An Examination of Federal Permitting Processes
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The Trump Administration on February 12, 2018, unveiled a $1.5 trillion initiative to repair the nation's roads, bridges, airports, and railways. Proponents of the initiative claim that an infrastructure splurge would create millions of jobs,[1] accelerate economic growth, and increase productivity. However, work must actually commence in order to yield these supposed benefits, and a raft of federal, state, and local regulations impose years of delay that erodes the nation's quality of life and global competitiveness.

Among the most problematic of these regulations are the National Environmental Policy Act (NEPA) and the Section 404 permitting regime under the Clean Water Act (CWA). Four decades of experience with both statutes has exposed a raft of regulatory flaws, including politicized science, arbitrary standards, and protracted litigation.

The average time to complete a NEPA impact assessment of a transportation project—just one of several permitting hurdles—has expanded from 2.2 years in the 1970s to 4.4 years in the 1980s, to 5.1 years between 1995 and 2001, to 6.6 years in 2011.[2] Every day of delay increases project costs and postpones the benefits of modernized—and thus safer—infrastructure for little or no environmental benefit.

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[1]Researchers at Georgetown University calculated that a $1 trillion investment in infrastructure spending would create as many as 11 million jobs through 2027. See Anthony P. Carnevale and Nicole Smith, "Trillion Dollar Infrastructure Proposals Could Create Millions of Jobs—Will the New Jobs Lead to Sustainable Careers?" Georgetown University Center on Education and the Workforce, 2017, https://cew.georgetown.edu/wp-content/uploads/trillion-dollar-infrastructure.pdf (accessed February 22, 2018). Research by former Heritage Foundation analyst James Sherk challenges the claim that increased infrastructure spending would create jobs and boost the economy. According to Sherk, "These arguments have little empirical justification. Infrastructure projects require more physical and human capital than brute labor. Consequently, most workers hired on new federal construction projects would come from existing projects—not unemployment lines. Additional infrastructure spending would do little to reduce unemployment." See James Sherk, "Additional Infrastructure Spending Would Employ Few New Workers," Heritage Foundation *Issue Brief* No. 4081, November 7, 2013, http://thf_media.s3.amazonaws.com/2013/pdf/IB4081.pdf.

[2]AECOM, "40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance," U.S. Department of the Treasury, 2016, https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf (accessed February 22, 2018). The average time to prepare all types of NEPA-related environmental impact statements in 2016 was 5.1 years, according to: National Association of Environmental Professionals, "NAEP Annual National Environmental Policy Act (NEPA) Report for 2016," http://www.naep.org/index.php?option=com_content&view=article&id=285:NEPA_2016_Annual_Report&catid=19:site-content&Itemid=241 (accessed February 23, 2018).

The NEPA is rendered pointless by the vast number of "categorical exclusions" that agencies routinely grant to waive an environmental review. The Federal Highway Administration alone lists more than 50 types of such exclusions,[3] and waivers constitute between 90 percent and 99 percent of the NEPA decisions involving state transportation programs.[4] Even the Obama Administration granted waivers to more than 95 percent of the 192,707 projects funded by the American Recovery and Reinvestment Act of 2009.[5]

Section 404 permitting is also a regulatory quagmire; there is no agreement among Congress, the Environmental Protection Agency, the Army Corps of Engineers or the U.S. Supreme Court on the definition of "waters of the United States," the basis of federal jurisdiction for wetlands.[6] The regulatory uncertainty delays the repair of teeth-rattling roads, deteriorating bridges, and timeworn rails and runways.

It also inhibits investment. Mining consultancy Behre Dolbear notes that despite overall investor confidence in the United States, problems with permitting "creates sufficient uncertainty to sometimes destroy the viability of new projects."[7]

That's evident in various country rankings of business receptivity. For example, the United States ranked a measly 15th out of 33 OECD countries for ease of permitting, according to the World Bank's 2017 "Doing Business" study.[8] (Even Estonia, France and Portugal ranked better.) In the 2018 Heritage Index of Economic Freedom,[9] the U.S. was designated as " Mostly Free" (18th out of 180 countries).

Whatever the outcome of the Trump Administration's infrastructure initiative, Congress and the President must eliminate regulatory hurdles before committing tax dollars or soliciting private investment. Otherwise, a sizable proportion of the funds will be wasted fighting regulatory roadblocks instead of rebuilding the nation's infrastructure.

