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REFORMING ENVIRONMENTAL LITIGATION

by Robert W. Poole, Jr.

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EXECUTIVE SUMMARY

There is growing awareness that building needed U.S. infrastructure is plagued by long delays, cost overruns, and an increased risk that projects will be canceled rather than implemented. Concerns about this problem have increased significantly as U.S. policy moves toward dramatic increases in the supply of “green” electricity, requiring massive investments in energy generation, long-distance transmission lines, mining and processing of needed minerals, etc. This country also faces the need to rebuild and modernize its aging Interstate Highway System and to add facilities for new forms of air and surface transportation.

Since 2020 a growing number of opinion leaders have published critiques of what is increasingly seen as a dysfunctional environmental review process, with a new focus on environmental litigation—the last stage of federally required review of the environmental impacts of proposed infrastructure, including major projects in energy and transportation. These critiques focus on what is being seen as excessive use of what has been termed “citizen voice” to prevent projects gaining needed federal approvals. While some of the critiques come from conservatives, a growing number arise from centrists and liberals, in major national media including *The New York Times* and *The Atlantic*. As Matthew Yglesias has written, “Delay is a policy choice—one governments at various levels have opted for over the past half century, regularly prioritizing community input and litigation avoidance over the goal of getting something done quickly.”

In 2023 a new study from researchers at Stanford University sought to identify the impact of environmental litigation using a dataset (from the White House Council on Environmental Quality, a.k.a. CEQ) of environmental impact statements from 171 large energy projects and 184 large transportation projects. Some categories of projects of each kind faced average litigation rates of 50% or more, with permit process duration averaging as much as seven years for energy projects and as much as 9.6 years for transportation projects. Their assessment concluded that environmental litigation prioritizes local concerns over broader regional and national concerns, and even more important, that it provides no mechanism by which such a balancing could even be attempted.

U.S. environmental assessment appears to be an outlier compared with many peer nations in Europe and Australia/New Zealand. Data from a study of environmental reform in such countries showed very few examples of U.S.-type litigation delays, with the exception of the U.K., whose common-law system is similar to ours. In 2023 Germany enacted sweeping reforms of litigation related to major infrastructure. Many peer governments impose time limits for their environmental review process, and some provide a streamlined process for projects with national significance.

Two major studies of the cost of rail transit projects in other countries were released in 2023. The Eno Center for Transportation found that the average construction cost premium for U.S. rail transit projects is 48% for at-grade rail transit projects and 57% for tunneled projects. The Marron Institute at New York University, using a database of 900 transit projects in 59 countries, found striking differences, identifying relatively low cost per kilometer in Greece, Italy, Portugal, South Korea, Spain, and Switzerland. The 10 most-costly countries, in addition to the United States, included Hong Kong, Netherlands, New Zealand, Singapore, and the U.K. While the study did not focus on environmental litigation, its case study of Italy revealed a dramatically different approach to such reviews, with the first stage addressing environmental (ecological) impacts, and with public objections addressed by specialized administrative tribunals at that early stage.

Congress has adopted several environmental review reforms in recent legislation. In the Infrastructure Investment and Jobs Act (IIJA) in 2021, it codified aspects of the One Federal Decision policy from the Trump administration, limited the alternatives analysis of Environmental Impact Statements (EISs) to 200 pages, and required the release of a Record of Decision with 90 days of the final EIS. In the Fiscal Responsibility Act (FRA) of 2023, Congress imposed time limits and page limits for EISs and Environmental Assessments (EAs) and codified CEQ requirements that an EIS must consider “reasonably foreseeable”

environmental impacts and a “reasonable range” of alternatives that are “technically and economically feasible.”

But at more or less the same time, CEQ released revised Phase 2 NEPA regulations that add explicit climate and environmental justice provisions, as well as prioritizing “environmentally preferable” alternatives, which critics have dubbed as providing a “NEPA shortcut” for the Biden administration’s preferred alternatives.

None of these changes addressed the problems caused by current environmental litigation practices. Consequently, this policy brief outlines an array of potential litigation reforms. Some of these originated from centrist organizations: the Bipartisan Policy Center (BPC) and the Institute for Progress (IFP). Others come from legal analysts and university researchers, and another from an affiliate of the Federalist Society. This brief suggests an initial bipartisan reform agenda along the lines of the BPC and IFP proposals.

This policy brief’s final section assesses the political feasibility of bipartisan environmental litigation reform in Congress. First it cites a wide array of organizations assembled by the U.S. Chamber of Commerce in 2023—96 national organizations and state business groups in 46 states—arguing for streamlining the environmental permitting process. Signers include several major labor unions and an array of think tanks. Potential originators of such a reform proposal could be the Conservative Climate Caucus (CCC) and the bipartisan House Problem Solvers Caucus, whose members overlap somewhat with the CCC. There are no Senate counterparts to these two House organizations, but these two groups have worked with bipartisan groups of senators in 2020 and 2021.

The growing support for streamlining environmental litigation with potential sponsors in Congress suggests a priority for the new Congress that will take office in January 2025.

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PART 1

THE ENVIRONMENTAL LITIGATION PROBLEM

1.1

THE NATURE OF THE PROBLEM

The United States has an infrastructure permitting problem. Proposed projects spend years in the federal environmental review process, delaying their eventual construction and the resulting benefits to their users. Project costs grow, sometimes dramatically, due to inflation during the years-long review process but also due to mitigation measures that are imposed on the project as a condition for going forward. And some projects end up not being built. Bipartisan infrastructure experts view the legal infrastructure that has evolved for implementing the requirements embodied in the 1970 National Environmental Policy Act (NEPA) as a significant factor.¹

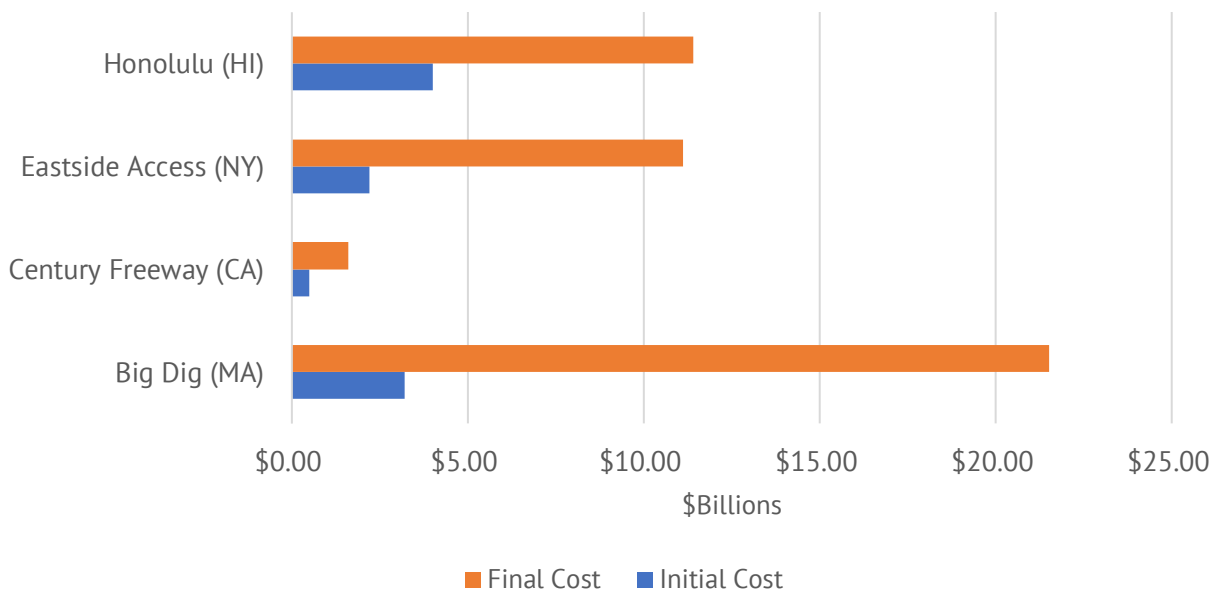
Historically, transportation megaprojects were the primary focus of concerns about the negative consequences stemming from the environmental review process. One notorious example was Boston's Central Artery/Tunnel project (the "Big Dig"), whose cost grew from

¹ "NEPA Permitting Process Crucial to Renewable Infrastructure Project Success," Center for American Progress, [americanprogress.org](https://www.americanprogress.org), 7 Sep. 2023. <https://www.americanprogress.org/article/nepa-permitting-process-crucial-to-renewable-infrastructure-project-success/> (18 Apr. 2024).

an initial \$3.2 billion to a total of \$21.5 billion by the time it opened to traffic in 2007.² As Alan Altshuler and David Luberoff explained in their book on megaprojects, a large fraction of the increased cost was due to 1,500 costly mitigations demanded by opposing litigants, which accounted for half the eventual project cost.³ On a much smaller scale, the Century Freeway project (I-105) in Los Angeles, after many years of litigation, was eventually built for \$1.6 billion, compared with an original budget of \$500 million.⁴

Transit megaprojects have experienced comparable opposition and cost escalation. The long-promised East Side Access project in New York City, conceived more than 50 years ago, began construction in 2006 at an estimated cost of \$2.2 billion. The delay was partly a result of opposition. By the time it neared completion in 2021, the cost had grown to \$11.1 billion.⁵ An elevated rail transit project in Honolulu experienced fierce opposition. Projected in 2006 to cost \$4 billion, the estimated cost of the system reached \$11.4 billion by 2021 with a projected completion date for its final link of 2031.⁶

FIGURE 1: MEGAPROJECT COST ESCALATION



² “Big Dig,” Wikipedia, https://en.wikipedia.org/wiki/Big_Dig, 19 September 2023.

