March 21, 2025

ACORE Submission for Senate Environment and Public Works Committee hearing titled, "Improving the Federal Environmental Review and Permitting Process," February 19, 2025

The Honorable Shelley Moore Capito
Chairman
U.S. Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
U.S. Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Capito and Ranking Member Whitehouse:

The American Council on Renewable Energy ("ACORE") respectfully submits the following comments in response to the Committee's February 19, 2025 hearing titled, "Improving the Federal Environmental Review and Permitting Process."

About ACORE

Founded in 2001, ACORE is the oldest full-spectrum clean energy organization in the United States. We are a national 501(c)(3) nonpartisan, nonprofit organization with membership that spans the entire energy value chain, including clean energy developers, institutional investors, corporate buyers of clean energy, manufacturers, electric power generators, retail energy providers, and other stakeholders. In 2023, roughly 85 percent of the thriving clean energy growth reported nationwide was financed, developed, owned, or contracted for by ACORE members.

Introduction

During the February 19 hearing, Chairman Capito recognized that durable, effective permitting reforms will require bipartisan engagement from Energy and Public Works ("EPW") as well as other Committees in the House and Senate.

While these comments are primarily focused on the National Environmental Policy Act ("NEPA") issues within EPW's jurisdiction, ACORE and its membership also remain supportive of the balanced approach to permitting across generation and transmission resources and sectors represented in the Energy Permitting Reform Act ("EPRA") (S. 4753, 118th Congress), which was advanced on a strong, bipartisan 15-4 vote by the Senate Energy and Natural Resources Committee in 2024. We also reference in these comments some of the specific provisions within EPRA that represent beneficial improvements in permitting reform.

ACORE would like to acknowledge and applaud Chairman Capito's principles for permitting reform legislation as articulated during the hearing,[1] which can be summarized as:

- Legislation must help all types of projects, not just politically favored projects or projects that will support the infrastructure needs of some Americans, but not others.
- Legislation should provide clarity and transparency in permitting processes.
- Legislation should examine every stage of the permitting process to find efficiencies while balancing public health, the environment, and the needs of our economy.

These comments recommend reforms that seek to meet each of these principles. ACORE and its members stand ready to work with the Chairman, Ranking Member, members of the EPW Committee, as well as other Congressional Committees, the Administration, and stakeholders, to achieve the durable, efficient, and effective permitting reforms that are necessary to meet the needs of a 21st century economy.

Challenges Presented by the Permitting Status Quo

Despite the critical need for an expansion of electricity transmission to meet the nation's growing energy demand while ensuring energy affordability and reliability, permitting both clean energy and transmission projects often entails lengthy and complex processes. A recent study from the

[1] Opening Statement of Chairman Shelley Moore Capito, U.S. Senate Committee on Environment and Public Works, hearing titled, "Improving the Federal Environmental Review and Permitting Processes," February 19, 2025, available online at: https://www.epw.senate.gov/public/_cache/files/3/9/39c3e947-4b10-4889-987b-ee8da5a75d82/4A24993F04AFEBCDEFA30C14E76607609C9474D04B6FD971E106A0BA1FA385E5.spw-02192025-improving-federal-environmental-review-and-permitting-process.pdf

North American Electric Reliability Corporation ("NERC") found that between 35 and 58 gigawatts of interregional transmission are needed to ensure reliability during extreme weather events.[2] But these critical interregional transmission lines can take 10 years or even longer to complete.[3] While local, state and federal permitting all impede the approval process, reforms are still needed to obtain further efficiencies in NEPA compliance and especially to reduce post-NEPA litigation. Uncertainties around NEPA timelines, costs and potential litigation can all adversely affect project financing, materials procurement, and other key steps in project development.

1. Litigation Under NEPA

The U.S. Department of Justice has identified NEPA as the nation's most frequently litigated environmental statute.[4] A Stanford University analysis of litigation against 355 transportation and energy projects required to undertake an Environmental Impact Statement ("EIS") between 2010 and 2018 further reveals such challenges.[5] All of the projects examined had completed the EIS at the time of the study but were now facing litigation, highlighting a critical distinction between the administrative obligations under NEPA and the often-perilous legal process that can play out thereafter, with "years and likely millions of dollars of direct costs in early project planning and permitting."[6]

2. NEPA Environmental Study Process

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[2] North American Electric Reliability Corporation, *Interregional Transfer Capability Study, Final Report* (Nov. 2024), available at: https://www.nerc.com/pa/RAPA/Documents/ITCS_Final_Report.pdf