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[3]"23 CFR 771.117–FHWA categorical exclusions," Legal Information Institute, https://www.law.cornell.edu/cfr/text/23/771.117 (accessed February 23, 2018).
[4]U.S. Department of Transportation, "National Environmental Policy Act Categorical Exclusion Survey Review," November 27, 2012, https://www.fhwa.dot.gov/map21/reports/sec1318report.pdf (accessed February 23, 2018).
[5]The White House Council on Environmental Quality, "The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects," November 2, 2011, https://energy.gov/sites/prod/files/2013/09/f2/CEQ_ARRA_NEPA_Report_Nov_2011.pdf (accessed February 23, 2018).
[6]Daren Bakst, What You Need to Know About the EPA/Corps Water Rule: It's a Power Grab and an Attack on Property Rights, Heritage Foundation Backgrounder No. 3012, April 29, 2015, http://thf_media.s3.amazonaws.com/2015/pdf/BG3012.pdf
[7]Behre Dolbear, Where to Invest in Mining 2015, http://www.mining.com/wp-content/uploads/2015/08/WHERE_TO_INVEST_2015_08.pdf
[8]A high ease of doing business ranking means the regulatory environment is more conducive to the starting and operation of a local firm. The rankings for all economies are benchmarked to June 2017. See World Bank, Doing Business Economy Rankings, http://www.doingbusiness.org/rankings?region=oecd-high-income
Terry Miller, Anthony B. Kim, James M. Roberts, 2018 Index of Economic Freedom, Heritage Foundation, https://www.heritage.org/index/download
[9]Terry Miller, Anthony B. Kim, James M. Roberts, 2018 Index of Economic Freedom, Heritage Foundation, https://www.heritage.org/index/download

What is NEPA

The National Environmental Policy Act of 1969[10] requires federal agencies to assess the potential environmental effects of proposed government actions (including government financing, technical assistance, permitting, and regulations). Every executive branch department must comply, and individual projects often include multiple agencies.

As part of assessing the impact on the "environment," agencies are required to consider the aesthetic, historic, cultural, economic, and social effects of proposed actions.[11] This overly broad mandate provides virtually endless opportunities for bureaucratic wrangling and legal challenge.

As set forth by Congress, the purpose of NEPA is to:

> [E]ncourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.[12]

Such sentiments reflect lawmakers' faith that federal bureaucrats can dispassionately assess their own actions as long as they amass enough data and solicit public comment (including comment from local, state, municipal, and tribal authorities).[13] But the NEPA predates the Environmental Protection Agency (EPA) and virtually all of the nation's other environmental statutes, and thus its architects were relatively naive about the machinations of bureaucratic self-interest, the distortions of policy wrought by judicial activism, and the limits of environmental science. All of which have rendered the NEPA process costly, time-consuming, and riddled with conflict.

Unlike many other environmental statutes, the NEPA is not a "substantive" law; rather than mandate specific outcomes, it imposes procedural obligations on federal agencies. The Council on Environmental Quality (CEQ) within the Executive Office of the President *guides* (and only guides) agencies' implementation of the NEPA. However, each agency decides on its own assessment model and dictates whether or how to modify projects based on their interpretation of the NEPA.

There are several steps in the process:

- **Categorical Exclusion (CE).** A CE constitutes a type of NEPA waiver for a category of actions that do not significantly affect the human environment either individually or cumulatively.[14] An action that qualifies for a CE is not required to prepare an environmental assessment or an environmental impact statement.

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[10]National Environmental Policy Act of 1969, 42 U.S. Code 4321-4347, January 1, 1970, https://ceq.doe.gov/laws-regulations/laws.html (accessed February 22, 2018).
[11]Council on Environmental Quality, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," 40 CFR Parts 1500-1508, 2005, https://energy.gov/sites/prod/files/NEPA-40CFR1500_1508.pdf (accessed February 23, 2018).
[12]National Environmental Policy Act of 1969.
[13]Daniel R. Mandelker, "The National Environmental Policy Act: A Review of Its Experience and Problems," *Journal of Law & Policy*, Vol. 32, No. 293 (2010), pp. 293–312.
[14]Council on Environmental Quality, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act."