³ Alan Altshuler and David Luberoff, *Mega-projects: The Changing Politics of Urban Public Investment*, Brookings Institution Press, 2003.

⁴ Altshuler and Luberoff, *Mega-projects*, 232.

⁵ Ralph Vartabedian, “Years of Delays, Billions in Overruns: The Dismal History of Big Infrastructure,” *The New York Times*, 28 November 2021.

⁶ Ibid.

More recently, similar environmental review delays and cost increases have occurred on energy/environmental projects that Congress has prioritized for reducing greenhouse gas emissions (GHGs): solar farms, wind turbines, high-voltage transmission lines, modular nuclear plants, rare-earth mines, etc. Environmental opposition to such projects often comes from local members of organizations whose national offices strongly favor “green” infrastructure projects.

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At the 27th annual United Nations Climate Change conference (COP27) in 2022, the head of the International Energy Agency’s Tracking Sustainable Transitions unit said that the world was on track to scale up renewable energy production to meet 2030 targets. But environmental policy researcher Mario Loyola of Florida International University argued that the stated U.S. goal of deploying enough low-carbon energy to reduce U.S. GHG emissions 50% from their 2005 levels by 2030 is impossible because federal and state officials will only be able to issue “a tenth of the necessary permits under current law.”⁷

Lending some credibility to this statement is the story of the 700-mile TransWest Express Transmission Project, which filed its first permit request with the Bureau of Land Management in November 2007. Securing all the needed permits took until April 2023, and the transmission line is expected to be operational by 2028—23 years after it was first proposed in 2005.⁸ More recently, *The Wall Street Journal* reported that the \$11 billion SunZia wind farm project in New Mexico, begun in 2006 and “fast-tracked” in 2011 by the Obama administration, had finally begun construction in January 2024 after years of litigation.⁹

⁷ Ronald Bailey, “Permitting Hell vs. Climate Hell at COP27,” *Reason.com*, 15 November 2022.

⁸ Eric Boehm, “It Took 15 Years for the Feds to Approve a 700-Mile Electric Line,” *Reason.com*, 17 April 2023.

⁹ Scott Patterson, “Biggest U.S. Renewable Project Is Under Way at Last,” *The Wall Street Journal*, 16 January 2024.

One of the most important (and most-cited) studies of the impact of environmental litigation is a 2019 working paper by Leah Brooks (George Washington University) and Zachary Liscow (Yale University), published in an academic journal in 2023.¹⁰ They sought to figure out what factors led to the cost per mile of Interstate highway construction tripling between the 1960s (when the program began) and the 1980s. They found that the costs of labor and materials were largely in line with inflation over that period. What did increase significantly was real per-capita income and housing prices. Their research suggested that more-affluent households demanded more-expensive highways (e.g., with noise walls, depressed sections, bypasses of certain locations, etc.). And the mechanism used to get such design changes was environmental litigation enabled by NEPA and a key Supreme Court decision.



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After quantifying the growth of these costly design changes, Brooks and Liscow concluded that these changes, which were argued for via litigation (which they dubbed “citizen voice”), accounted for about 25% of the increased costs of 1980s Interstate projects. Their paper also included a case study that illustrates the changes. I-696 in Detroit was constructed in two sections, the first in the 1960s and the second in the 1980s. The latter project had faced “decades of opposition” from citizen groups, leading to a final design that included building the entire section depressed below grade, adding three 700-ft plazas decked over the highway, plus noise walls along most of its length.

¹⁰ Leah Brooks and Zachary Liscow, “Infrastructure Costs,” *American Economic Journal: Applied Economics*, Vol. 15, No. 2, April 2023.

Today such features are not uncommon in projects that rebuild or expand urban freeways. Few today would argue against reducing negative externalities borne by adjacent neighborhoods. The question for today, and the future of U.S. infrastructure, is whether the empowerment of extensive, years-long litigation by project opponents has gone too far, sometimes killing the project or dramatically increasing its cost and timely completion.

1.2

GROWING AWARENESS OF THE PROBLEM



...beginning in 2020, we have seen a growing awareness that the current NEPA process is costly to the U.S., driving up the cost of large-scale energy, environmental, and transportation infrastructure projects.



For several decades, the idea of questioning or reforming NEPA was unthinkable, politically. Yet beginning in 2020, we have seen a growing awareness that the current NEPA process is costly to the U.S., driving up the cost of large-scale energy, environmental, and transportation infrastructure projects. During both the Trump and Biden administrations, modest reform measures were proposed and a few, such as “One Federal Decision,” were enacted.¹¹ And during the 2022 congressional debates over what became the Infrastructure Investment and Jobs Act (IIJA), Senate negotiations led to a promise of further reforms, few of which have materialized, although the 2023 Fiscal Responsibility Act (FRA) codified that environmental impact statements should include discussion of reasonably foreseeable effects of a proposed action, reasonably foreseeable effects that cannot be avoided, and a reasonable range of alternatives to the proposed action.¹² At the July 2023 conference of the American Road and Transportation Builders Association (ARTBA) P3 division, Rep.

¹¹ Executive Order 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,” Council on Environmental Quality <https://trumpwhitehouse.archives.gov/ceq/initiatives/infrastructure>

¹² Council on Environmental Quality, “Amendments to NEPA from the Fiscal Responsibility Act of 2023,” June 2023.

Garret Graves (R, LA) told panel moderator Steve DeWitt that his committee is “working on” NEPA litigation reform.¹³

In parallel with these political debates, a sea change has been evident among opinion leaders. In April 2020, *Governing* magazine published a commentary by Alex Marshall titled “Why Can’t We Build Infrastructure Cheaply, Quickly, and Well?”¹⁴ While he cited others who had raised this question over the previous decade, he noted in particular the Brooks/Liscow paper on Interstate Highways’ tripling cost of construction. And he wrote that opponents of projects “are adept at using the environmental review process to delay a project for reasons unrelated to safeguarding nature.”

In 2022, progressive journalist and *New York Times* columnist Ezra Klein wrote a column headlined “Government is Failing, in Part Because Liberals Hobbled It.”¹⁵ In the piece, while lauding the intent of the Clean Air Act and NEPA and their many positive results, Klein noted that today, the environmental process has been captured by well-off citizen groups who use the process to oppose many good things. “The problem is that these laws were built for an era when the issue was that the government was building too much, with too little environmental analysis. The core problem of this era is that the government is building too little, in defiance of all serious environmental analysis.” He also noted that, “Environmental groups that were founded on conservation . . . routinely find themselves at odds with their local chapters who still hold those views even as the national organizations now obsess over the climate crisis.”

“
... the environmental process has been captured by well-off citizen
groups who use the process to oppose many good things.
”

That same month, *The Atlantic* staff writer Jerusalem Demsas published a provocative article in the magazine, “Community Input Is Bad, Actually.”¹⁶ She led off writing that

¹³ Robert Poole, meeting notes, ARTBA P3 Conference, Washington, D.C., 12 July 2023.

¹⁴ Alex Marshall, “Why Can’t We Build Infrastructure Cheaply, Quickly, and Well?” *Governing*, 16 April 2020.

¹⁵ Ezra Klein, “Government Is Failing, in Part Because Liberals Hobbled It,” *The New York Times*, 13 March 2022.

¹⁶ Jerusalem Demsas, “Community Input Is Bad, Actually,” *The Atlantic*, 22 April 2022.

“Today America’s development process is rife with veto points. The conventional view, moreover, is that community opposition to a project ought to result in its defeat—regardless of the broader benefits it may provide.” She went on to note that community groups “have weaponized environmental regulations in their quest to [block projects].” She also noted that “The community input process is disastrous for two broad reasons.” First, it’s not representative of the local population, since it includes mostly those who don’t like the project but only a fraction of those who would benefit from it. Second, even a truly representative public meeting would nearly always tend to oppose a project: “The downsides of new development tend to be very localized . . . By contrast, the beneficiaries are either unknown at the inception of the project . . . or extremely diffuse.”

Jeremiah Johnson of the Center for a New Liberalism posted a June 2023 commentary, “How Progressives Abandoned Progress for Process.”¹⁷ While criticizing local citizen and interest group opposition to new development, he also wrote that progressives themselves have made the situation worse by overly focusing on process. Environmental activists in the days of New York development czar Robert Moses pioneered litigation aimed at stopping Moses’ projects. “Where progressives err [today] is in confusing the process being good (at times) with the process being the goal—an inherent good in and of itself.” Johnson refers positively to Ezra Klein and Jerusalem Demsas as suggesting a kind of “supply-side progressivism” that would be open to reforming the current NEPA process.

