AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Building on Experience
100 YEARS

Reforms for Improving Federal Environmental Review and Permitting

PROBLEM

The Federal Government is a steward of the public trust and the timeliness of its decisions can have major implications for the environment and the economy. Delays in environmental review and permitting decisions, as well as lengthy procurement processes, often derail the efficient delivery of needed infrastructure projects by many years. These processes are bureaucratic, lengthy, complex and duplicative. They involve multiple interrelated approvals within a labyrinth of numerous agencies. Throughout these processes, too often, litigation abounds. Delays deny the public the substantial benefits that come from a construction project: improving our economy, our competitiveness, and our quality of life.

GOAL

AGC hopes this document will help frame the problems that are playing out on public projects and demonstrate the need for reform. The sections that follow identify ways to lessen the time and costs associated with environmental review and permitting – with a focus on integrating the processes to avoid sequential and duplicative reviews, minimize redoing permit documentation and analyses, foster innovation, reduce litigation, and mitigate the unreasonable contractual risks that are unnecessarily driving up costs for infrastructure projects. AGC offers specific reforms that seek to offset lengthy National Environmental Policy Act review schedules and avoid the Clean Water Act Section 404 permitting lag that follows.

Prepared by:
The Associated General Contractors of America
2300 Wilson Boulevard, Suite 300
Arlington, Virginia 22201
Main Phone Number: (703) 548-3118

Date: Discussion Draft v2 - July 24, 2017

Table of Contents

I. Executive Summary 3

II. Introduction to Federal Review and Permitting 4
A. The Use of NEPA 4
B. The Interplay between NEPA and other Federal Requirements 5
C. Federal Review and Permitting in Action 7
D. Federal Review and Permitting Costs 7

III. General Recommendations to Improve Federal Review and Permitting Efficiency 8
A. Streamlining Reforms in Current Law Have Limited Applicability; Fail to Mandate Schedules 8
B. Sequential and Duplicative Reviews Add Hurdles to Infrastructure Approvals 10
C. Redoing Permit Documentation and Analyses Wastes Time and Money 11
D. Environmental Justice and "Not in My Backyard" (NIMBY) Principles Are Being Used to Stop Infrastructure Growth 12
E. Citizen Suits Are the 800-Pound Gorilla 12
F. Permitting Risk Remains Key Barrier to Infrastructure Investment 14

IV. Recommended Reforms Specific to the NEPA Process 15
A. NEPA Process Issues Compromise Efficient Delivery of Infrastructure Projects 15
1. Initiating Design-Build or P3 Procurement Prior to Conclusion of NEPA Process Drives Up Cost 15
2. Even Minor Construction Changes Cause Major Delay When It Re-Opens NEPA; Stifling Private Sector Innovation 16
B. Inefficient Bureaucratic Processes Force Reevaluation of Previously Approved NEPA Documents, Decisions 17
C. Disagreements Loom Over Role Coordinating Agencies Play in NEPA Process 17
D. USEPA Plays Commanding Role in NEPA Review Process 18
E. Agencies Struggle with Climate-Change Impacts Analyses 18

V. Federal Permitting Example: The Clean Water Act Section 404 Permit Process 19
A. At-A-Glance Look at the CWA Section 404 Permit Process 20
B. 'Chokepoint' Details in CWA Section 404 Individual Permit Process 21
1. Jurisdictional Determination 21
2. Application Adds/Corrections 21
3. Public/Agency Input Process 21
4. Related Reviews/Permits 22
5. USEPA Veto 404(c) or 404(q) Elevation 23
6. Litigation 23
7. Permit Conditions 23
C. Recommended Reforms Specific to the 404 Program 23
1. USEPA's Authority to Veto a Duly Issued Permit Casts Uncertainty on Development 23
2. Permitting Authorities Are Thwarting Advanced Mitigation, Mitigation Banking, and Future Mitigation Investments 24
3. Delay on the RHA Section 408 Side Puts Off the CWA Section 404 Review Process and Further Delays Construction 25

VI. AGC Staff Contacts 26

Appendix 1: Expedited Environmental Review of Infrastructure Projects – FAST-41 Highlights 32

I. Executive Summary

Most large infrastructure projects must receive environmental reviews and approvals that involve many federal agencies and multiple levels of government. What is more, these projects generally do not qualify for efficient general permitting procedures and must obtain extremely costly and time-consuming individual permits, on a project-by-project basis. AGC, in this document, is focused on reforming the National Environmental Policy Act (NEPA) and the federal environmental permitting process to eliminate delays, unnecessary duplication, and frivolous litigation, and give worthy projects a timely green light.

Specifically, Congress should strengthen and expand the time-limited schedules and other meaningful "streamlining" reforms in current law and impose action-forcing mechanisms as well as incentive programs to ensure agency-wide compliance. To avoid sequential and duplicative reviews that slow down many large infrastructure projects, Congress should require the issuance of Clean Water Act Section 404 permits in conjunction with the NEPA Record of Decision. To this end, it is critical that Congress require agencies to allow the monitoring, mitigation and other environmental planning work performed during the NEPA process, and included the final Environmental Impact Statement, to satisfy federal environmental permitting requirements.

AGC also points out why undisclosed environmental risk – as for managing and remediating unforeseen hazardous material – can unnecessarily drive up construction costs, particularly on public works projects, (due to added cost contingencies) and limit the universe of qualified, responsible construction firms (due to contractors dropping out of the procurement). Congress should require the government to bear such unquantifiable risk on public works projects and/or provide contractual relief through cost sharing mechanisms.

Importantly, the threat of endless litigation (with regard to environmental justice, climate impacts and other issues) is forcing agencies to try to make their NEPA analyses litigation-proof so they survive judicial challenges under NEPA's well worn "hard look" standard. AGC herein makes the case for why Congress should work to remove the incentives for frivolous and obstructive litigation that are delaying, and sometimes defeating, proposed projects.

AGC also offers specific reforms to the NEPA process that would help to expedite project construction at a reduced price, while supporting the innovation needed to our nation's infrastructure, include prohibiting the initiation of procurement prior to the NEPA approval and exempting *de minimis* changes formal NEPA re-evaluation. Specific to the 404-permitting process, reforms are needed to encourage advance mitigation planning and investment.

II. Introduction to Federal Review and Permitting

A. The Use of NEPA

NEPA is a procedural "planning" statute with two primary aims. First, it obligates federal agencies to consider every significant aspect of the environmental impact of an action along with alternatives before proceeding with it. Second, it ensures that the agency responsible for the action will inform the public of what the action is, and that it has considered environmental concerns in its decision-making process. In this capacity, NEPA has become one of the primary mechanisms through which the public can participate in the federal decision-making process.

There are three triggers for NEPA's procedural requirements:

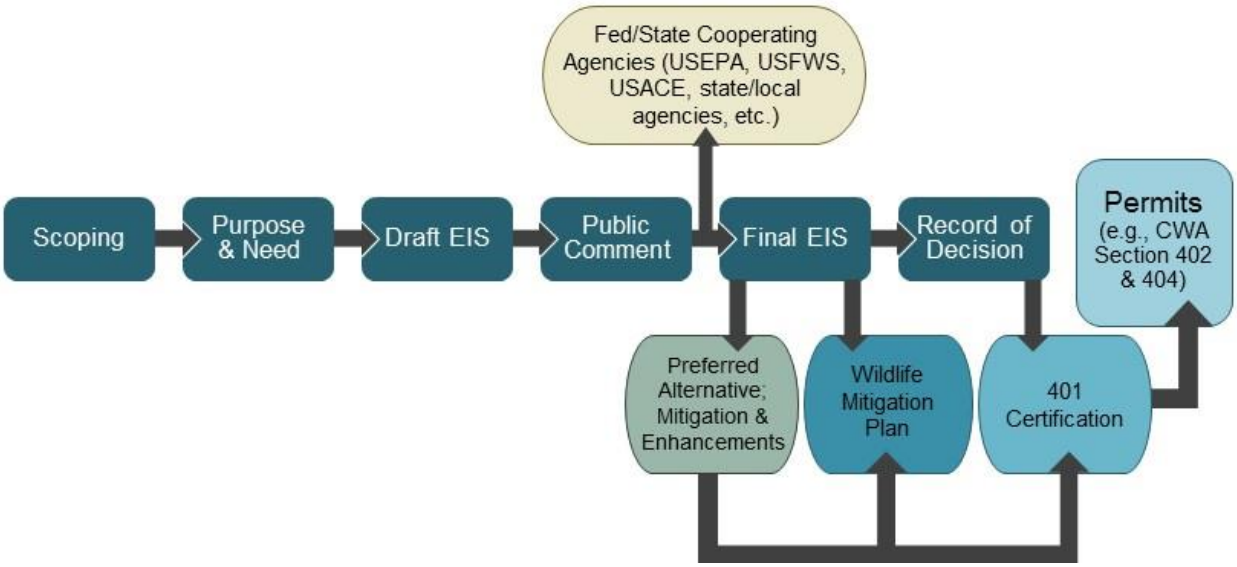
- One or more project components will occur on federal lands, such as national forests or Bureau of Land Management lands (e.g., building powerlines, drilling for oil, logging, installing renewable energy projects).[1]
- The project or its components will be funded in part or whole by federal funds.
- The project will require a federal permit or license.

Federal actions to which NEPA applies involve the participation of a "lead agency" and "cooperating agencies." The lead agency is the federal agency that takes responsibility for preparing the NEPA documentation.[2] A cooperating agency is any federal agency, other than a lead agency, that has jurisdiction by law or special expertise regarding any environmental impact involved in a proposal. A tribal, state, or local agency may also be a cooperating agency.[3] As explained below, there are a host of environmental statutes that may apply to a given federal action and, as such, numerous federal agencies may be required to participate in the NEPA process.

NEPA covers the full range of potential environmental impacts, including but not limited to water quality impacts, wetlands impacts, air quality impacts, endangered species impacts, and historic resources impacts. NEPA establishes procedural and planning practices for federal agencies but it does not replace (or conflict with) other substantive environmental laws (e.g., Clean Air Act, Clean Water Act, Endangered Species Act) and the additional permitting and process procedures required therein.[4] See Section II.B below.

If the environmental consequences of a proposed federal action may be significant, the federal agency prepares an Environmental Impact Statement (EIS). An EIS is a detailed evaluation of the proposed action and alternatives. As soon as possible after determining that an EIS is needed, the agency is required to determine the scope of the project (including any environmental laws, regulations, or executive orders, in addition to NEPA, that will apply to the project). Once the agency determines the scope of the action, EIS preparation can begin. The action's "purpose and need statement" is the foundation on which subsequent sections of the EIS are built.[5]

EISs and supporting technical studies often run a thousand pages or more. The public, other federal/state cooperating agencies, and outside parties provide input into the preparation of an EIS and then comment on the draft EIS when it is completed.[6] After a final EIS is prepared, a federal agency will prepare a public Record of its Decision (ROD) that addresses how the agency incorporated the findings of the EIS, including consideration of alternatives, into the decision-making process.[7]



B. The Interplay between NEPA and other Federal Requirements

NEPA forms the framework to coordinate compliance with other environment-related statutes and regulations, many of which impose permit requirements. On the positive, the NEPA process serves to provide decision-makers with a more comprehensive view of the major environmental issues and potential conflicts among the environmental components of proposed projects. However, NEPA does not give the lead agency (or for that matter, the Council on Environmental Quality (CEQ)) regulatory authority and oversight of the agencies charged with implementing the regulations and permitting programs that are required to adequately ensure the federal activity is conducted to avoid and minimize potential impacts. In current practice, project proponents are generally proceeding with piecemeal permit applications after NEPA to advance the project to construction.

