



## Research

# Addressing Delays Associated with NEPA Compliance

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## Summary

- It takes on average 70 months for an infrastructure project to be approved under NEPA review.
- The prolonged review process is due to a several factors, but are primarily hinged upon the need for interagency coordination that fully addresses all legal obligations.
- There are some opportunities to modify NEPA without major reform that could ease the burdens of the review process, namely addressing the statute of limitations for judicial review and expanding exemptions.

## Introduction to NEPA and Associated Challenges

The National Environmental Policy Act (NEPA, 1970) is a law which essentially requires all federal infrastructure projects to undergo an environmental assessment (EA), then, if found to have significant environmental impacts an environmental impact statement (EIS) is required which must be publicly published. The purpose of the EAs and EISs is to determine if the projects are consistent with established laws and regulations for environmental and historical preservation. All agencies that could be considered to have jurisdiction in regulating the project cooperate in the formulation of the EIS. In this sense, NEPA is considered an “umbrella” law. Compliance with NEPA is intended to occur concurrently with compliance of all applicable federal, state, and local laws. For this reason, it is uncertain if NEPA’s notoriously lengthy process is due to problems with NEPA itself, or with the regulations that NEPA facilitates compliance with, or both.

## Costs and Time to Reach Decision

With respect to duration and costs of NEPA compliance, a Department of Energy (DOE) [report issued last year](#), assessed lessons learned on NEPA, and found that the average time to complete an EA during 2015 was 21 months, with an average cost of \$386,000. During the same period, completion of an EIS averaged 49 months and cost \$4.19 million. Essentially, a project that has a significant environmental impact could expect a 70-month-long process to receive approval.

## Reasons for Long Compliance Periods

There are many reasons for prolonged NEPA compliance periods. Some of the reasons found by DOE and the [Congressional Research Service](#) (CRS) are as follows (when relevant, section of law provided):

- Litigation brought against the EA or EIS associated with the project.
  - The most common reasons for litigation are the EIS failing to acknowledge all reasonable alternatives, and the requirement for an EIS being waived improperly.
- Multiple agencies required to coordinate (in 2015, 93 percent of DOE's EISs were done in coordination with other agencies).
- EA contractors failing to provide calculations with their submitted drafts, necessitating technical reviewers to obtain the information.
- Agencies initiating research late.
- Cooperating agencies not adhering to agreed schedules.
- Disagreements on EA structure and content.
- Coordination with State Historic Preservation Officers exceeding allotted time (NEPA, [Section 106](#)).
- Growing list of protected species under the Endangered Species Act (Endangered Species Act, [Section 7](#)).
- Estimation of climate change impacts, which necessitates further coordination with agencies that have the requisite expertise (Clean Air Act, [Section 309](#))

## Possible Ways to Reduce NEPA Compliance Periods

- Further shorten the statute of limitations on judicial review of final agency actions. In 2015 this was shortened to two years from six years, but CRS notes that other environmental statutes are often 60-120 days ([28 U.S.C. § 2401](#)).
- Provide enforcement authority to the Council on Environmental Quality (CEQ) on its regulatory guidelines by codifying them into law. This could reduce the use of litigation as the preferred method of addressing EA or EIS concerns, and could improve the behavior of agencies to comply with NEPA concurrently, rather than consecutively (as intended).
- Delegate authority to states.
- Expand the list of exemptions under NEPA. While large projects are unlikely to be exempted, exempting smaller projects could free up agency resources to expedite the approval of non-exempted projects.
- Clarify the “range of alternatives” that must be addressed in an EIS, which in theory can be infinite ([Section 1502](#)).

*Note that the FAST Act (2015) already implemented several changes to expedite the NEPA review process, including: creating an inventory of projects, allowing “lead” agencies to coordinate the process, and setting a deadline for agency decisions on environmental reviews.*

*Also, note that the CRS acknowledges that attempts to mandate shorter review periods, like those proposed in the RAPID Act (passed House in 2015), would need to be enforceable to be successful.*

## Quantification of NEPA Impacts

There are currently 148 projects undergoing NEPA review. At the DOE’s estimated average costs, that would entail \$57 million for EAs and \$620 million for EISs (\$677 million) just for current projects to comply with the NEPA review process.

An American Action Forum (AAF) [analysis](#) on the regulatory burdens of NEPA found that the 148 projects undergoing review are expected to have at least \$229.4 billion in costs (not all projects have cost estimates attached). The analysis found that under a deadline of 2 years for NEPA review (recommended under the RAPID Act, which passed the House in 2015), there would be 32 energy projects that would be cleared and would have a value of at least

\$67.1 billion. For transit, there would be 87 projects, and the value would be at least \$56.4 billion. AAF finds that the current value of proposed infrastructure is almost certain to exceed the estimated \$250 billion in private capital seeking infrastructure investment.

## **Considerations on Systemic Challenges of NEPA**

The long compliance periods for NEPA are a symptom of the problem, rather than just the problem itself. In a sense, NEPA is supposed to make it easier for stakeholders to have infrastructure projects approved, by allowing a single group to coordinate all the necessary actions for compliance. As such, it is not just the structure of NEPA alone that causes protracted decision periods, but the patchwork of regulations that must be addressed under it. Therefore, the challenge is systemic in nature, and there are limited opportunities to modify the law to shorten protracted compliance periods (averaging over five years). Policy alternatives that preserve environmental quality while minimizing the need for interagency coordination should be sought.

Under the current system, agencies carrying out EAs and EISs for NEPA have no incentive to be expeditious or timely in their decision making. Rather, the incentive is to produce a legally sound document that will not be the target of litigation. As such, unless the systemic process of NEPA review is reformed to realign incentives (or environmental regulations significantly curtailed), the review process will likely continue to be protracted.

## **Conclusion**

Opportunities for shortening the NEPA review process in the near term should focus on the likely causes of litigation, and provide clarity in the legal requirements of all parties to avoid litigation. Attempts to mandate shorter review periods may not yield much benefit absent enforceable provisions. Addressing some mandated periods, such as the duration of comment periods or the mandatory waiting period before issuing a decision, are not likely to yield enough truncation of the process to be significant.

In the long term, consideration for how the federal government coordinates environmental policy pertinent to infrastructure projects should be given. The current system was implemented during a time when there were much fewer regulations, and incentivizes drawn out review that addresses legal concerns rather than timely approval.