In a Bloomberg column that same month, Matthew Yglesias addressed the same problem, in this case contrasting the very rapid repair of I-95 in Philadelphia that month with the usual citizen litigation facing so many highway improvement projects.¹⁸ He noted that “[D]elay is a policy choice—one governments at various levels have opted for over the past half century, regularly prioritizing community input and litigation avoidance over the goal of getting something done quickly.” Like several of the others quoted in this section, Yglesias cited the Brooks and Liscow research on Interstate highway cost growth and “citizen voice.”

Global news magazine *The Economist* has noticed this American problem. A lengthy article in its February 4, 2023 edition carried the sub-head, “Blocking Clean-Energy Infrastructure

¹⁷ Jeremiah Johnson, “How Progressives Abandoned Progress for Process,” *TheBulwark.com*, 1 June 2023.

¹⁸ Matthew Yglesias, “America Can Fix Its Highways Much Faster, If It Wants,” *Bloomberg Opinion*, 24 June 2023.

Is No Way to Save the Planet.¹⁹ After providing a number of examples, the article included the following:

The rush to green the grid has created rare bipartisan consensus that it takes too long to build things in America. Permit reform, a hot topic among energy nerds and a few others, has become one of the most important issues the 118th Congress could tackle. Without it, America risks allowing the investment boom the IRA unleashes to be for naught. But the debate over whether and where to build the green infrastructure has pitted climate hawks against their erstwhile allies: environmentalists.

¹⁹ “Environmentalism: Green v Green,” *The Economist*, 4 February 2023.

PART 2

THE COST OF ENVIRONMENTAL LITIGATION

Although the 1970 NEPA legislation was only five pages long, the environmental review process has evolved via guidance set forth by the White House Council on Environmental Quality (CEQ) and via more than 50 years of court decisions in response to environmental litigation.²⁰ The NEPA process directs federal agencies to study the impacts of projects they expect to approve or carry out; this is the law's *administrative* process. The agency's draft environmental statements must then undergo a public comment period, which has been termed the law's *democratic* process. And third, those statements are subject to potential litigation, in what is referred to as the law's *judicial* process. The judicial process is the subject of this policy brief.

For their environmental impact documentation, federal agencies conduct three levels of review. The vast majority are categorical exclusions (CEs)²¹—when the agency has found there are no significant environmental impacts that need to be addressed and as a result has explicitly exempted these actions in the agency's NEPA procedures (barring

²⁰ Eli Dourado, "Bringing NEPA Back to Basics," Center for Growth and Opportunity, Utah State University, March 2023.

²¹ 40 C.F.R. § 1508.1(d).

“extraordinary circumstances”).²² The second category is called an environmental assessment (EA), produced when a CE does not apply and it is not clear that there would be no significant environmental impacts from a project.²³ If the agency concludes the EA process by finding no significant impacts, it issues a finding of no significant impact (FONSI) and that is usually the end of the story (although some FONSI may be challenged as incorrect).²⁴



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If the project is likely to have significant impacts, the agency must produce a full environmental impact statement (EIS).²⁵ EISs are typically required for major infrastructure projects, such as energy, environmental, and transportation projects. The draft EIS, when issued, is followed by a mandatory public comment period. After reviewing the comments, the agency produces a final EIS that responds to the comments. If those comments raised sufficiently difficult questions, the agency might issue a supplemental EIS to address them. A supplemental EIS may also be prepared if new information becomes available or if the project scope has changed. If this latter document is not litigated against, the agency publishes a record of decision (ROD) approving what it has defined as the preferred alternative for the project.

²² 40 C.F.R. § 1507.3(e)(2)(ii).

²³ 40 C.F.R. § 1508.1(h).

²⁴ 40 C.F.R. § 1501.6.

²⁵ 40 C.F.R. Part 1502.

Much environmental litigation challenges an EIS, a final EIS, and/or a supplemental EIS. Case law allows litigants to ask for and often receive an injunction requiring the agency to do further work to address concerns raised in the litigation. Environmental litigation dates back to 1971, and extensive case law has developed over the decades since then.



Much environmental litigation challenges an EIS, a final EIS, and/or a supplemental EIS. Case law allows litigants to ask for and often receive an injunction requiring the agency to do further work to address concerns raised in the litigation.



A recent study by Michael Bennon and Devon Wilson sought to identify impacts of environmental litigation over EISs for major infrastructure projects in the energy/environment and transportation sectors.²⁶ They used a database published by CEQ on 1,161 EISs for federal projects, with final EISs issued between 2010 and mid-2018. From those projects, they extracted the EISs for 171 large energy projects and 184 large transportation projects. Data on each project included the duration of each phase of the environmental review process, and other key data elements. Bennon and Wilson added information on whether each project received a supplemental EIS and whether it was included in the Federal Permitting Dashboard. They also segmented the two major categories into subcategories such as solar, transmission line, light rail, highway improvement, etc.

Each project was coded on its status as of fall 2022: operational, under construction, in predevelopment, or canceled. Interestingly, 14% had been canceled, 16% were still in predevelopment, 24% were still under construction, and 47% were completed. Litigation was associated with 100 of the projects, about 28% of the data set. They also used legal sites to identify the specific litigation associated with each project.

The authors also note that since all the projects in their data set had published a final EIS by 2018, more than four years prior to the start of their study, the administrative requirements of all these projects had been completed by that time. And the data set

²⁶ Michael Bennon and Devon Wilson, "NEPA Litigation Over Large Energy and Transport Infrastructure Projects," *Environmental Law Reporter*, Environmental Law Institute, October 2023.

covered more than eight years of final EISs. Hence, the authors expressed surprise that in all that time, less than half resulted in an implemented project, and more than one quarter were still in predevelopment or canceled.

Table 1 shows the average duration of permitting and the average litigation rate for energy projects, along with the number of each in the data set.

TABLE 1: LITIGATION RATE AND PERMIT DURATION FOR ENERGY PROJECTS

Sector	Litigation Rate (in percentage)	Permit Process Duration (in years)	Projects
Bio plant	50	3.7	2
Bio refinery	0	1.7	1
Carbon capture	0	2.1	2
Coal plant	0	2.0	2
Energy, program	20	3.2	15
Gas plant	0	1.7	2
Geothermal	33	2.0	3
Hydro	0	4.7	14
Liquification	29	3.7	7
Mine-coal	50	7.0	4
Mine-gas	50	7.0	6
Mine-other	25	4.6	4
Nuclear	0	6.3	2
Other-energy	0	2.7	2
Pipeline	56	2.1	18
Pump storage	100	5.5	1
Regasification	0	3.4	1
Solar	64	2.4	22
Transmission	31	3.8	42
Waste	25	5.3	8
Wind	38	3.6	13

Source: Bennon and Wilson, "NEPA Litigation Over Large Energy and Transport Infrastructure Projects," Table 1

TABLE 2: LITIGATION RATE AND PERMITTING DURATION FOR TRANSPORTATION PROJECTS

Sector	Litigation Rate (in percentage)	Permit Process Duration (in years)	Projects
Airport, improve	17	9.4	6
Airport, new facility	0	5.1	3
Boulevard/road	0	8.4	5
Bridge	33	7.5	12
Bus Rapid Transit	0	6.3	3
Ferry	0	6.0	2
Freight rail	20	7.3	5
Highway, improve	20	7.1	71
Highway, new	26	9.6	31
Heavy rail transit	33	4.6	3
High speed rail	29	7.6	7
Light rail transit	50	5.1	16
Regional rail	11	4.8	9
Transit, other	0	2.1	1
Transport corridor	0	4.4	1
Transport program	17	4.3	6
Tunnel	33	5.2	3

Source: Bennon and Wilson, *NEPA Litigation Over Large Energy and Transport Infrastructure Projects*, Table 1.

Reviewing the findings in these tables, the authors note that subsectors with higher rates of private financing have higher cancellation rates. This is evident in comparing energy projects with transportation projects. Energy projects, which typically have more investor financing, have both higher rates of cancellation but also higher completion rates. The findings suggest that investors may be more ready to abandon a project that seems likely to drag on for years of additional litigation but may also be more amenable to making changes to overcome objections. By contrast, highway projects have relatively low rates of cancellation but also far lower rates of completion in a timely manner. The authors' assumption is that most highway projects in the data set are public-sector funded, since privately financed public-private partnership (P3) transportation projects are still relatively uncommon in the U.S.

The authors also carried out several regression analyses. Only one sector, solar energy, showed a positive correlation with incidence of litigation. But having to produce a supplemental EIS was positively correlated with litigation across all project types.

Litigation is also correlated with project cancellation and also, in most cases, with the duration of the permitting process.