- **Environmental Assessment (EA).** An EA determines whether the proposed federal action will significantly affect the environment. If the assessment indicates that the impacts will not be significant, the agency next prepares a Finding of No Significant Impact" (see below). If the impact is likely to be significant, the agency must prepare an "environmental impact statement."
- **Finding of No Significant Impact (FONSI).** This is the determination by the agency that a proposed action will not have a significant impact on the environment and therefore does not require further action under the NEPA.
- **Mitigated FONSI.** This is a determination by the agency that a proposed action will not require further action under the NEPA if mitigation requirements (such as erosion controls) are met.
- **Environmental Impact Statement (EIS).** An EIS is a thorough analysis of a proposed action's effect on the "human environment," as well as an evaluation of alternatives to the proposed action. As mandated by the Clean Air Act, the EPA reviews and comments on all environmental impact statements prepared under the NEPA.[15]
- **Record of Decision (ROD).** A ROD refers to the agency's rationale for choosing a specific course of action, including an account of the factors considered by the agency and the alternatives evaluated, a description of any mitigation measures to be implemented, and an explanation of any monitoring requirements.

The EPA is required to review the adequacy of each draft EIS and the proposed actions therein. If EPA officials deem the review unsatisfactory, the case is referred to the CEQ. (The EPA also publishes notices in the *Federal Register* soliciting public review and comment on pending EISs.)[16]

The NEPA in Practice

Congress intended the NEPA to be a planning tool for "integrat[ing] environmental concerns directly into policies and programs." In actuality, the process has become an administrative contrivance; agencies often conduct assessments—if they are undertaken at all—well after project planning is underway, and too late for the results to influence strategic choices as Congress intended.

Agencies control the result of a NEPA analysis by shaping its "scope," that is, delineating the purpose of and need for a project. This "scoping" will define the assessment parameters as well as the project alternatives that must be considered.[17] Consequently, the agencies effectively control the outcome of the NEPA review through deliberate scoping.

The result of this process is unavoidably political in nature, and not scientific.

The very heart of the NEPA—the EIS—is based on a conceptual view of the environment as static and predictable. Agencies construct a baseline measure of environmental conditions and

[15]In the event that EPA officials regard an agency's review as "unsatisfactory from the standpoint of public health or welfare or environmental quality," the case is referred to the White House CEQ. However, the lead agency is not obligated to alter its proposed course of action in the face of objections from either the EPA or the CEQ.
[16]The EPA maintains a database of EISes: Environmental Protection Agency, "Environmental Impact Statement (EIS) Database," https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/search (accessed February 23, 2018).
[17]Mandelker, "The National Environmental Policy Act."

model the anticipated impact of a project. This approach disregards the resilience and dynamism of ecosystems.[18]

In reality, perfect information about the environment does not exist, nor can scientists accurately forecast how complex environmental systems will respond to ever-changing conditions over time. Therefore, the impact analyses are largely comprised of assumptions with weak predictive value. As noted by CEQ researchers in a study of NEPA effectiveness: "(W)e often cannot predict with precision how components of an ecosystem will react to disturbance and stress over time."[19]

Moreover, the NEPA is rendered pointless by the vast number of "categorical exclusions" (CEs) that agencies routinely grant to waive an environmental review. The Federal Highway Administration (FHWA) alone lists more than 50 types of such exclusions,[20] and a survey by the U.S. Department of Transportation found that waivers constitute between 90 percent and 99 percent of the NEPA decisions involving state transportation programs.[21] Even the Obama Administration granted waivers to more than 95 percent of the 192,707 projects funded by the American Recovery and Reinvestment Act of 2009.[22]

Any regulation for which 90 percent or more of compliance is waived is a pointless regulation.

Congress has tinkered with marginal reforms in several statutes, and the CEQ has issued more than 35 sets of guidelines on NEPA implementation—all of which have made the review process unpredictable and inordinately politicized.

There is significant variation in the documentation necessary to obtain a categorical exemption depending on the agency and the environmental issues of primary importance in any particular region. Just because a project obtains an exemption from one agency, there is no guarantee that other agencies will likewise grant one.

Public meetings and hearings are held throughout the review process, and every procedural step is open to legal challenge. Consequently, environmental purists have considerable opportunities to delay projects or to extort mitigation commitments.

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[18]Sam Kalen, "The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy," *William & Mary Environmental Law and Policy Review*, Vol. 33, No. 2 (2009), http://scholarship.law.wm.edu/wmelpr/vol33/iss2/4 (accessed February 28, 2018).
[19]Council on Environmental Quality, "The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years," January 1997, http://digital.library.unt.edu/ark:/67531/metadc31142/m1/1/ (accessed February 23, 2018).
[20]"23 CFR 771.117–FHWA categorical exclusions," Legal Information Institute, https://www.law.cornell.edu/cfr/text/23/771.117 (accessed February 23, 2018).
[21]U.S. Department of Transportation, "National Environmental Policy Act Categorical Exclusion Survey Review," November 27, 2012, https://www.fhwa.dot.gov/map21/reports/sec1318report.pdf (accessed February 23, 2018).
[22]The White House Council on Environmental Quality, "The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects," November 2, 2011, https://energy.gov/sites/prod/files/2013/09/f2/CEQ_ARRA_NEPA_Report_Nov_2011.pdf (accessed February 23, 2018).

