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021), https://www.congress.gov/bill/117th-congress/house-bill/3684.

[178] US Department of Energy, "National Interest Electric Transmission Corridor Designation Process," Office of Electricity, last modified April 15, 2025, https://www.energy.gov/oe/national-interest-electric-transmission-corridor-designation-process#:~:text=A%20NIETC%20is%20an%20area,transmission%20project%20for%20financial%20purposes.

circumstances, to build or modify transmission facilities in the NIETCs.[179] These various provisions have had the intended effect of socializing a substantial part of the cost of providing transmission services.

The existing and important state role

States do still play a role in the siting and permitting of regional and interregional transmission. But, as discussed above, FERC has taken a much broader role in planning and cost allocation over the past two decades. It has expanded that role through its orders to the RTOs and similar planning entities. The notion that there needs to be an increasing federal role is questionable at best. In 2022, FERC Commissioner Mark Christie explained:

> The whole mantra that goes "the states are blocking needed transmission all over the country!" is simply a political and special-interest narrative. The steadily mounting increases over the past decade in transmission rate base nationally, with concomitant skyrocketing increases in transmission costs to consumers, blows up the narrative that states are systemically blocking needed transmission lines. Contrary to the narrative, states need *more* authority to scrutinize transmission projects for need and prudence of cost, not less, to protect consumers.[180]

Christie's central point is that transmission is being built—not blocked. This build-out without state oversight has led to cost increases. Part of what has driven this shift toward a greater federal role is the push to transition the energy supply toward more renewables, especially wind and solar. Because of their locations, these sources tend to require more transmission lines to reach customers.[181] Current transmission policy favors renewable power goals over reliability and affordability, which should be the most important goals of the power system.

At the end of 2023, 95 percent of the interconnection queue (the projects waiting to be connected to the grid) were solar, wind, and battery storage projects.[182] Compared to coal, gas, and nuclear power, solar and wind power are intermittent and volatile. Because their availability depends on weather and time of day, they cannot provide stable, on-demand power—which the grid needs to avoid sudden power drops and widespread blackouts.[183]

Moreover, considering rising electricity prices and the effect of new transmission on property owners, transmission planning and cost allocation need to focus on what benefits consumers, not renewable developers or special interests.

With this background in mind, the next sections provide principles and policy recommendations for electricity transmission planning in the context of current permitting reform efforts.

179 Federal Energy Regulatory Commission, "Explainer on Siting Interstate Electric Transmission Facilities (FERC Order No. 1977)," Office of Public Participation, February 13, 2025, https://www.ferc.gov/explainer-siting-interstate-electric-transmission-facilities.

180 FERC, "Commissioner Christie's Concurrence to Transmission Backstop Siting NOPR."

181 Samantha Gross, *Renewables, Land Use, and Local Opposition in the United States,* (Brookings Institution, January 2020), https://www.brookings.edu/articles/renewables-land-use-and-local-opposition-in-the-united-states.

182 Federal Energy Regulatory Commission, "FERC State of the Market Report: The Need for Transmission," March 27, 2024, https://www.ferc.gov/news-events/news/ferc-state-market-report-need-transmission.

183 "Frequency Regulation and Grid Stability: How BESS Solves Renewable Energy Variability in Real-Time," *Energy Central*, February 22, 2026, https://www.energycentral.com/energy-biz/post/frequency-regulation-and-grid-stability-how-bess-solves-renewable-energy-WNyX3mh9omZ1PeO.

2. Electricity Transmission: Reform Principles

by Paige Lambermont

Reforms to generally applicable law can be beneficial across the board, including for transmission. Thoughtful reforms to the National Environmental Policy Act or the Clean Water Act, for example, would be beneficial across the economy. The benefit would extend to transmission projects. Policymakers should bear this point in mind when considering permitting reform, including transmission-specific reforms.