In their conclusion, Bennon and Wilson note the surprising finding that “solar, wind, and transmission line projects exhibit high rates of litigation even though these sectors are widely considered to be critical components of the energy transition away from fossil fuels.” And similarly, “in the transportation sector some types of projects generally considered to be environmentally beneficial, such as light rail transit, exhibit worse permitting outcomes (in duration and litigation rates) relative to other sectors considered to be less environmentally beneficial, such as highway improvements.”²⁷

Their explanation of this unexpected result goes to the heart of the environmental litigation problem:

*The public comment and litigation process established by NEPA is naturally predisposed towards the local environmental and social impacts of projects, because those are the impacts that motivate stakeholders and interest groups to intervene in the permitting process. It is not a process that is capable of balancing the complex environmental tradeoffs of a utility scale solar project.*²⁸

They also point out that only in NEPA’s *administrative* process are such larger factors considered. But the key influencers under NEPA’s *judicial* process are the stakeholders that elect to litigate (for any of the reasons that stakeholders oppose infrastructure projects) and the courts that decide their cases.

This pinpoints the most critical issue with the NEPA judicial process. It is not merely that this process prioritizes local stakeholder and habitat impacts over broader regional and national concerns. More important, under NEPA’s judicial process there is no mechanism through which such a balance could even be attempted, since courts are limited to the questions the plaintiffs bring before them. The NEPA judicial process trumps NEPA’s administrative process.

²⁷ Bennon and Wilson “NEPA Litigation Over Large Energy and Transportation Infrastructure Projects,” 10856.

²⁸ Ibid.

In conclusion, the authors write that “[T]he current debates regarding permitting reform are overly focused on NEPA’s administrative process and comparatively neglect NEPA’s judicial process. Judicial review under NEPA appears to significantly impact infrastructure project development in the United States, and it impacts both the projects that are litigated and those that are not.”²⁹

“

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Some relief might result from provisions in the Fiscal Responsibility Act that now require a review of “a reasonable range of alternatives to the proposed action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no-action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal.”³⁰

²⁹ Ibid, 10858.

³⁰ Council on Environmental Quality, “Amendments to NEPA from the Fiscal Responsibility Act of 2023,” June 2023.

PART 3

ENVIRONMENTAL REFORM OVERSEAS

Many of the same problems the U.S. experiences in the environmental review process for major infrastructure projects are also found in other developed countries. Part 3 draws on three recent studies. The first is a review of environmental policy reforms in the European Union, five European countries, and four Asia/Pacific countries. The second is a study of rail transit projects in selected countries worldwide from the Eno Center for Transportation. And the third is the Transit Costs Project recently completed by the Marron Institute at New York University.

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3.1 ENVIRONMENTAL REFORM OVERSEAS

The first study was researched by Florida International University professor Mario Loyola for the Competitive Enterprise Institute and the Permitting Institute.³¹ It reviews the permitting regimes of the United States, five countries in Europe, Australia, New Zealand, Japan, and China. The following discussion focuses on Europe, Australia, and New Zealand. Japan has not really enacted meaningful permitting reform, and China's laws and institutions are very different from those of democratic countries.

3.1.1 EUROPEAN ENVIRONMENTAL REFORM

In 1985, the European Union (EU) published standards for environmental impact assessments (EIAs) within the EU. It added the concept of strategic environmental assessments (SEAs) for national/regional projects in 2001; those projects would require public consultation. And in 2011 it set forth requirements for “development consents” for projects likely to require EIAs or SEAs. The assumption was that the EIAs or SEAs would be prepared by the would-be developer rather than the agency that oversees the relevant kind of infrastructure. EU member states are required to compile statistics on project assessments and the duration of project permitting; they are to submit them to the European Commission every six years. Loyola points out that a European SEA “is the equivalent of a Programmatic EIS (or EA) in the United States. It is meant to cover an entire category of projects in order to reduce the burden on each one.”³²

The five countries whose environmental reforms are summarized include four EU members (Germany, Denmark, Spain, and the Netherlands) and one non-member, Norway, which is part of the European Economic Area.

Germany's environmental impact legislation dates back to 1974 and established the requirement for EIAs a decade before the EU legislation. Its current Environmental Impact Assessment Act was enacted in 1990. It outlines criteria for when an environmental review is needed. It was amended in 2001 calling for more-detailed SEAs for major projects.

³¹ Mario Loyola, “Global Infrastructure Permitting: A Survey of Best Practices,” Competitive Enterprise Institute and The Permitting Institute, June 2023. <https://cei.org/studies/global-infrastructure-permitting>

³² Mario Loyola, email to Robert Poole, 5 December 2021.

In an important piece of legislation in 2023, Germany's Bundestag enacted "sweeping reforms of the process for litigation related to key categories of infrastructure projects."³³ The intent was to streamline legal challenges to permits and EIAs. The relevant court may "disregard" minor defects in the permit being challenged if it is obvious that they will be remedied in the near future. It also provides that "significant" infrastructure projects be given priority in being heard by administrative courts. This is the only real litigation reform among the environmental streamlining of the countries in this international review.

Denmark, like Germany, assumes that the EIA will be carried out by the proposed developer of the project as part of the proposal it submits to the responsible agency. In turn, the agency may consult with stakeholders as part of its review of the proposal. The agency may reject the project, but if it accepts the project, it may propose mitigation measures as a condition of its approval. The agency's decision may be appealed by the proposer or affected stakeholders. For major projects, a more detailed SEA is required, which includes consultation with affected agencies and stakeholders. Once the developer submits the SEA, there is an eight-week public consultation, after which the project is generally approved. For energy projects, the Danish Energy Agency acts as a one-stop shop for project developers.³⁴

Spain's EIA dates back to 1986. As with Germany and Denmark, Spanish law assumes that the proposed developer submits to the relevant agency a proposal that includes an EIA. The agency reviews the proposal and EIA and consults with stakeholders, including local communities and interest groups. The agency then decides to accept, reject, or conditionally accept if the developer adopts mitigation measures. That decision can be appealed, but the report does not go into any details about the appeals process.³⁵

The Netherlands adopted its Environmental Management Act in 1994, establishing the process for EIAs. The law spells out what kinds of projects require EIAs, the content of an EIA, and procedures for public participation. The project developer is responsible for preparing the EIA as part of its proposal to the relevant agency. The Netherlands Commission on Environmental Assessment (NCEA) reviews the proposal. If the project has been designated as needing only the simplified procedure, that review is optional but may be requested by the agency in question. If the project requires the "full" procedure, NCEA reviews it, and its advice to the agency is mandatory for the agency to consider. And the

³³ Ibid, 67.

³⁴ Ibid, 70.

³⁵ Ibid, 71.

agency must take into account NCEA's review along with the views of the public. No details are provided on the role of litigation in this process.³⁶

Norway's Planning and Building Act of 1988 is the legislation authorizing environmental impact assessment. The government issued detailed regulations on the EIA process in 2017. As a member of the European Economic Area, Norway complies with EU directives including the EIA Directive and the SEA Directive. For infrastructure projects (as opposed to land-use projects), the proposer may be from either the public sector or private sector. As in other European countries, the proposer develops the EIA or SEA as part of its proposal. If the relevant agency approves the project, the developer must comply with the mitigations put forth by the agency in order for the project to proceed.³⁷

At least for the countries profiled above, several commonalities are apparent. First, the proposed developer prepares the draft EIA, and the relevant agency either approves, rejects, or modifies the proposal to include revised mitigation measures. These commonalities likely arise due to the EU Directives for EIAs and SEAs. Inputs from the public and interest groups are generally allowed, and decisions of the responsible agency may be appealed, but there is very little in the report on the extent of litigation or restrictions on its extent.



Currently, France, which is not included in the Loyola report, is sidestepping environmental litigation by creating an independent agency that carries out environmental reviews, rather than individual agencies doing them. Germany has adopted a similar approach.



Currently, France, which is not included in the Loyola report, is sidestepping environmental litigation by creating an independent agency that carries out environmental reviews, rather than individual agencies doing them. Germany has adopted a similar approach. Using this approach requires a prime minister who is committed to infrastructure development. Further, it may be challengeable in court.³⁸

³⁶ Ibid, 74.

³⁷ Ibid, 80.

³⁸ Eric Goldwyn, New York University, email to Robert Poole, 8 March 2024.

3.1.2 AUSTRALIA AND NEW ZEALAND ENVIRONMENTAL REFORM

Australia's primary environmental legislation is the 1999 Environmental Protection and Biodiversity Conservation (EPBC) Act. Any action or project that is likely to have a significant impact on the national environment requires authorization under EPBC, including an assessment of environmental impacts and proposed offsets/mitigations, per a 2012 amendment to EPBC. Nationally significant projects must be referred to the Department of Climate Change, Energy, the Environment, and Water (DCCEEW). That agency serves as a one-stop shop for authorization of such projects.

Project developers submit a preliminary application to DCCEEW, and in most cases the agency must respond within 20 days to decide if the project needs an assessment, and which of five alternative assessments is appropriate. Two of these are assessment via an environmental impact statement or public environmental report (PER), and assessment by public inquiry. Once the developer has completed the required assessment, DCCEEW has a maximum of 40 days to decide on the project's approval.