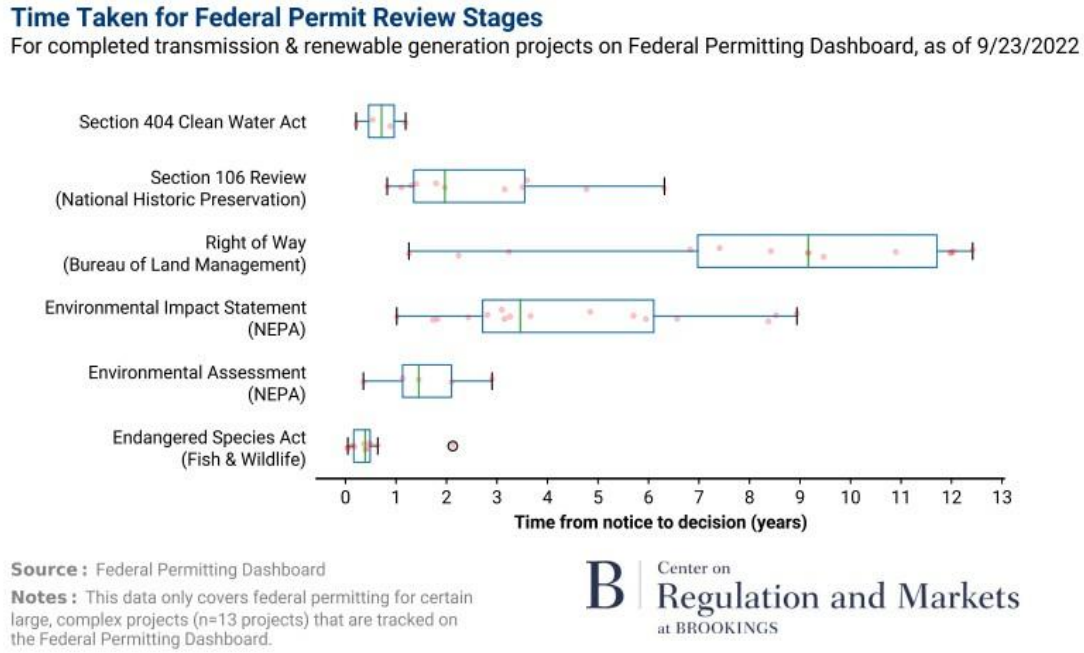
[3] See for example, The Bipartisan Policy Center, *Finding the Goldilocks Zone for Permitting Reform* (Jan. 2024) at 10, stating that permits for interstate transmission lines "can take upward of 10 years," available at: https://bipartisanpolicy.org/report/golidlocks-zone-bipartisan-permitting-reform-deal/; The Nature Conservancy, *Permitting Modernization: Accelerating A Clean Energy Transition and Benefitting Nature* (visited in March 2025) noting that transmission approval times "can stretch to over a decade," available at: https://www.nature.org/en-us/about-us/who-we-are/how-we-work/policy/permitting-reform-policy/

[4] Congressional Research Service, *National Environmental Policy Act: Judicial Review and Remedies* (Sep. 2021), available at: https://crsreports.congress.gov/product/pdf/IF/IF11932.

[5] Bennon, M. & Wilson, D., *NEPA Litigation Over Large Energy and Transport Infrastructure Projects* (Oct. 2023), available at: https://cddrl.fsi.stanford.edu/publication/nepa-litigation-over-large- energy-and-transport-infrastructure-projects.

[6] Id.

The EIS process itself can be extensive and delay clean energy and transmission project development. For example, the Brookings Institution scrutinized a set of 13 "national-priority" clean energy and transmission projects covered under Title 41 of the Fixing America's Surface Transportation Act ("FAST-41"),[7] concluding that completing the EIS and obtaining the Right-Of Way ("ROW") from the Bureau of Land Management ("BLM") were two of the largest sources of delay for such projects – with the EIS taking as long as nine years (see Figure below).[8] ROW authorizations depend on the completion of the NEPA process, and as such, their timelines are directly impacted by the duration of NEPA studies.



For context, the average time to complete an EIS for all projects in 2010-2018 was 4.5 years.[9] As of June 2024, the average time for projects covered under FAST-41 to complete an EIS review

[7] FAST-41 is designed to establish a coordinated framework for federal approvals of large, complex infrastructure projects in the United States. See Permitting Council, FAST-41 for Infrastructure Permitting (n.d.), available at:https://www.permits.performance.gov/sites/permits.dot.gov/files/2020-05/FAST_41_FS_20200325.pdf.