Construction projects, such as bridge and highway construction, pipelines, water resource projects, renewable or conventional energy production may require compliance with literally dozens of federal, state, tribal, and local laws.

Federal environmental legal requirements potentially applicable to federal actions include; but may not be limited to:

- Archaeological and Historical Preservation Act
- Clean Air Act
- Clean Water Act (CWA)
- Coastal Zone Management Act
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- Emergency Planning and Community Right to Know Act (EPCRA)
- Endangered Species Act (ESA)
- Executive Order 12898 (Environmental Justice)
- Farmland Protection Policy Act

- Fish and Wildlife Coordination Act
- Historic Sites, Buildings and Antiquities Act
- Marine Mammal Protection Act
- Migratory Bird Treaty Act
- National Historic Preservation Act
- Pollution Prevention Act
- Resource Conservation and Recovery Act (RCRA)
- Rivers and Harbors Act
- Safe Drinking Water Act
- Section 4(f) of USDOT Act (49 USC 303)
- Title VI of the Civil Rights Act
- Wild and Scenic Rivers Act
- Wilderness Act

These federal statutes are administered by a variety of different federal agencies that could all potentially become "cooperating agencies" in any given NEPA evaluation; including but not limited to:

- Advisory Council on Historic Preservation
- Army Corps of Engineers (USACE)
- Bureau of Land Management
- Environmental Protection Agency (USEPA)
- Federal Energy Regulatory Commission (FERC or Commission)
- Fish and Wildlife Service (USFWS)
- Forest Service
- National Marine Fisheries Service (NMFS)
- National Park Service
- Natural Resources Conservation Service of U.S. Department of Agriculture
- Tribal Consultation

Indeed, the NEPA process requires the lead agency to coordinate extensive reviews, documentation and analysis with other federal agencies including the ones listed above, as well as various state regulatory and review agencies. One of the challenges for project sponsors is to align all the different agency approvals that are needed for a project.

In addition to the NEPA process, the project sponsor/operator will need to complete separate environmental federal permit processes or analyses, as the final version of the project may warrant. CEQ's NEPA regulations require a draft EIS to "list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal."[8]

The CEQ has formally sought to streamline the NEPA process, and in 2011 it issued a Memorandum for Heads of Federal Departments and Agencies that touted the benefits of "integrating environmental reviews, coordinating multi-agency or multi-governmental reviews and approvals ..."[9] CEQ regulations encourage agencies to integrate these multiple reviews into a single, comprehensive EIS that is prepared concurrently and integrated with the requirements of other federal environmental laws.[10] Several agencies have issued guidance[11] on how to accomplish such streamlining with regard to substantive (and not merely procedural) environmental laws. But multi-year approval processes remain the norm and delay perpetuates the bottlenecks and inefficiencies that impede competitiveness and cause pollution.

C. Federal Review and Permitting in Action

There are a multitude of statutes, implementing regulations, agency policies, and court decisions that affect what permits are required on construction projects, what agencies look for during a permitting process, and what activities or discharges they can authorize. Duplicative environmental reviews and permits are often required on the same project by federal, state, and local governments. A builder of infrastructure must seek approval not from "the government," but from a dozen or more different arms of the government.

The process of issuing a federal environmental permit almost always involves a complex web of related permissions, approvals and certifications that are all interdependent. For example, if the USACE determines that a project requires federal authorization under a CWA Section 404 permit before it can proceed, the project sponsor/operator can expect a lengthy and costly process during which a host of separate agencies will enter the fray: the USFWS (and/or the NMFS) will likely be engaged through consultation on endangered species or essential fish habitats; the state environmental agency will be involved pursuant to the Section 401 water quality certification process; other state historic preservation offices may be involved depending on their role in their respective state and the nature of the project; the pertinent tribal government is involved if any tribal leads or interests are impacted by the project. See Section V – At-A-Glance Look at the CWA 404 Individual Permit Process and 'Chokepoints.'

Looking just at the federal environmental permitting scheme, in addition to the potential need for Section 404 permit coverage, a manufacturing or stationary-source plant would likely also need the following permits from the USEPA or from its delegated state authority:

- National Pollution Discharge Elimination System (NPDES) permit under CWA Section 402 ;
- Title V Clean Air Act operating permit for a "major source" of pollutants (certifying compliance with the applicable requirements of their permits at least annually);
- New Source Review and Prevention of Significant Deterioration Clean Air Act permit prior to construction to ensure that the anticipated "release of pollutants [does not] exceed federal standards for the region;"
- Additional CWA and CAA permits may apply – as well as Safe Drinking Water Act, RCRA and EPCRA requirements – depending on the types of materials the manufacturing facility uses and the waste streams it generates.

D. Federal Review and Permitting Costs

The cost to prepare an EIS is often borne by project sponsors. For public projects, this means the government and, ultimately, taxpayers.

- Per a National Association of Environmental Professionals (NAEP) review of the 194 EISs published in 2015, the average time to complete an EIS was five years and only 16 percent were prepared in two years or less.[12]
- A U.S. Government Accountability Office (GAO) report stated that the average completion time for an EIS in 2012 was 4.6 years.[13]

- Between 2003 and 2012, the U.S. Department of Energy paid consultants an average fee of $6.6 million, and as much as $85 million, to prepare EISs.[14]

The opportunity cost also can be significant:

- The 2015 report by Common Good, a non-profit government watchdog, finds that a six-year delay in starting construction on public projects costs the nation more than $3.7 trillion in lost employment and economic gain, inefficiency, and unnecessary pollution.[15]
- Delay also dramatically increases the cost of construction.
- That projected total is more than double the $1.7 trillion needed through the end of this decade to modernize and upgrade the crumbling U.S. infrastructure, according to projections of the American Society of Civil Engineers.

The procurement process for large projects is moving to design-build. These procurements expedite construction; however, these efficiencies may be offset by lengthy procurement processes.

- A $1.3 billion procurement of a 60-mile segment of high speed rail took 15 months from RFQ (request for qualifications) to award.
- A $860 million procurement of a 30-mile tollway took 21 months from RFQ to award.
- An RFQ for a $1.3 billion procurement for a reconstruction of a highway in a major city has spanned over two years and has yet to award.

III. General Recommendations to Improve Federal Review and Permitting Efficiency

A. Streamlining Reforms in Current Law Have Limited Applicability; Fail to Mandate Schedules

Currently the environmental streamlining reforms in current law have limited application and, in some cases, miss the mark. MAP-21 (The Moving Ahead for Progress in the 21st Century Act),[16] the Water Resources Reform and Development Act (WRRDA) of 2014,[17] and the FAST Act (Fixing America's Surface Transportation Act) included a great deal of new authority designed to streamline project review and approval. See Appendix 1: Expedited Environmental Review of Infrastructure Projects – FAST-41 Highlights. See also the Energy Policy Act of 2005 (EPAct 2005),[18] a law intended to streamline and expedite federal authorizations for interstate natural gas pipeline projects and electric transmission infrastructure projects. **Still, more reforms are needed, and on a more comprehensive basis, to improve our delivery of important infrastructure projects across the nation.**

REFORM: Rather than creating brand new processes, Congress should expand the meaningful reforms included in Title 41[19] of the FAST Act (FAST-41) (coordinated and time-limited environmental review and permitting schedule and enhanced procedural transparency) more broadly so that they cover more projects (i.e., projects with total investment of LESS than $200 million). FAST-41's definition of "covered project" leaves room for confusion and does not include most federal transportation projects or federal water resource development projects – see Appendix 1. What is more, the language appears to give developers the option not to participate in the new process: Infrastructure projects may be become "covered projects" under FAST-41 only after the project sponsor submits "an initiation notice for inclusion" under the Act.[20] To expedite the delivery of projects, Congress should ensure that the

"streamlining" process applies to all NEPA reviews for the "construction of, and infrastructure for" federally funded infrastructure projects.

A significant deficiency with the FAST-41 language is that the "deadlines" are flexible and non-binding. FAST-41 does not set specific review/permitting schedules.[21] FAST-41 sets a 180-day window for a federal agency decision on an environmental review or authorization – starting from the date the relevant agency receives all information needed to complete the review.[22] But the law gives agencies discretion in determining when they have sufficient information to make a decision on a project. Therefore, time limits are likely to fluctuate if an agency determines more information is needed or demonstrates a reason for missing the completion date (theoretically an agency could continue to ask for more information and/or propose alternative completion dates). See Appendix 1: Expedited Environmental Review of Infrastructure Projects – FAST-41 Highlights.

MAP-21 addressed environmental delays in the delivery of federal-aid transportation projects. Specifically, the law requires federal agencies to act on a decision to issue any permit, license, or approval within 180 days of either the lead agency's final NEPA decision or the receipt of the application by the participating agency, whichever is later. Failure to meet the deadline established in MAP-21 will result in financial penalties to the offending federal agency.[23] For complex projects, MAP-21 requires the U.S. Department of Transportation to provide additional technical assistance to establish a schedule for completing permits, approvals, etc., within four years of formal announcement of intent to prepare an EIS, as defined in CEQ NEPA regulations at 40 C.F.R. § 1508.22.[24]

REFORM: Congress should strengthen the time-limited schedules in FAST-41 to make them truly mandatory. Any objections that are not raised or resolved within a definite timeframe should be waived and the procedure deemed complete --- and you would move on to the next step. There should also be a hard deadline for the completion of NEPA review. (For example, the RAPID Act[25] proposed deadlines of 18 months for an Environmental Assessment (EA) and 36 months for an EIS.) An action-forcing mechanism should deem a project approved within a definite timeframe. Also, consider a broader application of MAP-21's provision that imposes financial penalties on agencies that fail to render permitting decisions within the deadline.

With the passage of EPAct 2005, Congress amended the Federal Power Act of 1935, the Natural Gas Act of 1938, and the Public Utility Regulatory Policies Act of 1978 and granted the Federal Energy Regulatory Commission (FERC or Commission) with significant responsibilities and authority over energy projects. EPAct included three principal policy goals for the Commission:

1. reaffirmed a commitment to competition in wholesale power markets as national policy;
2. strengthened the Commission's regulatory tools, recognizing that effective regulation is necessary to protect the consumer from exploitation and ensure fair competition; and
3. provided for development of stronger energy infrastructure.

For electric transmission infrastructure, the Commission signed a Memorandum of Understanding with the U.S. Department of Energy and other federal resource agencies with authority to issue federal authorizations for electric transmission facilities to establish a coordinated federal review and permitting process. As part of EPAct, Congress also gave three or more contiguous states the opportunity to enter an interstate compact to establish regional transmission siting agencies to:

1. facilitate siting of future electric energy transmission facilities within those states; and
2. carry out the electric energy transmission siting responsibilities of those states.