The Infrastructure Australia Act of 2008 created a commission, Infrastructure Australia, to expedite approval, funding, and construction of nationally significant projects in transportation, energy, communications, and water infrastructure. Certain projects can qualify for inclusion on the Infrastructure Priority List (IPL). These projects are assessed by Infrastructure Australia, using the checklists and templates in its assessment framework. To qualify for the IPL, the business case analysis by Infrastructure Australia must show a positive benefit/cost ratio and a minimum of net benefits of A\$30 million per annum.³⁹

New Zealand, a much smaller country, follows a somewhat similar approach. The basic framework is set by the Resource Management Act of 1991, which consolidated most of the country's environmental laws into a single act. As in Australia, project proponents must first apply to the NZ Environmental Protection Authority (EPA) for a resource consent. The application for that must include an assessment of environmental effects (AEE) developed by the proponent. Based on its review of the AEE, the EPA issues a report with recommendations on whether to approve the project. The report is submitted to the relevant infrastructure agency. Its process includes public consultation, which may include a hearing.

³⁹ Ibid, 81.

Pursuant to the Environmental Protection Authority Act of 2011, NZ EPA developed a separate resource consent for projects of national significance. This expedited process has its own application process, as well as streamlined processes for public participation, evaluation of the AEE, and appeals. The EPA determines if the project qualifies as nationally significant and whether it should be referred to a board of inquiry or to the Environment Court. The relevant minister (e.g., transport minister) reviews and approves or rejects the national significance designation. If the project is reviewed by the Environmental Court, that body holds hearings and sets timeframes and procedural requirements. Its decision can be appealed to the High Court only on questions of law.⁴⁰

3.1.3 SUMMARY

Examining the approaches of other countries reveals a number of commonalities. In all cases, it is the proposed project developer that prepares and submits the environmental study, which is included with its request for permission to do the project. This contrasts with U.S. environmental law, in which the EIS is prepared after agency assessment of the proposed project, either by the agency itself or by the proposer of the project.

Nearly all the countries discussed provide a separate process for projects of national significance.

Nearly all the countries discussed provide a separate process for projects of national significance (EU, Australia, Denmark, Germany, Netherlands New Zealand, and Norway). Australia and Denmark limit processing time for government review of proposals or environmental studies. Australia provides a “one-stop shop” approach (despite a separate track for projects overseen by Infrastructure Australia). And New Zealand stands out for consolidating handling of nearly all environmental laws by a single agency.

⁴⁰ Ibid, 88.

3.2

CASE STUDIES OF RAIL TRANSIT INFRASTRUCTURE COST

Two U.S. think tanks have released detailed reports comparing the performance of U.S. and non-U.S. rail transit projects, aiming to understand why new U.S. rail transit projects generally cost considerably more than comparable projects overseas. The first was done by the Eno Center for Transportation, based in Washington, D.C. The second was carried out by the Marron Institute at New York University (NYU).



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3.2.1 ENO CENTER FOR TRANSPORTATION STUDY

In September 2022 the Eno Center released its study, “On the Right Track: Rail Transit Project Delivery Around the World.”⁴¹ This study’s primary finding quantified the growing perception that “urban rail projects in the United States suffer from disproportionately high costs and long timelines compared to international peers.”⁴²

The Eno researchers selected 12 democratic countries for comparison with the United States. They collected data on rail transit projects constructed since 2000 in all 13 countries. Construction costs were converted into 2021 U.S. dollars, based on Organization for Economic Cooperation and Development (OECD) purchasing power parity rates and adjusted for inflation using the *Engineering News-Record* Construction Cost Index. The final output of the database is a comparable unit cost per mile of rail line. And since tunneled

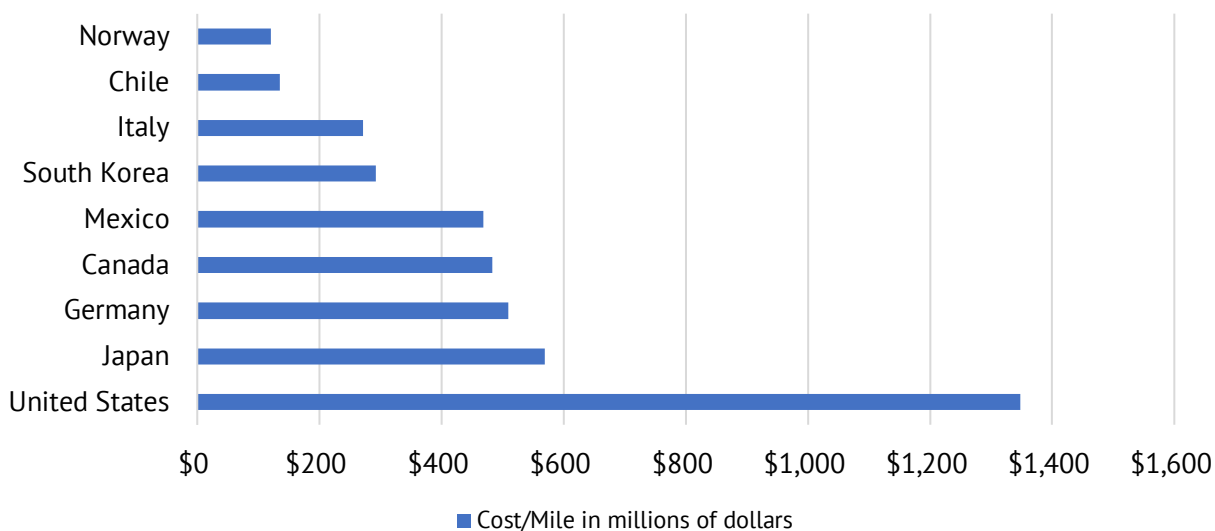
⁴¹ Eno Center for Transportation, “On the Right Track: Rail Transit Project Delivery Around the World,” September 2022. <https://enotrans.org/eno-resources/on-the-right-track-rail-transit-project-delivery-around-the-world>

⁴² Ibid, 2.

projects, on average, cost considerably more per mile than at-grade projects, data charts separate these two categories.⁴³

Figure 2 shows the average cost per mile for tunneled rail projects in nine countries. “Tunneled” is defined as having 80% or more of the project’s length underground.

FIGURE 2: AVERAGE COST PER MILE FOR TUNNELED RAIL TRANSIT PROJECTS

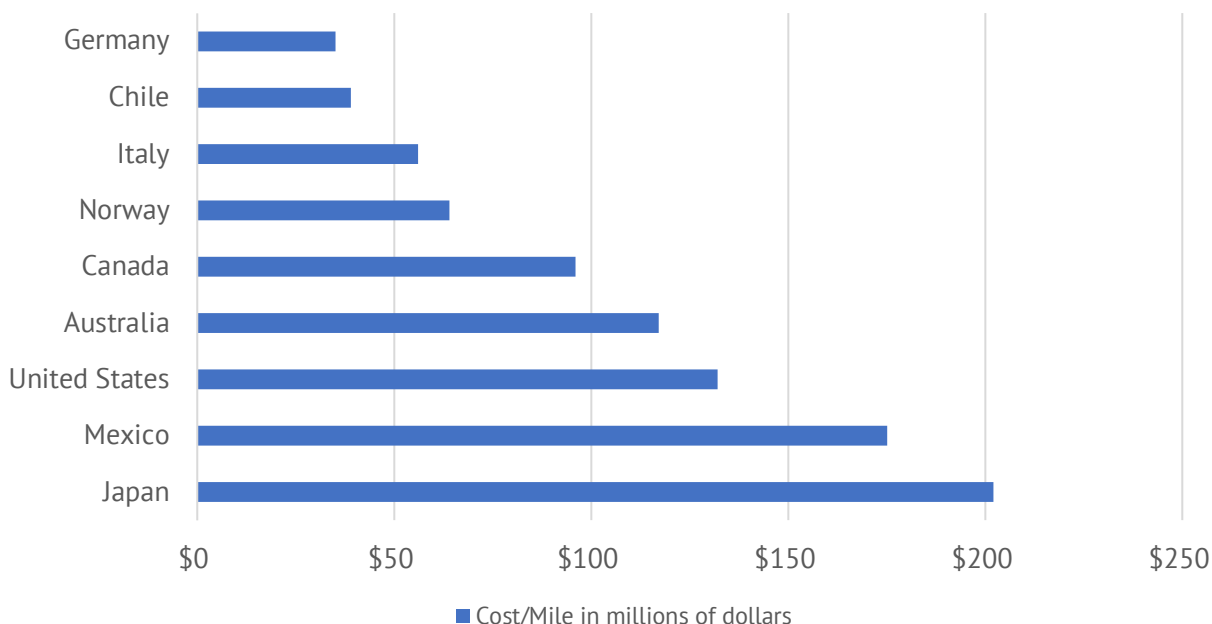


Source: Eno Center for Transportation, “On the Right Track” study.

New York is such a high-cost outlier that the U.S. figure for tunneled rail projects averages only \$582 million per mile if New York projects are excluded. Also, there were no projects meeting the 80% definition for tunneled projects in Australia or South Africa, so they do not appear in Figure 2. The comparison for primarily at-grade rail transit projects is generally similar, as Figure 3 shows.

⁴³ Ibid, 4-5.

FIGURE 3: AVERAGE COST PER MILE FOR AT-GRADE RAIL TRANSIT PROJECTS (\$M)



Source: Eno Center for Transportation “On the Right Track” study.

Because no at-grade rail projects in either South Africa or South Korea met the criteria for inclusion, those countries are not included in Figure 3.

