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FIXING THE NATIONAL ENVIRONMENTAL POLICY ACT

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The National Environmental Policy Act environmental review process is broken. The average time to complete an environmental impact statement under the Act is now over five years.¹ Whenever an investor considers building U.S. infrastructure that would require a federal permit and impact statement, he or she must consider whether it is worth waiting five or more years. Will markets change over that time? Will the permit be further delayed by court challenges? Would it make more sense to invest in another country?

These environmental review delays are lengthening at the worst possible time for U.S. energy markets. Innovative U.S. companies have discovered ways of producing natural gas, oil, and renewable power far more cheaply. But U.S. consumers and producers will only benefit from these new, cleaner sources of energy if they can be connected to markets with new pipelines and power-lines. Across the country, new energy transport facilities are waiting for federal permits to unlock the benefits of America's new energy renaissance.²

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¹ National Association of Environmental Professionals' (NAEP's) National Environmental Policy Act (NEPA) Practice, *NAEP Annual National Environmental Policy Act (NEPA) Report for 2016*, <http://www.naep.org/nepa-2016-annual-report>.

² James W. Coleman, *Pipelines & Power-lines: Building the Energy Transport Future*, 79 OHIO ST. L.J. ___ (2018).

The growing National Environmental Policy Act delays are simply unreasonable. In the countries that the U.S. generally views as environmental leaders, these reviews generally take less than two years.³ Canada has recently proposed expanding the scope of its reviews and completing them in 300 days.⁴

Each successive administration has tried to address this slow-rolling disaster for investment in the U.S. economy. President George W. Bush issued executive orders and laws designed to expedite environmental reviews.⁵ President Obama also signed multiple bills and memoranda designed to urge faster environmental reviews.⁶ Finally, President Trump issued an executive order to streamline permitting and recently followed it up with a memorandum of understanding between agencies to speed environmental reviews.⁷

³ Philip K. Howard, *Two Years, Not Ten Years: Redesigning Infrastructure Approvals*, COMMON GOOD, September 2015, <https://www.commongood.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf>.

⁴ Government of Canada, *A Proposed New Impact Assessment System*, <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html> (describing proposal).

⁵ Executive Order 13274, *Environmental Stewardship and Transportation Infrastructure Project Reviews*, Sept. 18, 2002; *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* (2005) Public Law No. 109-59.

⁶ *Fixing America's Surface Transportation Act* (2015), Public Law No: 114-94, Title XLI; *Moving Ahead for Progress in the 21st Century Act* (2012) Public Law No: 112-141. Exec. Order 13,604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*, Mar. 22, 2012, Executive Presidential Memorandum, *Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects*, Mar. 22, 2013.

⁷ Exec. Order 13,807, *Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure*, Aug. 15, 2017; *Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807*, <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>

Thus far, these bipartisan efforts have failed. A ten-year 2008 study found that the average NEPA review took 3.4 years and was getting longer.⁸ A 2015 Department of Energy study found that the average NEPA review took over 4 years.⁹ The most recent study shows that these reviews now take over five years.¹⁰ As President Obama’s regulatory czar put it, “If the permitting bureaucracy were a supervillain, it would be the Blob.”¹¹

Right now, the Blob is winning: we have lost decades of investment while environment reviews grow longer and longer. How can we ensure that the U.S. does not fall behind our global competitors?

First, we must address the root cause of delay: judicial rulings that constantly demand more and more analysis in NEPA reviews. NEPA impact statements were once less than ten pages¹² and current regulations say they should be under 150 pages.¹³ But four decades of judicial nitpicking has forced agencies to write longer and longer reviews—generally well over a thousand pages. Even a finding of no significant impact—a finding that a full environmental impact statement is not required because the project has no significant impact on the environment—can be well over a thousand pages.¹⁴

⁸ Piet Dewitt & Carole A. DeWitt, *How Long Does It Take to Prepare an Environmental Impact Statement?*, 10 ENVIRONMENTAL PRACTICE 164 (2008).