The regional transmission siting agencies "shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States)." The Commission shall have "no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement" and the Secretary makes the requisite finding.[26]

REFORM: Congress should review the initial success of EPAct with respect to regional transmission siting agencies and the effectiveness for timely development of electric transmission infrastructure projects.

For natural gas infrastructure projects, FERC became responsible for the coordination, environmental review, and the processing of all federal authorizations relating to proposals for interstate projects under its jurisdiction (pipelines, storage fields, compressor stations, liquefied natural gas facilities, etc.).[27] Subsequently in late 2006, FERC issued a Final Rule (Order 687)[28] and regulations[29] establishing the process by which it would exercise its responsibilities under Section 313 of EPAct, including the requirement to set expeditious schedules for all federal and state agencies acting under federal delegated authority, to reach a final decision on requests for federal authorizations necessary for natural gas infrastructure projects. In its final rule, the Commission established a 90-day deadline for other federal decisions upon the issuance of FERC's final EA or final EIS, unless a specific schedule is otherwise formally noticed by FERC.[30] However, if a federal or state agency does not comply with the FERC schedule for federal authorizations, EPAct 2005 only provides an enforcement option for the applicant, not FERC. Section 313 allows an applicant to file a petition with the United States Court of Appeals for the District of Columbia Circuit, which is given original and exclusive jurisdiction over any civil action for review of an alleged failure of an agency to issue, condition, or deny any permit required under federal law.[31] But this provision has rarely been used, allowing agencies to miss the required federal authorization deadline without consequence.

REFORM: Congress should review the initial success of EPAct in regard to interstate natural gas infrastructure projects and the more recent (last 3 years) project schedule delays and declining applicant certainly in regard to NEPA and permitting timelines. Further, Congress should clarify with the Commission why the FERC 90-day deadline for other federal decisions upon the issuance of a final EA or final EIS is not consistently upheld.

B. Sequential and Duplicative Reviews Add Hurdles to Infrastructure Approvals

The current process of performing sequential and often duplicative environmental reviews and permits on the same project – performed by all levels of government following the NEPA approval process – is presenting massive legal hurdles to infrastructure approvals. A builder of infrastructure—whether a contractor or government agency—must seek approval not from "the government," but from a dozen or more different arms of the government. According to bonding companies that finance large public works projects, two environmental approvals are critical in rating a project's risk for bond financing. Those are the NEPA review (1,679 days, on average, to complete an EIS) and CWA Section 404 permit authorization (788 days, on average, to obtain an individual permit). Obtaining these approvals prior to bonding greatly reduces risk and achieves a higher bond rating to the benefit of the project sponsor.

FAST-41 requires that state and federal permitting reviews run concurrently for a "covered project" so long as doing so does not impair a federal agency's ability to review the project.[32] The law does not specify the permits and approvals required to be included in the schedule. Again, as stated above, there is no penalty or regulatory consequence for missed deadlines. MAP-21 directs cooperating agencies to coordinate and carry out activities concurrently, instead of sequentially, and in conjunction with the NEPA review, and expanded the use of categorical exclusions.[33] (Notably, the "concurrent review" requirement under MAP-21 is waived if it "would impair the ability" of any agency to conduct any analysis or meet any obligation.) WRRDA similarly requires agency coordination and concurrent action on environmental reviews to accelerate project delivery.[34]

REFORM: For federal transportation projects, several states have merged their NEPA and CWA Section 404 permitting processes; this should be the national standard and USACE's current regulations already point in this direction but do not go far enough.[35] (Across the nation there is considerable variation in the usage and emphasis of merger processes.) In an integrated process, the project sponsor would submit the 404-permit application to USACE simultaneously with the publication of the draft EIS. USACE would be required to issue the 404 permit at the end of the NEPA process based on the information generated by NEPA.

Both the NEPA and Section 404 processes involve the evaluation of alternatives, the assessment of impacts to resources, and the balancing of resource impacts and project need. Conducting two processes simultaneously (or allowing the former to satisfy the latter) would greatly expedite project decision-making and avoid duplication and process inefficiencies.[36] NOTE: The federal funding agency should assume a lead role in shaping the project "purpose and need" and "range of alternatives" during the NEPA review. To simplify the review process, and reduce the potential for impasses over minor changes, Congress should modify any existing requirements for lead agencies to obtain participating agencies' "concurrence" in project schedules or the adoption/use of "planning products."[37]

More generally, it should be a requirement for all government agencies involved in the issuance of a federally required permit for any given project to complete concurrent reviews (in conjunction with the NEPA review process) within established time periods. From the perspective of the permit applicant, a coordinated concurrent review under all major federal and state authorities avoids duplication and delays and helps to avoid potentially conflicting permit conditions or limitations (e.g. differing mitigation requirements). There must be timelines and deadlines for completing the environmental permitting process as well as NEPA review deadlines (see above).

C. Redoing Permit Documentation and Analyses Wastes Time and Money

Time and money is wasted on redoing project analyses and reviews and on collecting duplicative information from permit applicants. Challenges with environmental documentation and permitting processes are root causes for delays on infrastructure projects. The environmental permit approval process generally entails sequential reviews by multiple agencies and various requests for project-specific information. Even though each agency has slightly different forms and different information requirements, some of the information (like project descriptions) is duplicated across applications. This means that there can be multiple forms requesting the same information in different ways.

On the positive side, MAP-21 allows the use of errata sheets, rather than rewriting the draft EIS, when minor modifications are needed in a final EIS. Also, under current law the lead agency should use a single document for the final EIS and ROD, as much as possible, unless there are substantial changes or there are significant new circumstances or information changes.[38] By preventing the needless production of multiple additional documents, MAP-21 significantly reduces the amount of time involved in EISs. MAP-21 also encourages the use of "programmatic" mitigation plans [39] and makes it somewhat easier to use previous planning work to meet NEPA requirements.[40] Notably, the FAST Act also calls for the lead agency to develop a NEPA ROD that is sufficient to satisfy any other federal approvals/permits that the project may require; however, the duty to use a "single document" is void if its use would be impracticable (e.g., impair the ability of any federal agency to conduct needed analyses or meet any obligations.)[41]

REFORM: The monitoring, mitigation and other environmental planning work performed during the NEPA process, and included the final EIS/ROD, must satisfy federal environmental permitting requirements, unless there is a material change in the project.[42] Implement an integrated "one-stop" permitting system by creating a single form that collects all information needed for major permits. That way, applicants only need to provide information once (and to fill out one long form and file it once). Also, build an online database of technical information (e.g., on distributions of endangered species, critical habitat, or previous permit requirements) so that new information does not have to be gathered anew for every project operating in a similar watershed or geographic area. Allow environmental reviews to adopt material from previously completed environmental reviews from the same geographic area. Require federal agencies to use regional- or national-level programmatic approaches for authorizations and environmental reviews, for frequently occurring activities as well as those activities with minor impacts to communities and the environment.[43]

D. Environmental Justice and "Not in My Backyard" (NIMBY) Principles Are Being Used to Stop Infrastructure Growth

As our communities get more crowded and congested, it has become more difficult to site major facilities for transportation, waste management, water supply, sewage treatment, mass transit, manufacturing, energy, etc. The transition to a more sustainable, renewable resource based economy requires new water infrastructure, coastal resiliency projects, mass transit and other types of development.

REFORM: The public at large (government officials, community groups, landowners, builders/developers) is provided meaningful opportunities to participate in the environmental review process. In addition, federal agencies must consider environmental justice in their activities under NEPA and in issuing permits. [44] Environmental justice should not be a legal basis for challenging RODs or approved environmental permits.

E. Citizen Suits Are the 800-Pound Gorilla

Citizens are famously litigious in attempting to impede government approvals of development or to control land use. All federal environmental statutes, except the Federal Insecticide, Fungicide, and

Rodenticide Act, allow "any citizen" to bring a "civil action on his own behalf" against "any person" (including the government) who is alleged "to be in violation" of a standard or order issued under the statute. While NEPA does not have a citizen suit provision per se, an agency's failure to follow NEPA's required procedures can be challenged under the Administrative Procedures Act.

Even on projects where an EIS is not required, officials spend years "working through every detail" for fear of being sued sometime in the future.[45] There is a high rate of turnover among the government career staff carrying out the NEPA procedures, and it is not uncommon for the new person on the team to "waste" $50,000 in printing fees and many months redoing documents just to make minor edits (e.g., date changes). Still, private plaintiffs who seek to delay or halt a controversial construction project will file a lawsuit against the government alleging noncompliance with the NEPA procedures or against the project owner or operator for an alleged failure to comply with (or secure coverage under) and environmental permit. **Many lawsuits begin with an injunction requiring immediate stoppage of work and may take considerable time, effort and cost in attorney fees and court costs to resolve.**

> **EXAMPLE:** When Maryland, Virginia and the District of Columbia agreed that the Woodrow Wilson Bridge (I-95 between Oxon Hill, Maryland and Alexandria, Virginia) *needed to be replaced and widened*, a long and detailed EIS process had to be followed, even though the proposed new (and wider) bridge was replacing an old and inadequate crossing. Once the EIS was complete, the Sierra Club filed suit in federal court for the District of Columbia to remand the document for more work, and Sierra won at the district court (trial court) level, but the trial court's remand was reversed by the U.S. Court of Appeals for the District of Columbia. All of this litigation took several years to complete.

As currently written, the FAST Act's judicial review changes are limited and not likely to provide significant relief. FAST-41 reduced the statute of limitations for NEPA challenges from six to two years to provide more certainty for applicants; however, most NEPA lawsuits already are filed well within two years, because project challengers generally want to sue before the targeted project is constructed to avoid mootness arguments. FAST-41 also provides that in any action seeking a temporary restraining order or preliminary injunction of a covered project, the court shall "consider the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction" and shall not presume that such harms are reparable. However, most courts already consider an injunction's negative impact when balancing the harms and equities. Another FAST-41 provision dictates that NEPA challenges can only be brought by those who commented on an EIS and did so with sufficient detail to put the lead agency on notice of the claims. With regard to standing, many courts have limited NEPA challenges to comments raised within the public review period on the EIS (others allow plaintiffs to file suit as long as they can show "injury in fact").

MAP-21 reduced the time limit to 150 days after publication of a notice in the *Federal Register* announcing that a permit, license or approval is final, for parties to file lawsuits that challenge agency environmental decisions regarding surface transportation projects.[46] However, the preparation and announcement of a "supplemental" EIS, when required, restarts to 150-day clock.

REFORM – Part 1: Further shorten and standardize the statute of limitations for challenges to final ROD or claims seeking judicial review of a permit, license or approval issued by a Federal agency for an infrastructure project (see Section III.A and III.B). The Portman-McCaskill Senate bill, Federal Permitting Improvement Act, that was reportedly supported by environmental and business groups would have

lowered the statute of limitations from six years to 150 days for all major projects across all sectors. In addition, interested parties should be forced to get involved early in a project's review process to maintain standing to sue later (RAPID Act proposed a "get-in or get-out" rule). Eliminate the risk of being sued when you reopen the ROD for minor changes to the construction contract. Another way to control the litigious environment that is delaying (and often stopping) critical infrastructure work may be to require any party who brings a challenge against a project's final EIS/ROD, and causes the work to stop, to put up a bond[47] that covers the cost of delay; legal fees also should be awarded if the project proponent prevails.