Table 3 compares the U.S. cost premium for tunneled and at-grade rail transit projects with global data based on all 132 projects in the database.

TABLE 3: CONSTRUCTION COST PREMIUM FOR U.S. RAIL TRANSIT PROJECTS (\$M)

Type	Per Mile U.S. Cost	Per Mile Non-U.S. Cost	U.S. Cost Premium (in percentage)
At-grade	\$132	\$89	48%
Tunneled	\$582*	\$371	57%

*does not include New York City projects

Source: Eno Center for Transportation

The Eno report notes that all 13 countries in this study have “some form of environmental review process,” but the report provides little comparative detail (which might help to explain some of the cost disparities). The first table in the Eno report identifies the type of legal system in each country. High-cost Australia, Canada, and the United States have common law systems (as does the U.K., which is not part of the Eno study). The lowest-cost

countries—Italy, Chile, Norway, and (in at-grade projects) Germany are all civil law countries, which might be reflected in their environmental review processes. A common law system is based largely on uncodified case law (in other words, disputes are settled in courts, where judges’ determinations can vary widely and can take many years to complete). A civil law system has administrative bodies designed specifically to handle such disputes, relying on legal codes.

In its section on recommendations, the Eno report singles out Chile, Italy, and parts of Germany for being able to deliver projects at lower cost and in less elapsed time. The authors note that in all three countries planning and project management are carried out either in-house by the transport agency (Chile) or by special-purpose government bodies that manage construction (Italy and Germany). It also recommends that U.S. policymakers “should learn from other countries’ efforts to streamline reviews for environmentally beneficial transit projects,” but offers only brief references to 2020 reforms in Australia and a 2008 reform in the Ontario province of Canada.⁴⁴

It is also worth noting that the United Kingdom, which was not included in the Eno study, would likely have rivaled the United States in having very high rail transit construction costs. Articles in *The Economist* have decried the ability of citizen groups to protest, very often successfully, all kinds of U.K. development projects, including housing, roads, reservoirs, and electric power generation.⁴⁵

3.2.2 NYU MARRON INSTITUTE STUDY

The Marron Institute’s Transit Costs Project released its final report in November 2022.⁴⁶ With a broader scope than the Eno project, the NYU researchers assembled a database of more than 900 transit projects in 59 countries. One of the project’s headline findings was that the United States is the sixth most expensive country in the world to which to build rail transit infrastructure.

⁴⁴ Ibid, 20

⁴⁵ “Britain Can’t Build,” *The Economist*, 3 September 2022, and “Taking the Slow Road,” *The Economist*, 12 November 2022.

⁴⁶ Eric Goldwyn, Alon Levy, Elif Ensari, and Marco Chitti, “Transit Costs Project: Understanding Transit Costs in American Cities,” New York University Marron Institute of Urban Management, November 2022. https://transitcosts.com/wp-content/uploads/TCP_Final_Report.pdf

Figure 1 in the final report is a bar graph of the average cost per kilometer of all the rail transit projects in each of the 59 countries. Major developed countries in the lowest-cost portion of the graph include Portugal, South Korea, Spain, Greece, and Switzerland. The next 10 lowest-cost countries include Chile, Italy, and Sweden. The 10 most costly include the Netherlands, United States, Singapore, Hong Kong, the United Kingdom, and New Zealand. The range from lower-cost to higher-cost countries is generally consistent with the findings of the Eno project discussed in the previous section.

“
... the United States is the sixth most expensive country in the world to which to build rail transit infrastructure.
”

For its analytical work, the project team carried out five detailed case studies. Two were of high-cost U.S. projects: the Boston Green Line extension and New York City’s Second Avenue Subway. As a dramatic contrast, the other three case studies explored how lower costs were achieved in rail transit projects in Istanbul, Italy, and Stockholm.

The research focused on three primary factors that influence project costs: physical structures, labor, and procurement, plus soft costs. The environmental review process, which exists in each of the 59 countries, was not a particular focus of the research, though it was a significant factor in at least two of the five case studies.

The Transit Costs Project examined data from the construction of the Boston Green Line extension case study to explain how citizen activity helped inflate that project’s cost. In the Green Line case, public input—not specifically in the form of environmental litigation—led to major cost increases in the early stages of the project. For example, the agency was pressured to construct seven expansive, customized stations rather than have all seven stations follow a standardized, low-cost design.⁴⁷ Local groups also lobbied hard for the inclusion of a bicycle/pedestrian path alongside the rail transit corridor, which also added to the cost. Despite some eventual cost savings, this 7.6 km. light rail project ended up costing \$301 million per kilometer, almost as much (in same-year dollars) as the 5.1 km. heavy-rail subway Red Line extension in 1985, whose cost was \$322 million per kilometer.

⁴⁷ Goldwyn, Levy, Ensari, and Chitti, *Transit Costs Project*, 62.

As the Transit Cost Project's first case study, the Green Line project helped inform the researchers what to look for in their overseas case studies.

The Italy case study, written by Marco Chitti, illustrates how different the Italian legal system is from those of common law countries like the U.K. and the U.S. The Italian system can be categorized as Bureaucratic Legalism, "based on the Napoleonic tradition of Administrative Law and on the principle that the State and its operational machine, the Public Administration, are responsible for pursuing the public interest. Hence, appeals against decisions of public agencies and authorities, like environmental approval, public contract awarding, etc. are dealt with by separate Administrative Tribunals."⁴⁸ He goes on to explain that EIRs in Italy are narrowly focused on ecological impacts (noise, emissions, etc.) rather than community impacts in general.

“

In the Green Line case, public input—not specifically in the form of environmental litigation—led to major cost increases in the early stages of the project.

”

In Italy large transit projects go through four phases of planning and design:

1. Sustainable Urban Mobility Plan
2. Technical and Economic Feasibility
3. Final Design
4. Engineering Design

The first stage establishes whether the project meets sustainability goals and appears to be cost-beneficial. "Public participation is mostly done at this [first] phase," Chitti explains.

Consistent with the civil law state structure, historic preservation is assessed by the Ministry of Culture and Heritage at the *initial* stage of the review. This precludes the kind of grass-roots historic preservation litigation that can arise much later in the process with U.S. urban infrastructure projects.

⁴⁸ Marco Chitti, "The Italian Case: Turin, Milan, Rome, and Naples," in Eric Goldwyn, et al., *Transit Costs Project*, 185.

Reading between the lines, in Italy, environmental review is considerably more limited in scope than in common-law countries. It also takes place in the first stage of project plan development, rather than occurring much further along, as in typical U.S. megaproject development. By limiting the amount and timing of citizen input, the system appears to avoid the kind of late-in-the-game citizen litigation that occurs in the United States under NEPA as it has evolved.

3.3

CONCLUSIONS

While a number of developed countries have implemented reforms of their infrastructure development process, there appears to be little reform of environmental litigation. The European Union has managed to bring about some degree of commonality in how major infrastructure projects are procured and approved, including the requirements for environmental impact studies. The only European country to implement significant environmental litigation reform is Germany. That reform puts limits on aspects of projects that can be questioned via litigation. Denmark and Australia have adopted time limits for agency review of environmental impacts, which gets at one aspect of the long time it takes in many countries to reach what we call a record of decision allowing the project to proceed. And Australia, New Zealand, Denmark, Germany, and Netherlands have created somewhat streamlined reviews of projects deemed to be of national significance.

“

The European Union has managed to bring about some degree of commonality in how major infrastructure projects are procured and approved, including the requirements for environmental impact studies.

”

A few of these ideas may be transferable to the United States. But fundamental differences in the nature of a country's legal system (as in Italy's case) do not seem to be readily transferable. Italy's process limits the scope of what is considered “environmental” and deals with those impacts within the administrative system, and at an early stage of project planning. It's difficult to imagine implementing that drastic a change in the United States.

In an email to this author in the initial months of research for this brief, the Marron Institute's project director for the Transit Costs Project offered some comments on the politics of U.S. infrastructure project review.

My brief read on this is that many jurisdictions go way above and beyond what is required to get these documents done. In our work, we have spoken with many transit agency staff, board members, etc. who say there needs to be much more public engagement than just a meeting for an EIS. Additionally, boards (especially ones made up of elected officials) sometimes extend comment periods several months at a time, because no one wants to make a controversial decision. . . . We have seen getting approvals from federal partners can also be time-intensive, depending on staffing levels/capacity at those entities. Lastly, getting cooperative agreements finalized with jurisdictions, freight railroads, universities, etc. is often a drawn-out process, because these third parties have so much power to withhold permits, approvals, etc. . . . Lastly, identifying impacts isn't the same as ranking them, which is maybe something NEPA should consider. In Turkey, rail [transit] projects can get a waiver because they produce environmental benefits. This process takes about three months. For a rail project that needs new right of way there is no way it would qualify for a Categorical Exclusion in the United States.⁴⁹

In other words, there is more to the politics of project approval than reforming environmental litigation.

⁴⁹ Eric Goldwyn, email to Robert Poole, 12 November 2022.