[8] Sud, R., Patnaik, S., & Glicksman, R. *How to reform federal permitting to accelerate clean energy infrastructure: A nonpartisan way forward* (February 2023), available at: https://www.brookings.edu/articles/how-to-reform-federal-permitting-to-accelerate-clean-energy-infrastructure-a-nonpartisan-way-forward/.

[9] Council on Environmental Quality, *Environmental Impact Statement Timelines* (2010-2018) (June 2020), available at : https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

had decreased to approximately four years. However, 32% of current FAST-41 projects still exceeded CEQ's earlier 4.5-year average.[10] Of the projects that took longer than CEQ's average, half were transmission lines. Moreover, this timeline excludes any pre-application processes or the potential for multi-year NEPA litigation.[11] Timelines for EIS reviews are often lengthened by the prospect of NEPA litigation due to the need to "litigation-proof" the environmental reviews. Furthermore, a 2024 analysis by the Niskanen Center and the Clean Air Task Force, described in the testimony of Nicole Pavia before this Committee, examined 37 transmission lines with a minimum voltage of 115kV and a minimum length of five miles that were subject to NEPA, finding that the EIS itself took between 1.2 and 11 years, and that 27% of the projects faced litigation or significant opposition, resulting in delays or cancellations.[12]

As shown in another analysis by the Niskanen Center, NEPA generally impacts larger projects. The transmission projects requiring an EIS between 2010 and 2020 made up 3.5% of projects by number, but 26% of the total domestic transmission line miles.[13]

Towards a 21st Century NEPA

There are many opportunities to create greater efficiency in the NEPA compliance process without sacrificing environmental protection, as described below:

1. Simplify the NEPA compliance process.

[10] Of 34 projects examined, 11 took longer than 4.5 years to complete an EIS, ranging between 4.7 and 9.3 years to complete an EIS.

[11] For example, see Adelman, D.E. & Glicksman, R.L. *Presidential and Judicial Politics in Environmental Litigation* (May 2018) finding that the median NEPA litigation time frame was about two years, available at: https://arizonastatelawjournal.org/wp-content/uploads/2018/05/Adelman_Pub.pdf

[12] Boling, T. et al. *Evidence-Based Recommendations for Overcoming Barriers to Federal Transmission Permitting* (April 2024), available at: https://www.niskanencenter.org/evidence-based-recommendations-for-overcoming-barriers-to-federal-transmission-permitting/.

[13] Manitius, N, Cavert, J, & Kelly, C, *Contextualizing Electric Transmission Permitting: Data from 2010 to 2020* (March 2024), available at: https://www.catf.us/resource/contextualizing-electric-transmission-permitting

While establishing deadlines for environmental studies is important, as was included in the 2023 Fiscal Responsibility Act ("FRA"), additional measures are needed to improve the process more comprehensively and can be undertaken by the permitting agencies without legislative changes.

a. Expand the use of Categorical Exclusions. Categorical exclusions may be granted by agencies to specific categories of actions that do not have an adverse environmental impact and, therefore, may comply with NEPA without conducting environmental studies. Agencies can create new exclusions or adopt exclusions from other agencies. For example, the U.S. Department of Energy ("DOE") expanded its categorical exclusions by removing the mileage limitation for upgrades and rebuilds of existing transmission lines, removing the acreage limitation for solar projects in previously disturbed areas, and adding a new exclusion for storage projects in previously disturbed areas.[14] Moreover, there should be a clear and timely process for agencies to adopt categorical exclusions from other agencies.

b. Avoid duplicative studies. A Programmatic EIS ("PEIS") helps to streamline decision-making and can avoid duplicative studies by allowing a single EIS to cover groups of projects with similar features and other broad actions, such as programs, policies, and rulemakings, although additional project-specific NEPA analysis may be required. A PEIS can be used for geographic areas with fewer resource conflicts and should be structured to avoid individual projects within that area having to perform an EIS. For example, under the Desert Renewable Energy Conservation Plan, permitting is streamlined for energy projects within specific Development Focus Areas (DFAs) that were identified as having minimal resource conflicts.[15]

c. Create a thorough pre-application process. Defined pre-application processes to collect information from the developer and consult with agencies early in the process could minimize later delays. For example, such a process was included in both DOE's Coordinated Interagency Transmission Authorization and Permits ("CITAP") program that streamlines the transmission

[14] U.S. Department of Energy, *National Environmental Policy Act Implementing Procedures*, Final Rule (April 30, 2024), available at: https://www.energy.gov/sites/default/files/2024-04/doe-10-cfr-1021-final-rule-2024-04-30-final.pdf.