REFORM – Part 2: Federal environmental rules and regulations that apply to construction site owners and operators are complex and cumbersome and should be enforced only by trained staff of government agencies. Alternative potential reforms include: limiting citizen suit penalties to violations of objective, numeric limitations rather than subjective, narrative standards; extend "notice period" beyond the current 60 days (giving regulatory agencies more time to review notice of intent letters and initiate formal actions); clarify definition of "diligent prosecution" of alleged violations, thereby allowing federal/state authorities to exercise their primacy in enforcement and preventing unnecessary citizen suit intervention.[48]

F. Permitting Risk Remains Key Barrier to Infrastructure Investment

Over the past 15 years, the growth in the use and performance of alternative contracting methods procurement of large projects has brought to light some specific environmental risks that need to be addressed when design-build is used as the project delivery system. Regarding risk, it is customary for the contractor to take on additional reasonable cost and schedule risk related to design, utility relocation and environmental compliance. (Reasonable risks are those that can be quantified for cost and time, where contractual compensation is provided to contain risk or for which insurance coverage can be obtained.) However, recently design-build agreements have included unquantifiable contractor risk, such as for managing and remediating pre-existing third-party site contamination.[49] This has resulted in the contractor assuming unreasonable cost and schedule risk, and in the case of site contamination, potential CERCLA liability. Since this risk is unquantified, insurance coverage is difficult if not impossible to obtain.[50]

Owners and contractors respond to this risk through the contract vetting process during the procurement stage where the contractor attempts to clarify through a question/answer process to gain owner approval for amendments to mitigate risk. This process usually generates multiple contract addendums causing a protracted and costly procurement process. The contractor addresses any remaining unreasonable/unquantifiable risk by adding cost contingencies resulting in higher construction costs to the owner or responsible contractors dropping out of the procurement process due to excessive risk.

Compounding this uncertainty is the lack of testing data to accurately characterize contamination for disposal, which forces the contractor to speculate on remediation requirements. Contractor responsibilities for managing and remediating and arranging for transport of contaminated materials creates exposure to long-term CERCLA liability.

REFORM: Where the public owner is unwilling to compensate the designer/builder for unforeseen events or circumstances, particularly related to encountering hazardous materials, negative consequences follow: limited universe of competitive bidders because some will walk away from such extreme risk scenarios; shut out of highly-qualified, environmentally-sophisticated firms; inflated contract prices because bidders are pricing risk into the contract that is going back to the owner (and ultimately being borne by the taxpayer).

Government is in the best position to bear the following risks:

- Environmental risk associated with unforeseen hazardous material that was not disclosed pre-bid; and
- Environmental risk associated with finding out after the contract has been awarded that a part of the project site, or any property or waterbody to which the project site drains runoff, is a newly-listed "Superfund" site.

On all federally funded projects, Congress should: 1) prohibit the transfer of CERCLA liability for pre-existing contamination to the contractor by requiring the public owner (e.g., Departments of Transportation (DOT)) to retain generator and arranger status and 2) require the public owner (e.g., DOT) to provide contractual relief through cost sharing mechanisms, such as allowances and schedule relief through delay clauses that compensate the contractor for responding to site contamination.

IV. Recommended Reforms Specific to the NEPA Process

A. NEPA Process Issues Compromise Efficient Delivery of Infrastructure Projects

1. Initiating Design-Build or P3 Procurement Prior to Conclusion of NEPA Process Drives Up Cost

In the case of highway work, state DOTs often will initiate the proposal process before they have a finalized NEPA ROD.[51] The costs of pursuing these projects is inflated when general contracting firms (taking both design and construction responsibility) are brought in before NEPA is complete. Design-build procurements for large projects are costly. Owner costs include fees for legal counsel, technical and procurement consultants. The contractor incurs costs as he advances the project design from the schematic stage (provided by the owner) to a preliminary design for cost estimating, performs value engineering, reviews the voluminous owner references and contract documents, and engages fully in the contract vetting process. Procurement delay of six to 12 months due to NEPA issues is not uncommon. This delay extends overhead, labor and consultant costs to owner and contractors and is particularly costly to contractors because the level of effort remains steady due to continuation of the contract vetting process, continued release of owner documents, and redesign in response to evolving owner expectations. Procurement delay results in owners and contractors absorbing substantial added procurement costs. [These costs are lost should a NEPA challenge effectively force reopening the NEPA process for additional study. Addressing court-ordered NEPA revisions typically takes one or more years to complete and usually results in termination of the procurement process, or the owner terminating the contract and compensating the contractor awarded the work for mobilization and delay costs. Owners, upon satisfying court order NEPA requirements, initiate a new procurement process from the beginning.]

Under the Federal Highway Administration (FHWA) regulations, prior to NEPA completion, a private design-build contractor cannot complete the final design or proceed with construction (23 C.F.R. § 636.109(b)). If the contracting agency awards a contract prior to NEPA completion, FHWA's authorization and obligation (of preliminary engineering and other pre-construction funds) is limited to preliminary design (23 C.F.R. § 636.109(b)(1)) and early acquisition of the right of way in accordance with 23 U.S.C. § 108. The contract must include termination provisions if the NEPA process concludes by selecting the "no-build" or "no action" alternative (23 C.F.R. § 636.109(b)(9)).[52]

REFORM: For projects involving "federal action," the project sponsor should not initiate procurement until the ROD is issued that closes the NEPA process. Such a change will substantially decrease procurement costs and increase the integrity of the NEPA process by removing any notion that the NEPA outcome was pre-determined. Another means to reduce owner and contractor costs would be to simplify the procurement process by standardizing the design-build agreement for federally funded projects. Owners incur sizable legal fees for outside counsel and consultants to draft, contractor vet and re-draft design-build agreements for each project. Contractors incur high legal and staff costs as well in the vetting process.

2. Even Minor Construction Changes Cause Major Delay When It Re-Opens NEPA; Stifling Private Sector Innovation

Even minor changes or adjustments to the project design or location – such as small additions or changes to right-of-way, small temporary or permanent easements or drainage pond features to accommodate schematics – will trigger another round of lengthy coordination at the federal and state level and public review and possibly a supplemental EIS. It is common for the project limits, as defined during preliminary design and used to establish the NEPA project foot print, to be inadequate to accommodate all project aspects – such as drainage features, utilities and construction access. Therefore, minor changes to the NEPA footprint are required to construct the project. Because of the overarching fear of litigation brought by advocacy groups alleging noncompliance with NEPA's procedural requirements, agencies are overzealous in producing a "litigation-proof" EIS. This attitude results *not just* in the over documentation of minor changes (that should not trigger NEPA), but it also impacts value engineering the contractor performs during a design-build procurement by stifling innovation of design changes capable of capturing larger cost savings.

Per FHWA regulations, under no circumstances may a private entity have any decision-making responsibility in the preparation of any NEPA document (23 C.F.R. § 636.109(b)(6)). After the NEPA process is complete, project sponsors may only accept alternative technical concepts (ATCs) if they do not conflict with the criteria agreed upon in the environmental decision-making process. (23 C.F.R. § 636.209(b)). This also is hindering project sponsors' ability to take advantage of private sector innovation.

REFORM: Minor changes to a project should NOT result in reevaluation of the project under NEPA. *De minimis* impacts do not need a formal reevaluation, but could undergo a review with the owner to prove *de minimis*. The *de minimis* threshold could be based the definition of Section 4(f) properties codified in 49 U.S.C. § 303 and 23 U.S.C. § 138, as implemented by the Federal Highway Administration (FHWA) through the regulation at 23 C.F.R. § 774. Also, amend FHWA regulations at 23 C.F.R. § 636109(b)(6) and 23 C.F.R. § 636.209(b). In addition, if the project sponsor accepts a change (i.e., ATC) as proposed by the designer/builder, and it results in project delay, due to the need for further environmental reviews,

then the costs associated with that delay should be equally shared by the owner and the general contractor.

To cite a program worthy of replication: Once a natural gas infrastructure project under the Federal Energy Regulatory Commission (FERC) jurisdiction is authorized, project sponsors can request changes as "variances." FERC will consider approval of variances upon the project sponsor's written request, if it agrees that a variance:

1. provides equal or better environmental protection;
2. is necessary because a portion of this Plan is infeasible or unworkable based on project-specific conditions; or
3. is specifically required in writing by another federal, state, or Native American land management agency for the portion of the project on its land or under its jurisdiction.[53]

AGC recommends that all federal and state agencies regulating approved publicly-needed infrastructure have a clearly defined variance process to follow to efficiently make project changes while maintaining environmental protection.[54]

B. Inefficient Bureaucratic Processes Force Reevaluation of Previously Approved NEPA Documents, Decisions

A final EIS is only valid for up to three years following the last major approval. If no action to advance the project has occurred in the last three years, a *written reevaluation* is required. This may be a case where a project has been "shelved" due to lack of funding or simply put aside due to changes in statewide or regional priorities.[55] The scope and breadth of the reevaluation generally is dependent on: the type and degree of public controversy, possibility or reality of litigation, and the original and anticipated types of environmental resources and project impacts.

REFORM: Congress should require agencies to report to congressional committees on the expiration of various environmental reviews/permits. Projects that have completed environmental reviews should be prioritized for federal funding. An adequate source of funding should be available before a public sponsor initiates any additional environmental reviews or studies. In addition, to avoid inefficiencies and costly delays, it is imperative that the environmental reviews (see related reform recommendations Section III.A) and permitting processes (see reforms in Section III.B) for capital projects be time-limited.

C. Disagreements Loom Over Role Coordinating Agencies Play in NEPA Process

Some projects are held up by the push-and-pull between the lead agency and the other coordinating agencies regarding the scope of decision-making authority afforded to individual agency leaders.

REFORM: Even with the positive reforms of the FAST-41 (see Section III.A), there remains a failure to delineate clear decision-making authority; rather, recent changes create more processes rather than empowering key decision-makers to move projects forward. Congress should: (1) empower the lead agency and CEQ to really make decisions and (2) empower the Office of Management and Budget (OMB) to resolve disputes.[56]

D. USEPA Plays Commanding Role in NEPA Review Process

Section 309 of the Clean Air Act empowers **USEPA to review other federal agencies' EISs and to make those reviews public**.[57] USEPA's reviews generally focus on identifying and recommending appropriate mitigation measures for the project, which can lead to lengthy back-and-forth negotiations between USEPA and the responsible federal agency(ies). If USEPA finds the draft EIS "inadequate," USEPA will recommend the draft EIS be formally revised and made available for a second period of public comment. USEPA also reviews final EISs to ensure that the lead agency has taken USEPA's comments into account. If the "lead agency" does not make sufficient revisions (and USEPA finds the project to be environmentally unsatisfactory), USEPA may refer the matter to CEQ for mediation.[58]

Notably, USEPA plays a very powerful role in the NEPA review process during project development by serving as a formal "cooperating agency" (see Section II above) and by providing wide-ranging review and comment on EISs and other federal NEPA related activities. USEPA also has veto authority for CWA Section 404 permit process and may elevate specific cases for further evaluation culminating with the Assistant Administrator of the USEPA and an Assistant Secretary of the Army (see Section V.C below).