⁹ UNITED STATES DEPARTMENT OF ENERGY, LESSONS LEARNED QUARTERLY REPORT, Mar. 2016, <http://energy.gov/nepa/downloads/lessonslearned-quarterly-report-march-2016>. A 2014 study from the U.S. Government Accountability Office found that the average time for a NEPA review was 4.6 years. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, LITTLE INFORMATION EXISTS ON NEPA ANALYSES, Apr. 2014, <https://www.gao.gov/assets/670/662543.pdf>.

¹⁰ National Association of Environmental Professionals *supra* note 1.

¹¹ Cass R. Sunstein, *Trump Did Something Good This Week*, BLOOMBERG (Aug 17, 2017) <https://www.bloomberg.com/view/articles/2017-08-17/trump-did-something-good-this-week>

¹² Daniel A. Dreyfus, *NEPA: The Original Intent of the Law*, J. PROF. ISS. ENG’G EDUC. & PRAC. 109, no. 4 (1983), pp. 252-3.

¹³ 40 CFR § 1502.7.

¹⁴ U.S. ARMY CORPS OF ENG’RS, MITIGATED FINDING OF NO SIGNIFICANT IMPACT, ENVIRONMENTAL ASSESSMENT DAKOTA ACCESS PIPELINE PROJECT WILLIAMS, MORTON, AND EMMONS COUNTIES, NORTH DAKOTA (Jul 2016)

The threat of judicial review compounds the harm that extended reviews do to the national economy. Investors can count on waiting over five years for their permit, but even when they have it, it can be invalidated at any time by a lawsuit that will send them back to the agency to wait for a fix. And that fix will, of course, itself be subject to judicial review.

Critics of NEPA streamlining now claim that if reviews are conducted more promptly, the courts will simply strike them down.¹⁵ Respectfully, if the courts believe that National Environmental Policy Act reviews should take a minimum of five years, then either the Act or its interpretation, must be changed. Americans, as part of the world's most litigious society, may have grown used to environmental reviews stretching over decades, but investors know that they can invest in other countries where the permitting system is more predictable.¹⁶

Second, we must be willing to consider legislative medicine strong enough to address the severity of the disease. For example, when a company is forced to wait an unreasonable length of time for a permit, that permit should eventually be immunized from invalidation under NEPA. After all, if a government issues an environmental impact statement and permit six years after a project is proposed, what is the benefit of allowing judicial review of that environmental impact statement? The environmental review took five years—seven times as long as a review would take in Canada. If a court believes that is still not enough review, what more would it like: twelve years of review?

And if the government's review is still truly inadequate after six years, why should the private company building the project be punished

available at <http://www.energylawprof.com/wp-content/uploads/2017/03/DAPL-EA-VOL-1.pdf> & <http://www.energylawprof.com/wp-content/uploads/2017/03/DAPL-EA-Vol-2.pdf>.

¹⁵ Ellen M. Gilmer, *Critics on new leasing policy: BLM is inviting lawsuits*, E&E NEWS, Feb. 2, 2018, <https://www.eenews.net/stories/1060072713>.

¹⁶ ROYAL ECONOMIC SOCIETY, *The 'Litigious Society': Why Americans Spend More On Lawsuits Than Brits*, Jul 2005, <http://www.res.org.uk/details/mediabrief/4388681/The-Litigious-Society-Why-Americans-Spend-More-On-Lawsuits-Than-Brits.html>; Paul H. Rubin, *More Money Into Bad Suits*, N.Y. TIMES, Nov. 16, 2010, <https://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/more-money-into-bad-suits>.

further? If the government had wanted to, it could have denied the permit at any time in the preceding six years. If it remained committed to the project through multiple administrations and successive congresses, what practical purpose is achieved by further delay?

If NEPA review was precluded after some interval—whether 6 years, 8 years, or 10—the government would still have an incentive to issue timely reviews. Project proponents do not want to wait six years for a permit—they would like their reviews and permitting completed within one or two years. But a time limit would solve the worst cases of delay and address investors’ worst fears.