PART 4

CONGRESSIONAL REFORM EFFORTS

Since passage of the NEPA legislation in 1970, administrative and judicial changes have greatly increased the scope and complexity of environmental reviews. Congress itself had made only minor changes in what has become a very large body of law. That began to change in 2021 with the Infrastructure Investment and Jobs Act (IIJA), otherwise known as the Bipartisan Infrastructure Law.

This legislation made a number of changes to the NEPA process:⁵⁰

- It codified aspects of the “One Federal Decision” policy from the Trump administration’s Executive Order 13807, which had been rescinded as one of President Joe Biden’s first executive orders after taking office.
- It established a lead agency to be in charge of federal environmental review of proposed projects, aiming to avoid multiple agencies each interacting directly with the project proponent.
- It limited the length of “alternatives analysis” in an EIS to 200 pages.
- It kept in place certain provisions of the transportation reauthorization bill called the FAST Act, including the Federal Permitting Steering Council.

⁵⁰ Nick Goldstein, “Infrastructure Law Offers Road Map to Real Permitting Reform,” *Transportation Builder*, September-October 2022.

- And it required the release of a record of decision (ROD) within 90 days of the issuance of a final EIS.

In 2022 two senators who had been key players in crafting IJJA—Sen. Joe Manchin (D, WV) and Sen. Shelley Capito (R, WV)—each proposed further legislation.⁵¹ Capito’s bill would have reinstated the Trump administration’s CEQ NEPA guidance, most of which had been reversed by the Biden CEQ. Manchin supported that bill, but his bill focused primarily on energy projects, including high-voltage transmission lines and pipelines. Both also included time limits for permitting energy projects, analogous to those that nominally apply to transportation projects: a 150-day window for filing environmental lawsuits. But legal opinion was divided on whether courts would uphold such limits. Neither bill was enacted.

Further reform came about via legislation enacted the following year. The Fiscal Responsibility Act of 2023 (FRA) included additional permitting reform provisions, as summarized in *Global Projects Review*.⁵²

- Time limits of two years for an EIS and one year for an EA;
- Page limits of 75 for an EA, 150 for an EIS, and 300 for an EIS for a project of “extraordinary complexity”;
- Narrowing the scope of NEPA applicability by defining a “major federal action”; and,
- Codifying the CEQ requirement that an EIS must consider “reasonably foreseeable environmental effects of the proposed action” and analyze a “reasonable range of alternatives that are technically and economically feasible and meet the purposes and needs of the proposal.”

On the other hand, in July 2023 the CEQ released its proposed Phase 2 NEPA regulations.⁵³ They more thoroughly replaced the already changed Trump CEQ regulations, adding explicit climate and environmental justice provisions. These changes embrace Biden administration priorities, but they are unlikely to gain bipartisan support. In a submission to CEQ commenting on the Phase 2 regulations, the American Road and Transportation

⁵¹ Michael Bennon, “West Virginia Senators for Permitting Reform,” *Public Works Financing*, September 2022.

⁵² Alex Arensberg, “A Summer of Reform for the National Environmental Policy Act,” *Global Projects Review*, 11 September 2023. <https://www.globalprojectsview.com/2023/09/11/a-summer-of-reform-for-the-national-environmental-policy-act>

⁵³ National Environmental Policy Act Implementing Regulations Revisions Phase 2, *Notice of Proposed Rulemaking*, Council on Environmental Quality, 88 Fed. Reg. 49924 (31 July 2023).

Builders Association (ARTBA) judged some of these provisions to be unsupported by any NEPA legislation.⁵⁴

The submission noted that the proposed regulations would eliminate references to NEPA reviews as “procedural” and instead require reviews to identify an “environmentally preferable” alternative and elevate this alternative above others. ARTBA wrote that this approach is contrary to the language of the NEPA statute. It would thereby authorize a “NEPA shortcut” for projects embracing the administration’s environmental priorities. It also argued that the rule would be unenforceable and would result in additional litigation and delays in project approvals, and that CEQ must account for the real-world impacts of delays resulting from their proposal. While many members of Congress would not agree with ARTBA’s assessment, those CEQ regulations are unlikely to be approved as part of any bipartisan legislation on NEPA reform.



To sum up, the fact that a closely divided Congress has enacted two bipartisan NEPA reforms since 2021 reflects a growing consensus that delays and extensive litigation affecting large-scale infrastructure in both energy and transportation need to be addressed.



To sum up, the fact that a closely divided Congress has enacted two bipartisan NEPA reforms since 2021 reflects a growing consensus that delays and extensive litigation affecting large-scale infrastructure in both energy and transportation need to be addressed. The 2021 and 2023 bills attempt to streamline and shorten NEPA’s *administrative* process by changing the rules via the *democratic* process. But these modest reforms have not addressed the *judicial* process—i.e., the role and extent of citizen litigation. This aspect has yet to be reformed.

⁵⁴ Prianka Sharma, “Submission to CEQ re Notice of Proposed Rulemaking: National Environmental Policy Act Implementing Regulations Revisions Phase 2,” American Road & Transportation Builders Association, 29 September 2023.

PART 5

POTENTIAL LITIGATION REFORMS

5.1 LEGAL BACKGROUND

To understand the proposed reforms discussed below, a bit of legal and political history is in order. In the 1970s, agencies went beyond the language of the brief NEPA statute to develop what became known as a “hard look” review of proposed agency actions. The Supreme Court endorsed this interpretation of the statute in its 1983 *State Farm* decision.⁵⁵ The Administrative Procedure Act’s Section 706 says that federal courts may set aside actions that are “arbitrary and capricious.” But in *State Farm* the Court said that courts should do this “if the agency failed to consider even one factor or issue the court would have preferred that the agency discuss.”⁵⁶ Due to the resulting “hard look” assessment, there is no use of materiality in NEPA assessments. An EA or an EIS can be challenged as “arbitrary and capricious” if even one paragraph in a very lengthy document is not perfect.

The other key actor is the Council on Environmental Quality (CEQ). Per the NEPA statute, agencies must study alternatives to the proposed action (approve, modify, or reject the proposed project). But the CEQ’s NEPA implementing regulations require the agency to

⁵⁵ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

⁵⁶ Mario Loyola, “Unleashing America’s Energy Abundance: Permitting Reform Is Vital for Affordable Clean Energy,” On Point No. 283, Competitive Enterprise Institute, 27 September 2022.

provide “the underlying purpose and need to which the agency is responding in proposing the alternatives, including the proposed action.”⁵⁷ Yet NEPA deals with the agency’s proposed *action*, not the proposed *project*. Hence, agencies devote hundreds or thousands of pages to alternatives that project developers may not be interested in pursuing.



Courts are also part of the problem, granting standing to almost any individual or group that does not like the proposed project.



Courts are also part of the problem, granting standing to almost any individual or group that does not like the proposed project. There is no right of action in the NEPA statute, but courts found one in the Administrative Procedure Act, which allows standing to anyone who might suffer “legal harm.” Subsequent courts have gone beyond that to confer standing to sue on any party that, basically, does not like the project. A Competitive Enterprise Institute (CEI) study notes that this is referred to as a “zone of interest” procedural standing.⁵⁸

Another serious legal problem is that the CEQ has come to be accepted as a regulatory agency, but the NEPA statute confers no regulatory authority on the CEQ. Yet that interpretation was upheld in the *Public Citizen* case. Justice Clarence Thomas in that case wrote that “CEQ was established by NEPA with authority to issue regulations interpreting it.”⁵⁹ But that grant of authority is not in the NEPA statute or subsequent legislation. It was President Carter’s Executive Order No. 11991 that mandated CEQ regulation.

With this information as background, this brief turns to proposed litigation reforms.

⁵⁷ 40 C.F.R. § 1502.13.

⁵⁸ *Ibid.*

⁵⁹ *Department of Transportation v. Public Citizen*, U.S. 541 US 75 (2004).

5.2

POTENTIAL LITIGATION REFORMS

The premise of this policy brief is that a climate of opinion is developing that might lead to bipartisan political support for litigation reform that reduces the time and cost of reviewing major energy and transportation infrastructure projects. For this reason, reform proposals discussed below would affect environmental reviews of both energy and transportation projects (as essential to achieving bipartisan support). Hence, energy-only proposals (e.g., that would apply only to, say, high-voltage transmission lines) are not included.



... a climate of opinion is developing that might lead to bipartisan political support for litigation reform that reduces the time and cost of reviewing major energy and transportation infrastructure projects.



Two centrist public policy organizations have proposed various across-the-board environmental litigation measures: the Bipartisan Policy Center (BPC) and the Institute for Progress (IFP). BPC was founded in 2007 with a board peopled by retired members of Congress from both parties. IFP was founded in 2022 by two former economists from the Progressive Policy Institute, which provided many of the “reinventing government” ideas embraced by the Clinton administration.

BPC assembled a group of experts to discuss an array of potential reforms of environmental litigation.⁶⁰ Policy ideas that received broad support included:

- Reduce the time period for filing lawsuits to two years;
- Limit standing to sue to those who expressed concerns during a public comment period;
- Send litigation directly to an appeals court, bypassing district courts, or establish a technical court with jurisdiction over federal permitting;
- Set deadlines for court decisions (if this is legal to do); and,
- Set deadlines on “remands” to the agency in charge of the EA or EIS.