REFORM: A firm "deadline" should apply to all USEPA Section 309 reviews.[59] USEPA should be required to participate in all meetings as requested by the lead agency. CEQ should have the power to ultimately resolve any disputes (including those referred by other departments or agencies).[60] In addition, CEQ should issue guidance to delineate the scope and parameters for USEPA's Section 309 reviews to ensure consistency across USEPA Regional Offices. Key points related to information/data:

- Request only information that is relevant to better decision-making
- Be realistic about the availability of data
- Agree at scoping (or earlier) on the tools for analyzing impacts

E. Agencies Struggle with Climate-Change Impacts Analyses

Federal agencies are – and will continue to – struggle with the level of analysis required when assessing climate-change impacts under NEPA. On March 28, 2017, President Trump released an "Executive Order on Promoting Energy Independence and Economic Growth" that effectively rescinds CEQ's Greenhouse Gas NEPA Guidance – "Final Guidance for Federal Departments & Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate."[61] However, the President's Order does not remove the need for agencies to consider climate change in NEPA reviews.

Agencies and courts reviewing agency actions have long struggled with precisely how to address climate impacts. Some agencies include quantitative calculations, some provide only qualitative and other still decline to include any analysis on a project-level basis (on the basis that climate change is a global phenomenon. Plaintiffs challenging agency NEPA analysis will continue to pursue claims that analysis of climate impacts was not done in sufficient detail, or not at all. Courts will remain the driver here, and thinner administrative records could be more vulnerable to NEPA-based challenges by project opponents.

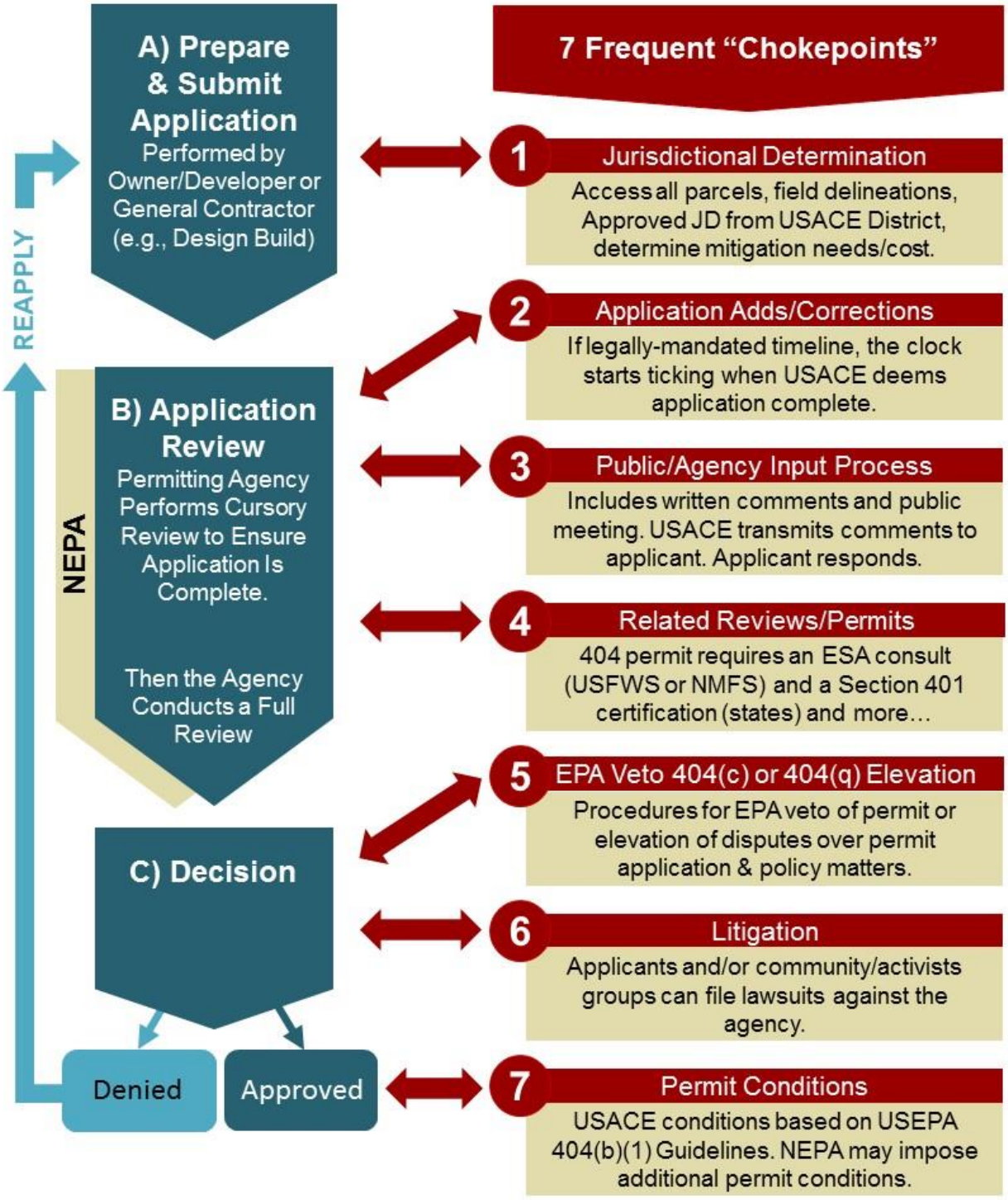
REFORM: The analysis of climate impacts will always vary by agency and by project. It is not clear what level of "hard look" is sufficient, particularly because climate change is a global phenomenon. A court-by-court standard on how to address climate is not conducive to efficient project reviews.[62] Congress should prohibit climate change reviews in NEPA environmental assessments and impact statements.

V. Federal Permitting Example: The Clean Water Act Section 404 Permit Process

Projects that cross wetlands, streams and other features deemed "Waters of the United States" (WOTUS) generally require USACE permits and must mitigate their impacts under CWA Section 404. Since the 2006 U.S. Supreme Court *Rapanos* decision, the USACE (and USEPA) have been asserting jurisdiction over any wet areas that have a "significant nexus" to downstream navigable waters.[63] This test has been met with very little nexus or significance between the actual wetland at issue and navigable waters.

The average applicant for an individual permit spends 788 days and $271,596 to complete the process.[64] (And if the process is beginning with an EIS, it may take three to six years (or longer) until the environmental reviews are complete. See Section II.D above.) Following are details of the various chokepoints the project proponent may encounter during the permit issuance process.

A. At-A-Glance Look at the CWA Section 404 Permit Process



B. 'Chokepoint' Details in CWA Section 404 Individual Permit Process

Following is a description of the various chokepoints the project proponent may encounter during the permit issuance process.

1. Jurisdictional Determination

For public design-build (or P3) construction projects – where the government is placing responsibility on the general contractor for environmental permitting – it is increasingly common for USACE to require 100 percent ground surveying and full delineation – along with field verification by a USACE District Engineer – before USACE will issue an Approved JD (jurisdictional determination). USACE staff will not accept NEPA analysis findings. More and more, USACE will not approve 404 permit without the Approved JD and final comprehensive mitigation plan. The USACE's insistence on better delineation data is holding up the permit issuance process because the general contractor does not have access to the entire project area to perform field studies until well into the construction process (for example, approval of right-of-way acquisitions). As a result, it is impossible to manage cost/risk due to the unknowns regarding project schedule and mitigation responsibilities.

2. Application Adds/Corrections

Applications for major projects requiring 404 permits rarely, if ever, are processed within the time limits set forth in the standard procedures. Agencies can work around strict timelines, including being able to start and stop the clock. If the agency's decision is that an application is incomplete or denied without prejudice, the applicant will need to resubmit it, which starts a new countdown. Added together, these many sequential clocks can create a long process.

USACE's increasingly high standards for field data/delineations before it will issue a decision on an application is bringing the permitting process on some large highway projects to a standstill (see #1). Limited access on design-build projects where the contractor is required to purchase the right of way severely limits a contractor's ability to conduct field delineations in a timely manner – causing excessive delay to the project.

Deadlines also can serve as a negative reinforcement, arguing that some agency staff sit on an application until their allotted time is almost up before looking at it regardless of how minor or simple the task.

3. Public/Agency Input Process

Notice must also be sent to all parties who have specifically requested copies of public notices and to the appropriate officials at USEPA, the FWS, the NMFS, and state historic preservation officers. When Section 404 (or CWA 401 – see below) applications are submitted, the agencies accept public comments regarding the applications for at least thirty days. If, during the initial comment period, someone requests a public hearing regarding the applications, the agencies must issue another public notice scheduling a public hearing at least thirty or forty-five days into the future.

Public notice requirements allow project opponents another opportunity beyond NEPA to challenge and stop projects, for which (generally) no contractor relief is provided. Oftentimes, even individuals who are not directly affected by the project become involved. This is presenting an opportunity to voice tangentially related concerns, or pursue political goals or no-growth agendas, thereby forcing the

permitting agencies to spend time and resources processing these concerns that ultimately do not have bearing on their permit decision.

4. Related Reviews/Permits

When a Section 404 permit application is submitted to the USACE, the agency typically routes the application to numerous other agencies for review and comment. Section 404 permit applications are routed to USEPA, the USFWS, the state environmental agency, and the state office of historic preservation. The commenting agencies have vast and varied concerns that must be addressed by the applicant. Each requires a slightly different type of alternatives analysis, and demands a somewhat distinct conditions, limitations and mitigation approach.

If the concerns of the commenting agencies are not adequately addressed, one or more of the commenting agencies may recommend against issuance of the requested permit.

Section 404 is a single permit, but it encompasses several other authorizations in a timeline of review:

- Need CWA 401 certification from state before a federal agency can issue a permit or license for an activity that may result in a discharge to WOTUS; state must certify that activity will not violate the water quality standards, or other applicable authorities, of the state (or waive Section 401 certification). [This process, in effect, allows for state control of dredge and fill activities. A state's review of the proposed construction activity will typically address feasible alternatives to the activity, initial and secondary impacts of the proposed activity, mitigation, compliance with water quality standards, stormwater/wastewater impacts, flood management, protection of rare resources, and other factors that would affect water quality.[65]]
- May need Section 408 authorization (permission from USACE under 33 U.S.C. 408 because project will alter or temporarily or permanently occupy or use a USACE-authorized civil works project).
- USACE consults with the USFWS and/or NMFS (Consultation / Biological Opinion) – Endangered Species Act (ESA) Section 7 consult – if project might affect endangered species. Under the ESA, any project with federal involvement or subject to federal oversight may not adversely affect federally listed species and habitat – otherwise mitigation strategies to minimize the impacts are required. With more than 1,400 species on the list and vast portions of the landscape designated as critical habitat, and many more species and areas of land awaiting listing and designation decisions, USFWS and NMFS are taking an ever-increasing role in the regulation of infrastructure projects.
- National Historic Preservation Act must account for potential impacts to historical and cultural resources (SHPO Consultation / Antiquities Permits)
- Fishery Conservation and Management Act (Essential Fish Habitat Consultations)
- Depending on location, Coastal Zone Management Act (CZMA Consistency Determination) and Wild Scenic Rivers Act
- Migratory Bird Treaty Act
- Bald and Golden Eagle Protection Act

5. USEPA Veto 404(c) or 404(q) Elevation

The U.S. Environmental Protection Agency (USEPA) has the authority to prohibit, deny, or restrict the use of any defined area as a disposal site under section 404(c), may elevate specific cases for further evaluation under Section 404(q), and enforces Section 404 provisions.