Policymakers should be reluctant to provide any special provisions for transmission. Large-scale transmission build-out is not always a general public need. It is frequently driven by a narrow interest of particular types of electricity providers or by a state's public policy aims. Any special provisions for transmission (in other words, policies applicable only to transmission) should be focused on projects with the broadest public benefits and should be considered only if there are also substantive generally applicable permitting reforms. Further, any special provisions for transmission should come with a reassessment and significant reduction of market-distorting subsidies provided to renewable generation (or any other sources) that would be unleashed as a result of those provisions. Ideally, electricity providers receiving direct, industry-specific federal subsidies would not benefit from any special provisions. In short, if new transmission is needed so renewables can access markets or because states want to meet their renewable or net-zero goals, then those driving the need should pay for the transmission, and those costs should not be socialized to other customers.

Transmission reform should not pick winners and losers. As a general matter, transmission reform, like broader permitting reform, should be broad based and technology neutral. This principle does *not* mean that reformers should avoid neutral reliability or affordability requirements that may affect some technologies more than others.[184] The purpose of the grid is to provide reliable, affordable electricity. It would be unreasonable to fail to establish standards to meet this objective.

Transmission should be treated as two distinct categories. Transmission has typically been treated as one big topic, but it should be treated as two distinct categories: (a) necessary transmission to improve the reliability of the grid for the benefit of ratepayers; and (b) transmission to meet state public policy goals or the needs of generating facilities that are beyond the normal scope of what is required to connect to the grid, such as a long-distance high voltage line to bring power from a new remote generation source to a population center.

For transmission under (a), it is acceptable for the cost to be allocated to the relevant group of consumers. However, for transmission under (b), it is not acceptable that average ratepayers not benefiting from the transmission investment be forced to bear its costs. These costs should be borne by the company or industry or state that has the specific need.

No transmission provision should be considered unless it improves the resiliency and reliability of the grid and reduces the delivered cost of electricity. If there are to be special transmission provisions for projects where costs are socialized, then those provisions should improve the reliability and resiliency of the grid and reduce the delivered cost of electricity. Note that the "delivered cost of electricity" is the right metric. Claims that wind and solar are low-cost generation do not necessarily account for the extra cost of transmission or backup generation needed when the wind does not blow or the sun does not shine. Those costs should be taken into account.

Furthermore, past proposed federal legislation that tried to address transmission build-out had

[184] Affordability according to a "levelized full systems cost of electricity" analysis. The proper measure looks not just at the cost of a facility alone and includes the cost of subsidies.

inadequate language requiring reliability and resiliency improvements.[185] Those requirements were so broad and vague as to include nearly any project, even those that may ultimately have harmed reliability. Permitting reforms addressing transmission should not assume that merely adding transmission will improve reliability and resiliency. There should be specific and concrete analysis showing that reliability and resiliency will be improved. In short, transmission that connects more dispatchable on-demand resources, like coal, nuclear, and natural gas, is more likely to contribute to reliability and resiliency than intermittent wind and solar.

Projects eligible for special provisions should also reduce the delivered cost of electricity—what the cost to consumers would be absent government subsidies. The requirements discussed in this principle will ensure that projects that receive special or expedited procedures are those that provide the broadest, most concrete benefits for ratepayers and for the grid as a whole.

States should continue to play an important role in transmission decisions. The traditional role of states in siting electric transmission lines should generally be respected, and any federal involvement in siting should be the exception. States along any route where transmission cost is to be socialized, or states where any ratepayers will be expected to pay part of the socialized cost on their bills, should continue to have substantial input on the design and approval of the transmission. The federal government should not be able to override state concerns about protecting their ratepayers from increased costs.

Cost allocation to ratepayers should be fair and reasonable. If there are special transmission provisions, costs socialized across American power consumers should be fairly and reasonably allocated to ratepayers. Previous proposed transmission legislation in Congress provided weak ratepayer protection. Past legislation would have allowed *all* non-trivial benefits in relation to the costs to be allocated, including those benefits that would have been slightly above trivial.[186] There should be protection to ensure that the benefits are direct, not speculative in any manner, and that they exceed costs. Projects where costs are to be socialized should also be required to demonstrate their necessity, not merely that they would be an improvement in some general way. After taking into account the costs and benefits, there should be a determination that a project will reduce the delivered cost of electricity.