Activists for years have used judicial review to challenge (and delay) development. The Government Accountability Office (GAO) has reported that the mere filing of a lawsuit and the project delays that result are often as important to plaintiffs as whether they ultimately prevail in court.[23]

Consequently, agencies seek to prepare litigation-proof analyses in hopes of staking a defensible position (and avoiding public embarrassment). Exhaustive demands for data and other information raise project costs and create years of delay. Companies trying to secure a federal permit are hardly in a position to complain.

The complexity of the NEPA is magnified to the extent that projects require interagency coordination. Federal agencies are constantly embroiled in political skirmishes, simultaneously called to account by Congress, the White House, courts, and activists. Few, if any, observe deadlines.

Under limited circumstances,[24] some states are allowed to assume authority for administering the NEPA review.[25] To date, the FHWA has authorized six states to prepare NEPA documentation for highway projects: Alaska, California, Florida, Ohio, Texas, and Utah. Federal officials monitor a state's actions and perform audits to ensure compliance with a memorandum of understanding between the state and federal governments.

Devolving NEPA administration to the states is certainly better than continuing the federal bureaucracy. But whether the states or the feds are calling the shots, the entire NEPA regime is redundant. Under the Clean Air Act, for example, federal, state, and even local regulators control demolition dust, emissions from construction equipment, and airborne debris from clearing land. State laws and the Clean Water Act regulate runoff from site surfaces as well as wetlands protection. The Endangered Species Act governs the effects of development on habitat and wildlife, and waste disposal is controlled under local and state statutes as well as the federal Resource Conservation and Recovery Act—to name a few. These and other regulatory mechanisms all provide opportunities for the government to impose the same mitigation actions available through the NEPA.

Failed Attempts to Fix NEPA

Since its passage in 1969, the NEPA has persisted despite dramatic changes in America's economic, social, political, and environmental landscapes—and enactment of countless other federal, state, and local regulations. The CEQ has issued more than 35 separate guidance documents upon which agency-specific requirements are based. However, guidance is purely

[23]Government Accountability Office, "National Environmental Policy Act: Little Information Exists on NEPA Analyses," April 2014, https://www.gao.gov/assets/670/662543.pdf (accessed February 23, 2018).
[24]States must apply to the Department of Transportation's FHWA or the Federal Transit Authority, which review the state's suitability to assume the authority based on meeting regulatory requirements. States must sign a memorandum of understanding (MOU) with the federal agency and consent to the jurisdiction of federal courts by waiving sovereign immunity for any responsibility assumed for the NEPA. The MOU is for a term of not more than five years and may be renewed.
[25]The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU); the Moving Ahead for Progress in the 21st Century (MAP-21) Act; and the Fixing America's Surface Transportation (Fast) Act).

advisory in nature, and thus Congress has had virtually no say in the NEPA regulatory framework despite its application to a wide variety of federal actions.

Congress has enacted dozens of provisions to streamline the NEPA process since 2005.[26] Some of them might seem useful, such as limiting the comments of participating agencies to subject matter within its expertise or jurisdiction, or barring claims for judicial review of a federal permit for highway projects unless they are filed within 150 days of final agency action.

However, 22 of 34 highway project provisions and 17 of 29 transit provisions were optional.[27] An analysis by the GAO found that some state officials reported that the revisions were ineffective because they had already developed similar processes, either through agreements with the U.S. Department of Transportation or at their own initiative. As a result, those states did not realize any new time savings from the amendments.[28]

Trump Administration Reform Efforts

President Trump has likewise sought to streamline the NEPA beginning in his first month in office. Executive Order 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, directed agencies to designate select infrastructure projects as "high priority" for the purpose of expediting permitting reviews.[29]

Executive Order (EO) 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure,[30] instituted a policy of "One Federal Decision." The executive order calls for designating a "lead" agency for each major project to navigate NEPA reviews. Relevant agencies will compile reviews into a single ROD (unless the project sponsor requests otherwise).