6. Litigation

Agencies are risk-averse, and sometimes choose not to pursue streamlined options out of concern that such "short-cuts" will increase litigation risk. Agencies/projects that face scrutiny from stakeholder groups want to minimize risk by gathering information, at the least to demonstrate due diligence. However, the burden of providing this political protection means asking information that applicants may not be able to obtain, or may be unwilling to share (in the case of proprietary information).

7. Permit Conditions

Section 404(b) authorizes USEPA to set the environmental standards that must be met by each permit, for the disposal of dredged or fill material; USEPA's Section 404(b)(1) guidelines set out at 40 C.F.R. § 230 establish the environmental criteria for evaluating 404 permit applications. Under the guidelines, permittees must complete an alternatives analysis describing how all the practicable alternatives to the proposed project were studied, weighed, and presumably rejected for the preferred project. The agencies regularly request more data, analyses of more sites, and/or other additional information regarding the proposed project and other (presumably) available business opportunities that the applicant could pursue in lieu of the project for which a permit has been requested. The Section 404(b)(1) guidelines also establish a "mitigation sequence" used by USACE: avoid, minimize and compensate impacts.

USEPA's guidelines often are applied in a rigid one-size-fits-all manner, failing to distinguish between different types of uses or between projects with net habitat gains—despite some damage to existing low-quality habitat—from projects that were simply destructive of habitat.

C. Recommended Reforms Specific to the 404 Program

As illustrated by the preceding "chokepoints" analysis, the *general* reforms discussed in Section III of this document would serve to improve the efficiency of the 404 program. In particular, a mandatory merger of the NEPA and Section 404 permit processes would greatly expedite project decision-making and avoid duplication and procedural inefficiencies (see Section III.B). In addition, AGC recommends the following reforms that are *specific* to the 404 program.

1. USEPA's Authority to Veto a Duly Issued Permit Casts Uncertainty on Development

Courts have upheld USEPA's authority under the CWA to change, if not revoke, Section 404 "dredge-and-fill" discharge permits that have already been approved and issued by USACE if it determines that the discharge will have an "unacceptable adverse effect" on identified environmental resources. This creates uncertainties for Section 404 permittees, their lenders, and others in business with them, which drives up financing and construction costs. USEPA has adopted regulations setting forth the process for implementing Section 404(c).[66]

REFORM: Amend CWA Section 404(c) and - as needed - direct USEPA to revise its "unacceptable adverse effect" regulations.

2. Permitting Authorities Are Thwarting Advanced Mitigation, Mitigation Banking, and Future Mitigation Investments

Permitting Authorities Are Thwarting Advanced Mitigation, Mitigation Banking, and Future Mitigation Investments. Complex procurement strategies, construction schedule risks, habitat alteration, and competition for potential mitigation sites can encumber the already difficult task of mitigating for "like" value and function and reinforce the need for project proponents to examine mitigation strategies as early as possible. There is a shortage of wetland mitigation banking credits in some parts of the country and many USACE Districts are unwilling to accept in-lieu fee arrangements. President Trump's Executive Order 13778 directing the USEPA and USACE to modify or rescind the 2015 Waters of the United States (WOTUS) is likely to stall the establishment of any new mitigation banks because it's likely that the federal government will eventually relinquish control over work in remote streams and isolated waters/wetlands.

What is more, federal permitting agencies generally will not accept preliminary jurisdictional determinations resulting from the NEPA process and will hold up project approvals until they have data collection (field surveys/delineation) from the entire project site. The project may be well underway before the design-build contractor has access to 100% of the parcels (e.g., right-of-way acquisition goes well into the project). As such, in the pursuit phase of the project, mitigation costs are unquantifiable because the quantity of WOTUS impacts and the quality of the waters impacted is unresolved. This unknown, combined with the lack of wetland bank capacity, requires contractors to speculate on mitigation costs – which can reach in the hundreds of thousands of dollars per project.

These uncertainties inhibit efforts to optimize construction phasing, schedules and to minimize cost and delay. What is more, design-build contracts that transfer the obtaining of Section 404 permits to the contractor generally provide no contractor cost or schedule relief for permitting delays or mitigation costs at the outset of a procurement. This forces contractors to add cost contingencies resulting in higher construction costs to the owner and/or responsible contractors dropping out of the procurement due to untenable risk.

REFORM: The use of remote sensing, geographic information systems (GIS) mapping software, and decision support systems for evaluating conservation strategies have made it possible to evaluate areas where WOTUS impacts must be avoided and identify areas for mitigation investments very early in the environmental planning process. Federal permitting agencies should accept NEPA planning-level decisions to support advance mitigation strategies that are both more economical and more effective from an environmental stewardship perspective. Revise the "2008 Mitigation Rule"[67] at 33 C.F.R. § 332.3(b)(2) and (3) and USACE's Regulatory Guidance Letter (RGL) 16-01 on the procedures for determining what geographic areas on a project are WOTUS.

To address the lack of mitigation banking capacity in many regions of the country, USACE should develop a national in-lieu fee mitigation option whereby sponsors of large projects may contribute funding, at mitigation market rates, to a national account when bank credits are unavailable at the time the USACE/USEPA is in position to issue the permit. The funding from the national account would be apportioned among the seven USACE Districts base on where impacts were taken and applied toward habitat preservation and promoting banking opportunities.

3. Delay on the RHA Section 408 Side Puts Off the CWA Section 404 Review Process and Further Delays Construction

Construction projects are being delayed because of Section 408 burdens.[68] USACE will *not even begin* to process many CWA Section 404 Nationwide and individual permits until the 408 permission is granted. This means that delay on the River and Harbors Act (RHA) Section 408 side puts off the CWA Section 404 review process and further delays construction. And, many of the reviews required under RHA Section 408 may be reviewed, yet again, under the CWA Section 404 process.

RHA Section 14[69] provides that the Secretary of the Army may grant permission for the alteration or use of works built by the United States when such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work. As a result, USACE requires that applicable construction projects are reviewed to determine if any of the proposed activities may affect a federal easement, right of way, property, levee, etc. Construction projects possibly subject to this process may include but are not limited to highways crossing Corps' property, bridges built over USACE flood control projects, and simply modification of existing Corps' projects—e.g., levees—by state and local entities.

USACE has recently undertaken action to more rigorously ensure compliance with Section 408, setting forth nine steps to obtain the 408 permission.[70] Those steps include pre-coordination, written request, required documentation (including environmental compliance, if applicable), district-led Agency Technical Review (ATR), Summary of Findings, division review, HQUSACE review, notification, and post-permission oversight.

Not all steps are applicable to every RHA Section 408 request, such as Division or Headquarters offices review. That stated, the Corps requires the RHA Section 408 requester to provide all information that the district identifies as necessary to satisfy all applicable federal laws, executive orders, regulations, policies, and ordinances. In addition, the Corps needs to review the relevant project area under the requirements of NEPA and other environmental statutes (e.g., the Endangered Species Act) where applicable. USACE must also consider factors that may be relevant to the public interest depend upon the type of USACE project being altered and may include, but are not limited to, such things as conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. And, the evaluation must consider information received from the interested parties, including tribes, agencies, and the public. **AGC is concerned that with such rigor has come redundant, administratively burdensome and inefficient 408 permission processes, especially in the broader context of federal environmental review and permitting.**

REFORMS: AGC recommends that USACE undertake the issuance of a new regulation or guidance allowing for the concurrent processing of the RHA Section 408 permission and CWA 404 permit.

As recommended by the National Waterways Conference, AGC agrees that the Corps should clarify the application of Section 408 to "works," and not undeveloped land or other features of a project, even if owned by the Corps and within the project's boundaries.

- According to the statute, the Corps' permission is required with respect to activities that may affect various "works" that are "built by the United States . . . for the preservation and improvement of any of its navigable waters or to prevent floods." The Circular states that it applies in the case of any "alteration or occupation or use of the *project*" (EC 1165-2-216, ¶ 6.a)

(emphasis added).[71] The language could be and seemingly has been interpreted to suggest 408 applies to any proposal that would alter or occupy any portion of a Corps project, which in turn suggests anything within the project's property boundaries.[72] However, that is not what Section 408 says, nor is it what Congress intended in enacting Section 14 of the Rivers and Harbors Act.[73]

- A broad reference to a Corps "project" without additional clarification can lead to a District office to require the 408 process for any proposal that involves any real estate within a Corps project.[74] A common example would be a highway or pipeline that crosses Corps' property.[75] To be clear, the Corps has a right to review and approve that proposal as property owner and potentially as a regulator under Clean Water Act Section 404 or other authorities.[76] However, if the project does not touch or affect the "works" regulated under Section 408, then the Corps should not overlay additional 408 requirements beyond whatever other procedure may be required.

Specifically concerning local flood control protections, like levees, AGC agrees with the Section 408 Coalition and the Mississippi Valley Flood Control Association: Congress through legislation and/or the Corps via regulation or guidance should clarify that the jurisdiction of RHA Section 408 does not extend to alterations or improvements made or allowed by the local sponsor (non-Federal interests) to the flood control projects for which they are responsible for operation and maintenance.

VI. AGC Staff Contacts

- Jeff Shoaf, Senior Executive Director, Government Affairs, (202) 547-3350 or (202) 215-2124, shoafj@agc.org
- Leah Pilconis, Senior Counsel, Environmental Law and Policy, (703) 837-5332, pilconisl@agc.org
- Jimmy Christianson, Regulatory Counsel, (703) 837-5325, christiansonj@agc.org
- Melinda Tomaino, Director, Environmental Services, (703) 837-5415, tomainom@agc.org
- Scott Berry, Director, Utility Infrastructure Division, Environment, and Trade, (703) 837-5321, berrys@agc.org
- Sean O'Neill, Director, Congressional Relations/Infrastructure Advancement, (202) 547-8892, oneills@agc.org
- Brian Deery, Senior Director, Highway and Transportation Division, (703) 837-5319, deeryb@agc.org

[1] Since "Waters of the United States" are under the jurisdiction of the Federal Government, projects such as constructing pipelines across rivers are a federal action.
[2] 40 C.F.R. § 1508.16.
[3] 40 C.F.R. § 1508.5.
[4] Note that some states (e.g., North Carolina, Massachusetts and Washington) have requirements that are like the requirements established for federal agencies by NEPA. Therefore, if your construction project is entirely or partly financed, assisted, conducted, regulated, or approved by a state agency in one of these states, you should consult with state agency officials to ensure that these requirements have been met.
[5] No hard-and-fast regulatory definition of "purpose and need" exists. However, as it has been interpreted, the statement cannot be so narrow that it effectively defines competing "reasonable alternatives" out of

consideration. The "purpose" of an action may be a discussion of the goals and objective of an action. The "need" may be a discussion of existing conditions that call for some improvement.