[15] See *About the Desert Renewable Energy Conservation Plan*, available at: https://drecp.databasin.org/pages/about-drecp/; *Desert Renewable Energy Conservation Plan – Permitting Fact Sheet*, available at: https://www.energy.ca.gov/sites/default/files/2019-12/DRECP_Permitting_Fact_Sheet_ada.pdf.

permitting process and in FERC's backstop siting authority process.[16] These processes also provide an opportunity for the project developer to conduct early community engagement and develop measures that will provide benefits to the community, such as funding for economic development projects. As discussed later, pre-application and other processes outside of the studies should also be subject to reasonable deadlines.

d. Early and upfront engagement with affected communities and landowners. Upfront and early engagement is a well-established practice for reducing opposition to planned projects. For example, DOE's CITAP program will require project proponents to submit public participation and engagement plans as part of the permitting process.

2. Legislative Improvements to NEPA and Related Processes

In addition to improvements to the NEPA process, there are further steps that require legislative action, including the following:

a. Strengthen and streamline FERC's backstop siting authority for transmission. FERC's backstop siting authority is an important tool, but it has not yet been used. Under current rules, projects can be subject to NEPA twice – first within the process of designating a National Interest Electric Transmission Corridor ("NIETC"), which is itself subject to NEPA, and second for the individual transmission line itself. DOE is currently accepting public comments on three proposed NIETC designations.[17] However, it could take about two years to complete the NIETC designation process and set the stage for FERC to use its backstop siting authority. An important reform is therefore to establish a process for FERC to use this authority without relying on the NIETC designation, as has been proposed in EPRA.[18]

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[16] U.S. Department of Energy, *Coordinated Interagency Transmission Authorizations and Permits Program* (April 2024), available at: https://www.energy.gov/gdo/coordinated-interagency-transmission-authorizations-and-permits-program; U.S. Federal Energy Regulatory Commission, *Applications for Permits to Site Interstate Electric Transmission Facilities,* Docket No. RM22-7-000; Order No. 1977 (May 2024), available at: https://www.federalregister.gov/documents/2024/05/29/2024-10879/applications-for-permits-to-site-interstate-electric-transmission-facilities

[17] U.S. Department of Energy, *National Interest Electric Transmission Corridor Designation Process*, available at: https://www.energy.gov/gdo/national-interest-electric-transmission-corridor-designation-process.

[18] Sec. 401 of the Energy Permitting Reform Act of 2024.

b. Ensure sufficient resources are available to permitting agencies. Establishing deadlines for environmental reviews will have a limited impact if federal agencies do not have sufficient resources to complete them, as Ms. Pavia pointed out in her testimony. Congress should consider additional resources to alleviate the agency capacity shortages that are delaying energy infrastructure projects of all types. Not only do the permitting agencies require sufficient staff, but staff with the necessary expertise. Therefore, priority should be given to hiring staff with expertise and experience in the range of actions involved in NEPA compliance – from the conduct of environmental studies to community engagement.

While having sufficient resources and expertise is essential, there may be additional opportunities for the Committee to explore, including allowing the applicants themselves to conduct the required environmental studies with their own experts or third-party consultants instead of the agencies; establishing a team of specialized NEPA consultants for the agencies; or encouraging agencies to create teams of dedicated permitting staff.

c. Address delays that occur prior to initiation and following completion of the NEPA studies. The deadlines established for the environmental studies in the FRA are positive steps, but delays can and do occur in earlier stages of the NEPA process before these studies begin (e.g., through an agency delaying in starting an EIS process through a Notice of Intent publication in the Federal Register), as well as after the completion of the final EIS and the issuance of the Record of Decision ("ROD"). An overarching deadline could be established that begins with the initial project application, including any pre-application process and ends with the ROD, not just the EIS. One good example of this approach is found in EPRA that would have required the establishment of timelines for multiple stages of the permitting process, including the determination of whether an application is complete; issuance of a notice of intent for projects requiring an environmental impact statement; cost recovery agreement; and right-of-way approval.[19] Additional deadlines could also be established for other key steps, such as initiating and completing the stakeholder process.

Agencies should also ensure that their NEPA process achieves early integration of non-NEPA federal permitting statutes, such as the National Historic Preservation Act ("NHPA") and

[19] See Sec. 206 of the Energy Permitting Reform Act of 2024.