At a minimum, uncertainty for permit applicants should be reduced by expediting judicial review of NEPA lawsuits. Suits to invalidate permits using NEPA should be treated like challenges to federal environmental regulation—suits should go straight to the federal Courts of Appeal and should be filed within sixty days after the federal permit is granted.

Third, we must resist the never-ending calls to further expand environmental reviews. The most recent effort is the call to consider the “upstream” and “downstream” impact of energy projects—going beyond the pipeline to consider how a pipeline will encourage energy use elsewhere. For example, advocates want the Federal Energy Regulatory Commission to calculate how natural gas pipelines encourage gas drilling upstream of the pipeline and encourage burning gas downstream of the pipeline. They say we should 1) estimate how much extra carbon dioxide these pipelines will encourage in other places and then 2) multiply that number by the social cost of carbon that was used under the Obama administration to find 3) a number for the climate harm encouraged by these projects.

This convoluted theory is an unhelpful distraction from the core environmental review process for pipelines.¹⁷ Pipeline reviews should maintain their traditional focus on environmental impacts from construction and operation of the pipeline. Between stream crossings, the danger of spills and explosions, and land-use impacts, there is plenty to consider in the already-delayed environmental review process.

By contrast, it is not possible to say how a single pipeline will impact oil or gas use in continent-wide energy markets. For example, if

¹⁷ James W. Coleman, *Beyond the Pipeline Wars: Reforming Environmental Assessment of Energy Transport Infrastructure*, 2018 UTAH L. REV. 119 (2018).

a pipeline or liquefied natural gas facility ships new gas to a foreign market, will that market burn less coal than it otherwise would have? Or will it build less wind power than it would have? These questions cannot be answered with any confidence.¹⁸

The futility of these reviews can be seen from the most careful and state-of-the-art “upstream” emissions review that has yet been attempted: the State Department’s review of whether the Keystone XL pipeline would encourage oil production in Canada. The State Department reviewed this project for seven years and finally concluded that the pipeline would probably not increase oil production in Canada—indeed it would likely lower worldwide emissions because, without it, the oil would just be transported by trains that emit more greenhouse gases than pipelines.¹⁹ But environmental groups accurately pointed out that, if one used different assumptions, one could reach different conclusions—under some assumptions the pipeline would increase oil production in Canada and worldwide greenhouse gas emissions.²⁰ Ultimately, the State Department decided that the pipeline should be rejected because, contrary to its own analysis, the pipeline would be “perceived as enabling further [greenhouse gas] emissions globally.”²¹ Seven years of review and the State Department’s best economic modeling of upstream emissions produced a result that even the Department decided was so hypothetical that it should be subordinated to contrary popular perception. This should not be the model for all energy transport project reviews.

Americans can still be proud that the federal government considers the environmental consequences of its action. And we can be proud

¹⁸ James W. Coleman & Sarah Marie Jordaan, *Clearing the Air: How Canadian Liquefied Natural Gas Exports Could Help the World Meet Its Climate Goals*, C.D. HOWE INSTITUTE, ISSUE BRIEF (2016).

¹⁹ United States State Department, Final Supplemental Environmental Impact Statement (Jan. 2014) at ES-34 & Table ES-6 (estimating that rejecting the pipeline lead to higher greenhouse gas emissions than approving it because all the oil would be transported by rail, which requires “28 to 42 percent” more greenhouse gas emissions than pipeline transport).

²⁰ Coleman, *Beyond the Pipeline Wars*, *supra* note 17 at 144-45.

²¹ UNITED STATES DEPARTMENT OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION (Nov. 3, 2015) 29 <http://www.energylawprof.com/wp-content/uploads/2016/01/KeystoneXL.Record-of-Decision.pdf> (emphasis added).

of the expertise and care that goes into these environmental reviews. But Americans can only be dismayed as these already-overlong reviews grow lengthier. NEPA was once called the “Magna Carta” of environmental law.²² Congress must help it regain that legacy so that it does not become a “Bill of Pains and Penalties” for U.S. investment in the 21st Century.

²² Arthur W. Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup De Grace?*, 72 COLUM. L. REV. 963, 963 (1972).