[6] The draft EIS should be prepared in accordance with the scope of the project and, to the fullest extent possible, meet requirements of § 102(2)(C) of NEPA. The CEQ regulations specify requirements for inviting and responding to comments on the draft EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1503.

[7] The final EIS should respond to any participating agency comments and address any inadequacies in the draft EIS.

[8] 40 C.F.R. § 1502.25(b) (2014).

[9] Memorandum from Nancy H. Sutley, Chair, Council on Envtl. Quality, to Heads of Federal Departments and Agencies on Improving the Process for Preparing Reviews under the Nat'l Envtl. Policy Act (Oct. 2011).

[10] 40 C.F.R. § 1502.25(a) (2014). In the agency's much-cited "Frequently Asked Questions," the CEQ clarified that project proponents who will need permits under other environmental laws are to "integrate the NEPA process into other planning at the earliest possible time to [e]nsure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." See "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 *Fed. Reg.* 18,026, 18,029 (Mar. 23, 1981). These FAQs have not received equal deference from courts as the CEQ regulations.

[11] USEPA's National Hardrock Mining Framework, U.S. Envtl. Prot. Agency app. C-2 and C-3 (Sept. 1997) ("NEPA offers the opportunity to identify permit conditions, including those needed to avoid or minimize impacts or to mitigate for unavoidable impacts."). *See infra* note 30.

[12] NAEP annually reports information on EIS time frames by analyzing information published by agencies in the *Federal Register*, with the Notice of Intent to complete an EIS as the "start" date, and the Notice of Availability for the final EIS as the "end" date. However, AGC members' experiences show that it's common for large and controversial projects to take even longer than these numbers reflect. *See e.g.,* Federal Highway Administration, "Estimated Time Required to Complete the NEPA Process," online at - https://www.environment.fhwa.dot.gov/strmlng/nepatime.asp and U.S. Department of Energy, "Record of Decision (ROD)" online at https://energy.gov/nepa/record-decision-rod.

[13] U.S. Gov't Accountability Office (GAO), GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses*, at 14 (2014).

[14] *Id. See also* 2014 GAO report noting that "there is no government wide mechanism [for agencies to track] the cost [or time] of completing NEPA analyses … However, the Department of Energy (DOE) tracks limited cost data associated with NEPA analyses."

[15] Although large projects often take a decade or longer to permit, the Common Good report assumes that the avoidable delay on major projects is six years.

[16] Pub. L. No. 112-141, 126 Stat. 405 (2012).

[17] Pub. L. No. 113-121, 128 Stat. 1193 (2014).

[18] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005) (EPAct 2005).

[19] 42 U.S.C. § 4370(m); https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf.

[20] 42 U.S.C. § 4370m-2(a).

[21] FAST Act Pub. L. No. 114-94, 129 Stat. 1312 (2015); *Id*. § 41002(c)(1)(C)(ii)(II)(aa), (bb). The final completion date in the recommended performance schedule for each category cannot exceed the average time to complete an environmental review or authorization for projects within that category. The benchmark time periods for decisions on environmental reviews and approvals are to be calculated based on an analysis of the time required to complete them for projects within the relevant category of covered projects during the preceding two calendar years.

[22] *Id*. § 41002(c)(1)(C)(ii)(II)(cc).

[23] Pub. L. No. 112-141, § 1306, 126 Stat. 405, 537-38 (2012) (creating 23 U.S.C. § 139(h)(6)). Failure to meet this deadline results in a financial penalty: rescission of funding from the relevant office at the delinquent agency at a weekly rate ranging from $10,000 to $25,000. 23 U.S.C. § 139(h)(6)(B).

[24] Pub. L. No. 112-141, § 1309, 126 Stat. 405, 539-40 (2012).
[25] Responsibly and Professionally Invigorating Development Act of 2014, S. 2641, 113 Cong. (2014).
[26] 16 U.S.C. § 824(p) - Siting of interstate electric transmission facilities.
[27] See "Guidance for Federal and State Agencies for the Processing of Federal Authorizations in Cooperation with the FERC" online at https://www.ferc.gov/industries/gas/enviro/epact-gas-guidance.pdf.
[28] https://www.ferc.gov/whats-new/comm-meet/101906/C-2.pdf.
[29] 18 C.F.R. § 157.22.
[30] *Id.* With respect to the federal-authorization deadline provision, FERC's regulations also provide that, for certificate applications requiring an EA or an EIS, "notice of a schedule for the environmental review will be issued within 90 days of the notice of the application, and subsequently will be published in the *Federal Register*. 18 C.F.R. § 157.9(b).
[31] EPAct 2005 § 313(a)(3), (b), codified at 15 U.S.C. §§ 717n(c)(2); 717r(d)(2).
[32] 42 U.S.C. § 4370m-4(a), paraphrased.
[33] Pub. L. No. 112-141, §§ 1305, 1314, 126 Stat. 405, 535, 547 (2012).
[34] Pub. L. No. 113-121, § 1005, 128 Stat. 1193, 1203 (2014). Section 1005 also promoted project acceleration through the following measures: encouraging the establishment of new categorical exclusions from environmental review requirements, enhancing transparency and public reporting requirements on the status and progress of environmental reviews, and facilitating the acceptance of environmental review documents approved by another agency.
[35] *See* 32 C.F.R. § 651.14(e) (2014) ("Several statutes, regulations, and Executive Orders require analyses, consultation, documentation, and coordination, which duplicate various elements and/or analyses required by NEPA and the CEQ regulations; often leading to confusion, duplication of effort, omission, and, ultimately, unnecessary cost and delay. Therefore, Army proponents are encouraged to identify, early in the NEPA process, opportunities for integrating those requirements into proposed Army programs, policies, and projects. Environmental analyses required by this part will be integrated as much as practicable with other environmental reviews, laws, and Executive Orders (40 C.F.R. § 1502.25). Incorporation of these processes must ensure that the individual requirements are met, in addition to those required by NEPA.").
[36] The "2015 (update) Red Book -- Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects" describes a process that satisfies the NEPA requirements and synchronizes environmental permitting for all agencies involved. It includes examples of successful NEPA/404 merger process agreements whereby the documentation and coordination conducted comply with NEPA and any preferred alternative selected under the joint process comply with CWA Section 404(b)(1) guidelines.
[37] 23 U.S.C. § 168; 23 U.S.C. § 139(g). *See infra* note 32.
[38] MAP-21 § 1319; 23 U.S. C. § 139(n). *See* https://www.fhwa.dot.gov/map21/guidance/guideaccdecer.cfm.
[39] MAP-21 §§ 1305, 1318 (amending 23 U.S.C. § 139(b)).
[40] The federal lead agency may adopt and use "planning products" in proceedings for any class of action in the environmental review process. "Any planning product adopted by the Federal lead agency in accordance with this section **may** be incorporated directly into an environmental… document." However, 10 conditions are spelled out in statute -- and participating agencies, the lead agency, and project sponsors must all concur that these conditions have been met. MAP-21 § 1310.
[41] FAST Act § 1304; 23 U.S.C. § 139(d)(8).
[42] The "Environmental Consequences" section of the EIS describes the impacts of project alternatives on the environment and documents the methodologies used in evaluating these impacts. Information in this section is used to compare project alternatives and their impacts. This section should describe in detail both the impacts of the proposed action and the potential measures that could be taken to mitigate these impacts. Mitigation must be considered for all impacts, regardless of their significance. Environmental impacts should be discussed in terms of their context and intensity.
[43] In late 2016, FHWA and the U.S. Fish and Wildlife Service developed and deployed a first of its kind Rangewide Programmatic Consultation for the Indiana and Northern-long eared bat.

[44] To meet the requirements of the Environmental Justice (EJ) Executive Order (EO) 12898, the DOT Order 5610.2(a), and the FHWA revised EJ Order 6640.23A, a project involving Federal action must consider the potential for "disproportionately high and adverse" effects on minority and low-income populations. CEQ has guidance for agencies on how to address environmental justice under NEPA: https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf. In addition, USEPA has guidance affirming its commitment to consider EJ in environmental permitting: http://www.epa.gov/environmentaljustice/plan-ej/permitting.html.

[45] A project sponsor is generally mindful of previous judicial interpretation when preparing NEPA documentation in an attempt to prepare a "litigation-proof" EIS. CEQ has observed that such an effort may lead to an increase in the cost and time needed to complete NEPA documentation, but not necessarily an improvement in the quality of the documents ultimately produced. Council on Environmental Quality, "NEPA Study of Effectiveness After Twenty-five Years," p. iii.

[46] MAP-21 § 1308; 23 U.S.C. § 139(l).

[47] Possible bonding calculation methods/factors to consider: (i) Transportation agencies typically assess liquidated damages based on "end user cost," per hour or per day. (ii) DOTs and FHWA have a good understanding of their assigned project teams daily overhead and engineering costs to maintain the team during delays – this cost could be calculated on a per day basis. (iii) If a contract team is already under contract, there is usually a daily rate for the jobsite overhead costs. (iv) It may also be appropriate to consider the costs associated with a state acquiring specific project funding through a public bond. (v) And, finally, the loss of federal funds committed and not used within the determined funding period. These cost factors could be combined, based on the project and the impact of delays.

[48] All environmental statutes which authorize citizen suits bar such suits if the federal or state government is "diligently prosecuting" an action against the same violator. *But see Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, Case No. 1:14-cv-753 (M.D.N.C. Oct. 20, 2015) (a government enforcement action must not only be brought, but also managed, in good faith, to be a compliance bar to a CWA citizen suit).

[49] Recently, more owners are attempting to transfer this risk to the contractor through provisions that limit the contractor's compensation for "unknown" contamination (i.e., any contamination not disclosed by owner or reasonably ascertainable by contractor due diligence). Disclosures normally contain a Phase I ESA that includes a federal, state and local regulatory database search that lists and provides cursory information addressing all recorded site contamination within and adjacent to the project. This places the contractor on notice of every documented occurrence of contamination, such as reportable spills.

[50] Contamination risk is often unquantifiable, due to inadequate site investigation/testing data provided by the owner, or unavailable through contractor due diligence. Sampling and testing areas of suspect contamination within the proposed project right-of-way may be the only means to reasonably assess these risks. Owner testing (if it's even performed) is often limited and inadequate to allow the contractor to adequately and reliably price his risk or obtain insurance.

[51] In 2007, FHWA issued a final rule revising FHWA's regulation in 23 C.F.R. §§ 630, 635, and 636 for design-build contracting. The rule allowed contracting agencies to issue design-build RFPs, to award contracts, and to issue notices-to-proceed for preliminary design work prior to the conclusion of the NEPA process.

[52] The contract must also include provisions preventing the contractor from proceeding with final design or construction activities prior to the completion of the NEPA process (23 C.F.R. § 636.109(b)(3) and 771.113(a)). FHWA may only issue additional authorization for final design and construction once the NEPA process concludes and selects a build option (23 C.F.R. § 636.109(d)).