Endangered Species Act ("ESA"), which can overlap with the NEPA process but may sometimes result in unforeseen and costly delays after an ROD under NEPA has been issued, particularly for projects on BLM-managed land. NEPA Section 1502[24] states that: "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive orders applicable to the proposed action."

d. Fully utilize and explore opportunities to identify new Categorical Exclusions. Agencies should fully utilize the existing categorical exclusions while also seeking new opportunities to expand their categorical exclusions. But there are still steps that Congress can take.

Should agencies struggle to develop the body of evidence necessary to establish that such categories of actions do not cause significant environmental effects, Congress should as an additional measure identify certain actions that are categorically excluded, without the need for agencies to develop such categories individually.[20]

Moreover, in accordance with the FRA, the Forest Service and the BLM have taken the positive step of adopting the DOE's categorical exclusions for renewable energy and transmission.[21]

e. Expand the Scope of FAST-41 Coverage and Encourage State Participation. Projects covered under FAST-41 are displayed on a publicly available dashboard that displays their environmental review status and agencies' progress on target completion dates while affording projects various forms of assistance that can improve the permitting outcomes, such as enhanced legal protections, a two-year statute of limitations, and improved interagency coordination.[22] However, senior officials with the Federal Permitting Improvement Steering Council

[20] These categorical exclusions would still be subject to agency requirements to determine that no extraordinary circumstances exist.

[21] See Adoption of Categorical Exclusion Notices: https://www.federalregister.gov/documents/2024/11/08/2024-26036/adoption-of-categorical-exclusions-under-section-109-of-the-national-environmental-policy-act; https://www.federalregister.gov/documents/2025/01/16/2025-01057/notice-of-adoption-of-categorical-exclusions-under-section-109-of-the-national-environmental-policy.

[22] See Permitting Dashboard: https://www.permits.performance.gov/projects/fast-41-covered. Also see Permitting Council. FAST-41 for Infrastructure Permitting, available at: https://www.permits.performance.gov/sites/permits.dot.gov/files/2020-05/FAST_41_FS_20200325.pdf.

("Permitting Council"), a federal agency created by the FAST-41 statute to implement and model its provisions, recently acknowledged in congressional testimony the current limitations in the data that is available on the dashboard, such as the average timeline for completion of FAST-41 covered projects.[23] FAST-41 coverage is also limited to projects with a total investment of more than $200 million, including for states, which may voluntarily opt-in to FAST-41. A lower total investment threshold for energy and grid-related projects to participate in FAST-41 is a warranted reform,[24] to which a complement would be greater collaboration under FAST-41 among state governments, the Permitting Council and other federal agencies. Congress and the Permitting Council should consider more explicitly incentivizing states to opt-in to FAST-41, such as by tying participation to the use of any available or future funds earmarked for federal permitting assistance.

Moving forward, the Permitting Council should pursue more direct collaboration with developers to ensure that they are afforded sufficient guidance throughout the FAST-41 process, especially greater transparency when federal agencies miss their target completion dates for environmental reviews, and concrete actions that an agency can take to avoid further delays by leveraging input from developers.

3. Reform the Judicial Process to Reduce Litigation Risk

Greater efficiencies in the NEPA process must be paired with reforms that reduce the risk of litigation after the NEPA requirements are completed. A common basis for such lawsuits is the allegation that the federal agency responsible for NEPA implementation has not fully complied with the requirements of the environmental studies.[25] Such litigation can result in a court injunction to cease project development, at least until the litigation has been resolved.[26] As noted

[23] See Senate Homeland Security and Governmental Affairs Committee Hearing titled, "Oversight of the Permitting Council: Improving Transparency and Coordination" (July 2024): https://www.hsgac.senate.gov/hearings/oversight-of-the-permitting-council-improving-transparency- and-coordination/.

[24] See Sec. 104 of EPRA, which lowers the total project investment threshold to $50 million.

[25] See Liskow, Z.D., *Getting Infrastructure Built: The Law and Economics of Permitting* at 5 (April 2024), explaining that "[a]fter an agency completes any of these environmental reviews, especially the production of an EIS, the agency may be sued for not producing a thorough enough document," available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4775481

[26] See Liskow at 5 (April 2024). Also see Bennon & Wilson at 10840-10841 (October 2023).

earlier, the prospect of litigation can by itself extend the length of time involved in preparing an environmental study due to the need to "litigation proof" the study.[27]

Earlier and more meaningful community engagement and specific agreements to provide direct benefits to communities can reduce such litigation, but additional reforms will be needed to directly mitigate this risk, while also preserving citizens' rights to challenge certain projects. Such reforms include the following:

a. Shorten the deadline for a plaintiff to file a lawsuit. A straightforward and fair restriction on litigation would be to reduce the window of time for a plaintiff to bring a lawsuit from the six-year allowance under the Administrative Procedure Act ("APA") to two years or less. For example, the FAST Act established a two-year statute of limitations for certain infrastructure projects that require environmental review under NEPA.