185 James Broughel, "Concerning Transmission Provisions in the Energy Permitting Reform Act," *OpenMarket* (blog), Competitive Enterprise Institute, November 22, 2024, https://cei.org/blog/concerning-transmission-provisions-in-the-energy-permitting-reform-act; Energy Permitting Reform Act of 2024, S. 4753, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/senate-bill/4753.

186 Broughel, "Concerning Transmission Provisions in the Energy Permitting Reform Act"; Energy Permitting Reform Act of 2024, S. 4753.

3. Electricity Transmission: Reform Recommendations for Congress

by Paige Lambermont

Ensure that transmission projects are subject to cost-benefit analysis that considers benefits only in terms of affordability and reliability. Transmission projects should be justified in terms of the affordability and reliability of electricity. Delivering electricity in an affordable and reliable manner, after all, is the purpose of the grid. These projects should be subject to rigorous cost-benefit analysis. Indirect benefits should not be included, such as politically divisive and unshared environmental mandates. These steps are particularly important given the grid's inherent shared nature and the socialization of project costs.

Require FERC's interconnection decisions to prioritize projects that contribute to the reliability of the grid and to the affordability of delivered power. Interconnection decisions should prioritize projects that contribute to reliability and resource adequacy at the lowest reasonable cost. Projects that can reduce the delivered cost of energy to customers (including the cost of back-up power) should also be prioritized.

Repeal FERC Orders 1000 and 1920.[187] These FERC orders currently exacerbate many of the issues created by state electricity policy, such as renewable energy mandates. Order 1000 requires planning processes at both the local and regional levels to consider transmission needs driven by state policy choices, in addition to federal law and regulation.[188] This arrangement creates an opportunity for states to force the consequences of their decisions onto other states that have no input on these policies, including those imposing new transmission costs and reduced reliability.

Together, these orders create perverse incentives that increase the adoption of policies that raise prices and reduce reliability. They do this by providing a relief valve for states whose own policies have failed. Moreover, the regional planning process has become a complicated bottleneck to building needed transmission quickly and cost-effectively. Congress should repeal these orders and direct FERC to consider whether regional planning has actually produced better transmission planning, reduced costs, and enhanced reliability. Congress should expressly clarify under the Federal Power Act that state policies should not drive regional planning decisions or impose socialized costs on other states.

Remove the provision of the Infrastructure Investment and Jobs Act (IIJA) that allows the DOE to circumvent state disapproval. The Infrastructure Investment and Jobs Act (IIJA) amended section 216 of the Federal Power Act to allow FERC to issue permits to projects in DOE National Interest Electric Transmission Corridors (NIETC) even if the state has denied a siting application.[189] This is a sweeping attack on states' traditional role in siting decisions. Prior to the IIJA, section 216 allowed FERC to override states in some situations, such as when a state failed to make a timely decision.[190] This IIJA language is a way to get states out of making siting decisions.[191]

Reform the NIETC process. Congress should reform the NIETC process by requiring the DOE to identify only those projects that are needed for reliability. Also, Congress should allow FERC to approve these transmission lines through a regulatory proceeding and ensure that costs are properly allocated.

Require states to bear the costs of their policy choices. States with energy policies that drive up costs and reduce reliability, such as renewable portfolio standards or net zero goals, should not be able to socialize those costs onto nearby states. Congress should enshrine in law that states must bear the costs of their own policy choices and provide options for neighboring states to refuse to build infrastructure that is not to their benefit.

187 Order No. 1000, 136 FERC ¶ 61,051 at P 25.
188 Order No. 1000, 136 FERC ¶ 61,051 at P 25.
189 FERC, "Explainer on Siting Interstate Electric Transmission Facilities."
190 FERC, "Commissioner Christie's Concurrence to Transmission Backstop Siting NOPR."
191 FERC, "Commissioner Christie's Concurrence to Transmission Backstop Siting NOPR."

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