The executive order also calls for reducing the processing time for environmental reviews to "not more than an average of approximately two years." Once an ROD is issued, permit decisions should be completed within 90 days.[31]

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[26]Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (2005), Public Law 109–59; Moving Ahead for Progress in the 21st Century (2012), Public Law 112–141; Fixing America's Surface Transportation Act (2015), Public Law 114–94.

[27]Government Accountability Office, "Highway and Transit Projects: Evaluation Guidance Needed for States with National Environmental Policy Act Authority," January 2018, https://www.gao.gov/assets/690/689705.pdf (accessed February 23, 2018).

[28]Ibid.

[29]The White House, "Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects," January 24, 2017, https://www.whitehouse.gov/presidential-actions/executive-order-expediting-environmental-reviews-approvals-high-priority-infrastructure-projects/ (accessed February 23, 2018).

[30]The White House, "Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure," Executive Order 13807, August 15, 2017, https://www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-discipline-accountability-environmental-review-permitting-process-infrastructure/ (accessed February 23, 2018).

[31]EO 13807 also calls for the director of the Office of Management and Budget to establish a "performance accountability system" to score agencies on the efficiency of their infrastructure permitting. The OMB Director will consider each agency's scorecard during budget formulation and determine whether penalties are appropriate.

In his order, the President stated: "Inefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations, have delayed infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment."

Meanwhile, on September 14, 2017, the CEQ published an initial list of actions it plans to take to further implementation of EO 13807.[32]

The President's infrastructure plan features numerous proposals to reform the NEPA and eliminate other regulatory barriers to permitting.[33] The most notable is the proposal to "Expand Department of Transportation NEPA Assignment Program to Other Agencies."

Current law allows only the Department of Transportation's FHWA and Federal Transit Authority to authorize states to administer NEPA reviews. The President is proposing to allow other agencies to do the same for other types of infrastructure projects. In addition, the President is proposing to allow states to make permit determinations required by the Clean Air Act,[34] and for flood plain protections and noise abatement for transit and highway projects.

Other significant reform recommendations in the infrastructure plan include:

- **One Agency, One Decision.** The President is proposing that a lead agency be required to develop a single NEPA review document to be used by all agencies, and a single ROD to be signed by all cooperating agencies (similar to the "One Federal Decision" directive in EO 13807). The proposal also calls for a firm deadline of 21 months for lead agencies to complete their environmental reviews and issue either a FONSI or ROD, and a firm deadline of three months thereafter to approve or reject the permit application.
- **Performance-based pilot projects.** The President is proposing to use environmental performance measures in place of environmental reviews for up to 10 projects (based on project size, national or regional significance, and opportunities for environmental enhancements). The project sponsor would agree to design the project to meet performance standards and permitting parameters established by the lead federal agency (and public comment) in lieu of an environmental review.

A second pilot would authorize the Secretary of Transportation (or other infrastructure agencies) to negotiate mitigation agreements that address project impacts in lieu of NEPA review. The mitigation could include the purchase of offsets, avoidance of anticipated impacts, and in-lieu-fees dedicated to an advanced mitigation fund.

[32]Council on Environmental Quality, "Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process," *Federal Register*, September 14, 2017, https://www.gpo.gov/fdsys/pkg/FR-2017-09-14/pdf/2017-19425.pdf (accessed February 23, 2018).
[33]The White House, "Legislative Outline for Rebuilding Infrastructure in America."
[34]This provision would not change the EPA's responsibilities under the Clean Air Act.

- **Revise statute of limitations for infrastructure permits or decisions.** Under current law, legal challenges to infrastructure permits may be filed up to six years after the decision has been issued.[35] The President is proposing to revise the statute of limitations to 150 days.

Useful as such proposed reforms may seem, there is no fixing the NEPA. Predating the EPA, the NEPA was at one time the legislative vanguard for environmental law and regulation. But that was nearly 40 years ago, and it is now out of sync with current environmental, political, social, and economic realities. In fact, the intended goal of environmental stewardship is actually thwarted by agencies' circumvention of the NEPA reviews, the project delays, and the higher costs imposed by the redundant regime, as well as by the politicization of science and the influence of special interests.

Simply put, the NEPA cannot be fixed, it must be rescinded.

The Chaos of Section 404 Permitting

Congress enacted the Clean Water Act of 1972 ''to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'' Section 404 of the act prohibits the discharge of any pollutants, including dredged or fill material, to ''navigable waters,'' except in accordance with the Act. The CWA states that the term "navigable waters" refers to "the waters of the United States." However, the statute provides no further definition, which has led to decades of costly regulatory disputes and arbitrary enforcement.