In addition, reducing the window for litigation must also be accompanied by revisions to the Supreme Court's decision in *Corner Post, Inc. V. Board of Governors of The Federal Reserve System*.[28] In this case, the Court ruled that that the six-year time frame does not begin "until the plaintiff is injured by final agency action."[29] As a result, there is now no clear time limit on legal challenges because newly created entities can claim injury from an action, such as a project authorization that occurred years earlier. Along with shortening the timeframe, legislation should also mitigate the difficulties created by the *Corner Post* decision by clarifying that the timeframe begins with the agency action, not injury.[30] However, given the uncertainty created by his decision, a shorter statute of limitations may be warranted. Under EPRA, there is a 150-day statute of limitations which begins on the date of the final agency action granting or denying authorization of a project.

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[27] See Liskow at 5 (April 2024). Also see Bennon & Wilson at 10840-10841 (October 2023).

[28] *Corner Post, Inc. v. Board of Governors of The Federal Reserve System,* No. 22–1008 (U.S. July 1, 2024).

[29] Ibid at 1.

[30] As Justice Jackson explains in her dissent, "Congress can amend §2401(a), or enact a specific review provision for APA claims, to state explicitly what any such rule must mean if it is to operate as a limitations period in this context: Regulated entities have six years from the date of the agency action to bring a lawsuit seeking to have it changed or invalidated; after that, facial challenges must end. See Ibid. (Jackson, J. Dissenting at 24).

b. Fully clarify agency discretion under NEPA to consider all alternatives. One reason lawsuits can easily be brought under NEPA is the ability of plaintiffs to claim that the EIS did not study all alternatives to the project.[31] Agencies should only analyze technically and economically feasible alternatives as determined in consultation with project developers who have greater knowledge of such alternatives. These improved practices would be strengthened by changes to the APA that would give agencies greater discretion in determining the alternatives for the EIS, whereby a project could still proceed even if the agency does not consider every possibility.[32]

c. Establish processes to accelerate the projects subject to judicial claims. Two provisions of EPRA would help reduce the delays caused by litigation. First, the legislation would require courts to establish an expedited review of litigation regarding a federal authorization for energy and transmission projects; and second, it would establish a 180-day deadline for agencies to act when a court remands an environmental review back to an agency.[33]

d. Limit a federal court's ability to enjoin or halt a project in response to the initiation of litigation. Courts should not be able to halt the construction of a project solely because litigation has been initiated. One measure to curtail this practice would be to establish clear criteria that limit when projects can be halted by a court, such as only where a NEPA analysis is deficient in a respect that would have changed the agency's final decision to approve.

Conclusion

A 21st century NEPA, with the reforms described in these comments, can protect the environment and support effective public engagement, while paving the way for a future built around growing domestic energy production. Reducing impediments to siting and permitting of energy and transmission infrastructure will be essential to meeting growing electricity demand, leading to more economic growth, job creation and affordable energy.

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[31] See Liskow and Bennon & Wilson. Also see Senator Shelly Moore Capito's (R-WV) Revitalizing the Economy by Simplifying Timelines and Assuring Regulatory Transparency (RESTART) Act: https://www.epw.senate.gov/public/_cache/files/4/f/4f2a46c5-0215-4be0-9ed8-63b517fab09f/61F3BBA10475E6DBC93B7F7177B10349.restart-act-text-capito-final.pdf

[32] See Liskow at 27.

[33] See Sec. 101 of EPRA.

Federal agencies' recent actions to update NEPA help build momentum for further improvements. But additional policy changes are needed to reduce the risk of post-NEPA litigation and ameliorate siting and permitting barriers in coordination with state, local, and Tribal governments. Moreover, there are numerous opportunities to obtain greater efficiencies in the NEPA process itself, such as by expanding categorical exclusions and addressing delays in the process prior to the initiation of environmental studies.

ACORE stands ready to work with the Committee on achieving improvements to the permitting process that benefit all resources and looks forward to further engagement on this important issue.

Respectfully submitted,

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