[53] Variances are not specifically mentioned in FERC's regulations but rather in its standard best management practices for operators found in the "UPLAND EROSION CONTROL, REVEGETATION, AND MAINTENANCE PLAN" and "WETLAND AND WATERBODY CONSTRUCTION AND MITIGATION PROCEDURES." Note that these plans are referenced in the regulations at 18 C.F.R. 380.12(i)(5) and 380.12(d)(2) – but not the details of the plans. Both plans were updated in 2013, but the variance process has been in place since at least 2003. *See* Sections I.A., *Applicability* in these online documents: https://www.ferc.gov/industries/gas/enviro/plan.pdf; https://www.ferc.gov/industries/gas/enviro/procedures.pdf.

[54] Variances are not specifically mentioned in FERC's regulations but rather in its standard best management practices for operators found in the "UPLAND EROSION CONTROL, REVEGETATION, AND MAINTENANCE PLAN" and "WETLAND AND WATERBODY CONSTRUCTION AND MITIGATION PROCEDURES." Note that these plans are referenced in the regulations at 18 C.F.R. 380.12(i)(5) and 380.12(d)(2) – but not the details of the plans. Both plans were updated in 2013, but the variance process has been in place since at least 2003. *See* Sections I.A., *Applicability* in these online documents: https://www.ferc.gov/industries/gas/enviro/plan.pdf; https://www.ferc.gov/industries/gas/enviro/procedures.pdf.

[55] Reevaluations are not required under the National Environmental Policy Act (42 U.S.C. § 4321) or Council on Environmental Quality (CEQ) regulations (40 C.F.R. §§ 1500-1508). They are, however, required by the FHWA/FTA regulations, (23 C.F.R. § 771.129).

[56] Unlike other environment-related statutes, no individual agency has the final say with regard to NEPA's environmental review requirements. This absence of enforcement authority is sometimes cited as the reason that litigation has been chosen as an avenue by individuals and groups that disagree with how an agency meets NEPA's mandate or EIS requirements for a given project. (For example, a group may charge that an EIS is inadequate or that the environmental impacts of an action will in fact be significant when an agency claims they are not). Currently, CEQ is charged with providing oversight and guidance to agencies with regard to EIS preparation. USEPA is required to review and comment publicly on the environmental impacts of proposed federal activities, including those for which an EIS is prepared. EPA is also the official recipient of all EISs prepared by federal agencies. However, neither agency has enforcement authority with regard to an agency's environmental review requirements.

[57] 42 U.S.C. § 7609(a).

[58] *See* CEQ's regulations at 40 C.F.R. § 1504.

[59] Pursuant to USEPA's revised guidelines on NEPA reviews, since October 2012 the agency has accepted electronic EIS filings only – using e-NEPA, an online system for submitting EISs in .PDF format. This paperless process should facilitate a faster review and response timeline.

[60] *See* supra note 15. The head of the department or agency must make the referral to CEQ within 25 days after the notice of availability of the FEIS (final Environmental Impact Statement). CEQ determines whether to take the referral based on several criteria, including a determination of whether the issue is of national importance. If the CEQ takes the referral, several options currently are available for resolution, including making recommendations to the President. The most typical outcome is the publication of Findings and Recommendations. The referral process focuses on the underlying proposed action and how it does/does not meet the policy goals of NEPA, rather than procedural compliance with NEPA.

[61] NEPA requires an assessment of the impact on the environment of a proposed Federal action including rulemakings, permitting, overarching programmatic decisions, and specific projects – including some construction projects. The August 2016 guidance, which the White House has rescinded, encouraged agencies to quantify direct and indirect GHG emissions for construction projects (and other actions) where NEPA applies, as well as, short-term and long-term effects, cumulative effects and impacts from connected actions—as well as for all the alternative options being evaluated, including the option of taking no action.

[62] *See e.g., Wild Earth Guardians v. Jewell*, 2015 WL 4886082, slip op. (D. Wyo. 2015) (court simply required that the climate issue be identified and discussed). But other recent cases have found a much more comprehensive review of climate impacts to be deficient.

[63] *Rapanos v. United States*, 547 U.S. 715 (2006).

[64] *Id.*

[65] The level of state responsibility, and autonomy of the state review, vary greatly, from cursory review or waiver of review (with USACE carrying most of the responsibility), to in-office review of draft USACE permits, to a full blown independent technical review by the state, assuming a significant component of program responsibility.

[66] *See* 40 C.F.R. § 231.1 *et seq.*

[67] In 2008, USACE and USEPA published compensatory mitigation rules (2008 Mitigation Rule). *See* 73 *Fed. Reg.* 19,594 (Apr. 10, 2008). While USACE makes the final determination regarding the mitigation conditions included in the permit, USEPA retains the authority to veto the permit if it concludes that the mitigation is not adequate.
[68] *See* http://www.nola.com/environment/index.ssf/2017/05/corps_attempting_to_speed_coas.html; http://www.journalscene.com/news/waiting-on-the-final-leg-of-berlin-g-myers-parkway/article_72b28f28-1309-11e7-a986-1f5ecfa794a9.html.
[69] 33 U.S.C. § 408.
[70] USACE Policy - Engineering Circular 1165-2-216.
[71] https://waterways.org/wordpress2/wp-content/uploads/2014/10/NWC-Comments-WRRDA-Webinar-III.pdf.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

Appendix 1: Expedited Environmental Review of Infrastructure Projects – FAST-41 Highlights

Title 41 of the Fixing America's Surface Transportation Act of 2015 (FAST-41)
PL 114-94 (42 U.S.C. §§ 4370m – 4370m-12)

- Project sponsors can apply to a new federal oversight entity, the Federal Permitting Improvement Steering Council (Council), for expedited environmental review as a "covered project"

- Statutory definition of the term "covered project" dictates scope: Any activity in the United States that requires authorization or environmental review by a federal agency involving construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, or any other sector as determined by a majority vote of the Council that—
  - Subject to NEPA, likely cost >$200M, doesn't qualify for streamlining under any applicable law** or
  - Subject to NEPA, size/complexity warrant enhances oversight and coordination (opinion of Council) – e.g., projects subject to approvals by more than two federal agencies and/or need EIS

**Transportation projects subject to MAP-21 and water resources projects subject to the Water Resources Reform and Development Act of 2014 benefit from expedited permitting and environmental review procedures.

- Federal Permitting Improvement Council: Includes an Executive Director appointed by the President and representatives from 10 federal departments (Agriculture, Army, Commerce, Defense, Energy, Environmental Protection Agency, Housing and Urban Development, Homeland Security, Interior, Transportation), three independent agencies (Federal Energy Regulatory Commission, Nuclear Regulatory Commission, Advisory Council on Historic Preservation), the Office of Management and Budget (OMB) Director, and the Council on Environmental Quality (CEQ) Chairman

- Streamlining Measures: Coordinates NEPA review across federal agencies and coordination of state environmental review with federal NEPA process; improved and early communication with federal agencies re: necessary permits, content, and review timelines; standardized, enforceable schedules for environmental review and permitting; processes for resolving issues and modifying timetables; shortened timeframes for legal challenges; increased transparency/accountability in the federal environmental review process by requiring posting of specific info on "covered projects" to online federal permitting dashboard (includes status reports explaining project status, delays)
  - REVIEW & PERMITTING TIMELINES: Agencies must issue decisions on environmental review or authorizations not later than 180 days after the date on which *all necessary information* is in the agency's possession. Pub. L. No. 114-94, § 41002(c)(1)(C)(ii)(II)(cc).
  - PROBLEM: THESE DEADLINES ARE NOT STRICT OR ENFORCEABLE: The Act states that "each agency shall conform" to these dates. But the Act further provides for specific next steps if the schedule is not met by an agency; the consequences for failure to act on a project is to publish "an explanation of the specific reasons for failing or significantly risking failing to conform to the

completion date and a proposal for an alternative completion date," and monthly updates thereafter. Pub. L. No. 114-94, § 41007(c)(2)(f). The Act also gives agencies discretion in determining when they have sufficient information to make a decision on a project, and issuance of a final decision must occur no later than 180 days thereafter. See Part 41002(c)(1)(A)(ii)(II)(cc). It appears that time limits may vary if an agency determines more information is needed or demonstrates a reason for missing the completion date (theoretically could just keep asking for more info and/or proposing alternative completion dates – which is what happens without expedited review). **See also OMB & CEQ Guidance referenced below, Section 4.3 "What happens if an agency fails to conform to the permitting timetable?" on page 50.**

- REFORM: TIMELINE/SCHEDULE SHOULD BE MANDTORY, NONDISCRETIONARY DUTY. Any objections that are not raised or resolved by the deadlines are waived and the procedure is deemed complete --- and you move on to the next step.

OMB and CEQ Guidance – *Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects* (Jan. 13, 2017)
https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/Official%20Signed%20FAST-41%20Guidance%20M-17-14%202017-01-13.pdf

- Addresses the statutory requirements of FAST-41
- Explains the federal Permitting Dashboard – online framework for tracking covered projects, https://www.permits.performance.gov/
- Builds on an Executive Order and two Presidential memoranda issued during the Obama administration

****

Excerpt From Guidance – Page 50

E. Coordinated Project Plans (CPPs) and Permitting Timetables
……

4.36. What happens if an agency fails to conform to the permitting timetable?

Agencies should always try to meet the agreed upon completion dates as originally proposed or as modified using the procedures described above. However, if a federal agency fails to conform to a completion date for agency action on a covered project or is at significant risk of failing to conform with such a completion date, the agency shall take the following actions.

- First, as soon as the agency misses the date or becomes aware that it is at substantial risk of missing the completion date, **consult with the facilitating or lead agency, as applicable, to establish an alternative completion date**. It may not always be possible to establish an alternative completion date. For example, a completion date may not be modified within 30 days of the completion date; nor may such date be modified without undergoing the consultative process outlined in Section 4.31.
- Second, "[p]romptly submit to the Executive Director for **publication on the Permitting Dashboard an explanation** of the specific reasons for failing or significantly risking failing to conform to the completion date and a proposal for an alternative completion date." [198] OMB and CEQ

recommend that the agency send this explanation and alternative completion date to the Executive Director within 3 business days of the missed completion date or when the agency becomes aware of the risk.

- Third, "[e]ach month thereafter until the agency has taken final action on the delayed authorization or review, submit to the Executive Director for **posting on the Permitting Dashboard a status report** describing any agency activity related to the project." [199]

[198] 42 U.S.C. § 4370m-2(c)(2)(F)(ii)(I)-(II).
[199] 42 U.S.C. § 4370m-22(c)(2)(F)(ii)(III).

****

Trump Executive Order – *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects* (Jan. 24, 2017)
https://www.whitehouse.gov/the-press-office/2017/01/24/executive-order-expediting-environmental-reviews-and-approvals-high

- Provides for the designation of "high priority" infrastructure projects, to be made by the Chairman of CEQ in response to requests from state governors or the heads of federal departments/agencies
  - For any project so designated, CEQ is directed to coordinate with the relevant federal agency and establish expedited procedures and deadlines for completing environmental reviews and approvals "in a manner consistent with law"
  - If the deadlines are not met, the agency head must provide a written explanation to CEQ
  - Order does not mention FAST-41 or the OMB/CEQ guidance document