The EPA administers most provisions of the CWA, but the U.S. Army Corps of Engineers administers Section 404 permitting. In 2014, the two agencies proposed a new 88-page definition that vastly expanded the scope of federal jurisdiction over wetlands. (It drew 698,000 public comments.)[36] The new definition, finalized in 2015, hardly settled matters; it prompted numerous lawsuits nationwide instead.

The deeply flawed 2015 rule was stayed nationwide by the U.S. Circuit Court of Appeals for the Sixth Circuit. As a result, the agencies have administered Section 404 under the definition of ''waters of the United States'' in place before the 2015 Rule.[37]

President Trump in February 2017 issued an executive order[38] requiring the EPA and the Corps to solicit public comment on rescission or revision of the 2015 rule. On January 22, 2018, the Supreme Court held that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule.

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[35]When states assume NEPA administration, the statute of limitations is two years. A statute of limitations of 150 days would be consistent with the statute of limitations Congress already has enacted for surface transportation projects.

[36]Tiffany Dowell Lashmet, Murkey Water: The ongoing debate over the 'waters of the United States," PERC Reports, Vol. 36, No. 2, Winter 2017, https://www.perc.org/2017/12/08/murky-water/

[37]On January 22, 2018, the U.S. Supreme Court held that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule.

[38]Executive Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ''Waters of the United States'' Rule, February 28, 2017, https://www.gpo.gov/fdsys/pkg/FR-2017-03-03/pdf/2017-04353.pdf

The EPA's shoddy science has only exacerbated the chaos enveloping the Section 404 permitting regime. For example, the agency established a scientific advisory board in 2013 (supposedly) to review the state of the science on the connectivity of streams and wetlands with downstream waters.[39] According to the EPA, the report, when finalized, "will provide the scientific basis needed to clarify CWA jurisdiction, including a description of the factors that influence connectivity [of streams] and the mechanisms by which connected waters affect downstream waters."[40]

Alas, the agency didn't wait for the report before proposing the 2015 rule. Consequently, the public was never given the chance, through the rulemaking process, to challenge the scientific basis of the agencies' expanded jurisdiction.

Indeed, federal agencies too often mask politically driven regulations as scientifically based imperatives. The supposed science underlying these rules is often hidden from the general public and unavailable for vetting by experts. But credible science and transparency are necessary elements of sound policy.

The NEPA process is likewise mired in politicized science and uncertainty. Instead of producing environmental analyses of high technical quality, some scientists have criticized the NEPA assessments as nothing more than "massive amounts of incomplete, descriptive, and, often, uninterpreted data."[41] And the more complex the proposed action, the more flawed the data and analysis will be.[42]

On the upside, the CEQ in April 2017 announced the withdrawal of its guidance for federal agencies' consideration of greenhouse gas emissions in NEPA reviews.[43] The extent to which greenhouse gases affect climate—if at all—remains undetermined and government modeling amounts to little more than guesswork.

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[39]Environmental Protection Agency, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft)," September 24, 2013, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345 (accessed April 15, 2015).
[40]Ibid.
[41]Sonja Klopf, Nada Wolff Culver, & Pete Morton, A Road Map to a Better NEPA: Why Environmental Risk Assessments Should Be Used to Analyze the Environmental Consequences of Complex Federal Actions, Sustainable Development Law & Policy, Fall 2007, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1155&context=sdlp
[42]Sonja Klopf, Nada Wolff Culver, & Pete Morton, A Road Map to a Better NEPA: Why Environmental Risk Assessments Should Be Used to Analyze the Environmental Consequences of Complex Federal Actions, Sustainable Development Law & Policy, Fall 2007, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1155&context=sdlp
[43]Council on Environmental Quality, Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, Federal Register, April 5, 2017, https://www.gpo.gov/fdsys/pkg/FR-2017-04-05/pdf/2017-06770.pdf

Conclusion

President Donald Trump's infrastructure plan features 15 pages of recommendations to streamline permitting.[44] The very fact that so many provisions warrant reform illustrates that there is more wrong than right with the NEPA and other permitting regimes. Any new infrastructure funding should be conditional on meaningful regulatory reform—starting with repeal of the NEPA.

[44]The White House, "Legislative Outline for Rebuilding Infrastructure in America," February 12, 2018, https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf (accessed February 23, 2018).