⁶⁰ Xan Fishman, Marty Hall, John Jacobs, and Owen Minott, “Reforming Judicial Review for Clean Infrastructure: A Bipartisan Approach,” Bipartisan Policy Center, September 2023.

IFP's proposals were along much the same lines:⁶¹

- Put time limits on injunctions, such as no more than three years from the date the agency begins the NEPA process to the final agency decision. IFP noted that in the FRA legislation, Congress set two years to complete NEPA review, which would then limit judicial review to one year;
- Alternatively, mandate that no more than six months after the record of decision (ROD) all injunctions would be voided;
- Require that only those who participated in the public comment period could file suit; and,
- Send litigation directly to an appeals court, bypassing district courts.

In a refinement of its initial work, BPC did further evaluation of a larger array of reform proposals, giving each one two scores: one for likely effectiveness and the other for how controversial it would be.⁶² Each proposed reform received a composite score based on two dimensions:

- 1 Very promising (high effectiveness, low controversy)
- 2 Promising (effectiveness score higher than controversy score)
- 3 Negotiable (effectiveness score equal to controversy score)
- 4 Less promising (effectiveness score lower than controversy score)
- 5 Not worth pursuing (effectiveness score lower than controversy score)

Environmental litigation measures with scores of 1 and 2 are as follows:

Very promising (1)

- Establish a technical court with jurisdiction over federal permitting.
- Establish a permitting review board for energy [and transportation⁶³] projects.

⁶¹ Aidan Mackenzie, Arnab Datta, and Alec Stapp, "A Grand Bargain for Permitting Reform," Institute for Progress, 29 September 2023.

⁶² Xan Fishman, John Jacobs, Daniel Elizalde, Lori Pickford, and Owen Minott, "Finding the Goldilocks Zone for Permitting Reform," Bipartisan Policy Center, January 2024.

⁶³ BPC's focus was on energy infrastructure, but the author of this brief (Poole) suggests these measures should also apply to major transportation infrastructure.

Promising (2)

- Reduce the statute of limitations for filing lawsuits.
- Elevate litigation filed after the final agency decision directly to U.S. Courts of Appeal.
- Set deadlines on agency remands.
- Require agencies to expand the use of programmatic reviews.
- Expand utilization of categorical exclusions (CEs).
- Enforce statutory or administrative timelines for completing the permitting process.

Two former Republican officials proposed two mode-neutral litigation reforms in an op-ed piece in *The Wall Street Journal* in 2022:⁶⁴

- Limit those who can bring action in court to those suffering a legal wrong because of agency action; and
- Establish a proximate cause standard for what kinds of environmental effects are relevant to NEPA assessment. Only those with a “reasonably close causal relationship to the agency’s actions would be allowed. This would eliminate the current practice of including cumulative effects of all similar actions, rather than focusing on harms from the project undergoing review.

The CEI study suggested three mode-neutral litigation reforms in its referenced paper:⁶⁵

- Hold agencies to a standard of “substantial compliance,” so that a project can go ahead if the EIS is “mostly right.” In fact, “substantial compliance is a well-known common law principle;
- Tighten the rules on standing, as several of the previous papers have suggested; and,
- Establish programmatic and general permits for projects of which there will likely be a considerable number, with expedited processing.

⁶⁴ C. Boyden Gray and Michael Buschbacher, “Joe Manchin’s Legacy Now Depends on Permitting Reform,” *The Wall Street Journal*, 7 August 2022.

⁶⁵ Loyola, “Unleashing America’s Energy Abundance.”

A broader set of reforms has been set forth in a paper by Eli Dourado of the Center for Growth and Opportunity at Utah State University.⁶⁶ Since these proposals cover a wider ground, they require somewhat more details.

The Utah State paper's first principle is "Trust agencies to make responsible findings." It points out that under NEPA approximately 12,000 substantive environmental reviews are carried out each year. The vast majority of those are EAs, aimed at justifying a finding of no significant impact (FONSI). This requirement was set forth by the CEQ without reference to any support in the NEPA legislation. It notes that the requirement to make EAs into mini-EISs was upheld in the Federal District Court for the District of Columbia, which held in 1991 (in *Sierra Club v. Watkins*) that an EA is "in effect, a mini-environmental impact statement." It notes that, including appendices, EAs can run to thousands of pages. Yet the vast majority have no significant environmental impact.

Hence, its recommendation is that Congress should pass a single-sentence reform along the lines of:

Neither an environmental assessment as that term is defined in Volume 40 of the Code of Federal Regulations § 1508.1(h) nor any other process or document shall be a prerequisite for an agency to prepare and issue a finding of no significant impact as that term is defined in Volume 40 of the Code of Federal Regulations § 1508.1(l).

Its second principle is "Inform but do not involve the public." It points out that the NEPA statute requires the federal agency in question to consult with other federal agencies and to accept comments from them and state and local agencies. There is no requirement to request comments from the public. But President Nixon in 1970, after the legislation's passage, issued Executive Order 11514 requiring agencies to hold public hearings "to obtain the views of interested parties." This E.O. was reinforced by the CEQ's 1978 NEPA implementing regulations. The paper notes that it is these requirements that add months or years to the environmental review process and can also create grounds for litigation. It also notes that the public have many other ways to make their views known about proposed projects. These would include online commentary, op-ed articles, submission of legal briefs, etc.

⁶⁶ Eli Dourado, "Bringing NEPA Back to Basics," The Center for Growth and Opportunity, Utah State University, March 2023.

Hence, its second recommendation calls for two legislative actions.

- “Executive Order 11514 shall have no force or effect.”
- “Notwithstanding any other provision of law, no environmental review under the National Environmental Policy Act shall require public hearings or the solicitation of public comment.”

The paper’s third principle is “Disallow most judicial injunctions of agency decisions.” After noting that because NEPA does not create any cause of action against federal agencies, lawsuits are brought under the Administrative Procedure Act. Its concern is that in a number of large-project cases, lawsuits are “weaponized” in that they find fault with some detail and then rely on the courts to vacate the agency’s decision. That puts the project on hold until the agency spends months or years making its case more substantiated. Congress could end this “weaponization” by ordering the agency to remedy the defect *but not vacate the agency’s decision*. His proposed language is as follows:

Notwithstanding any other provision of law, no proposed agency action for which an environmental document is required shall be vacated or otherwise limited, delayed, or enjoined unless a court concludes the agency egregiously or willfully erred in following the requirements of the National Environmental Policy Act.

It also notes that the BUILDER Act, proposed by House Republicans, includes a similar limitation on vacating agency decisions.⁶⁷

The paper’s fourth principle is “Establish a national interest exclusion from NEPA.” It notes that occasionally Congress has decided that certain actions are so urgent and/or important that agencies should not have to go through NEPA review. Its only example is the Stafford Act, which provides such an exemption for the Federal Emergency Management Agency (FEMA). Most other agencies are covered by NEPA, but CEQ guidance says that in emergencies not addressed by the Stafford Act, the agency in question should seek guidance from CEQ.

It calls for Congress to authorize the president to be able to designate certain projects or decisions to be overwhelmingly in the national interest and exempt from NEPA requirements. Possible language could be as follows:

⁶⁷ House Committee on Transportation & Infrastructure, “The BUILDER Act: Building U.S. Infrastructure through Limited Delays and Efficient Reviews,” <https://transportation.house.gov/builder-act>.

Federal decisions designated by the President to be matters of the highest national interest shall be exempt from the requirements of the National Environmental Policy Act.

Another broad set of reforms has been proposed by Mark C. Rutzick for the Federalist Society's Regulatory Transparency Project.⁶⁸ Rutzick offers seven proposals for NEPA reform, most of them requiring action by Congress.

First, the president could address President Carter's Executive Order 11991 in either of two ways. One would be to simply rescind it, eliminating the basis for the CEQ to issue regulations. The alternative would be to amend that E.O. adding language that would bar judicial enforcement of such regulations, which Rutzick says is routine in executive orders.

Second, Congress could enact limits on the classes of persons permitted to sue under NEPA, in one of two approaches. The first would expressly define or limit those who have the right to sue under the NEPA statute. For example, the statute could be narrowed to those in the direct path of a transportation improvement. Alternatively, Congress could limit the availability of judicial remedies under NEPA, such as by defining the minimum environmental or economic injury that qualifies a person to file a NEPA lawsuit. This could be a dollar amount or linked to geographic proximity.

“

Congress could enact limits on the classes of persons permitted to sue under NEPA...For example, the statute could be narrowed to those in the direct path of a transportation improvement.

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Third, Congress could adopt a higher legal standard for injunctive relief in NEPA cases. This could take the form of limiting injunctive relief to cases posing a serious risk of actual environmental harm.

⁶⁸ Mark C. Rutzick, "A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It," Regulatory Transparency Project, 16 October 2018. <https://regproject.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-National-Environmental-Policy-Act.pdf>

Fourth, Congress could impose a project-based statute of limitations. That limit would be calculated from the date the relevant agency begins its environmental evaluation of the project. If the limit were set at five years, the remedy of injunctive relief would no longer be available to a reviewing court beyond that date.

Fifth, Congress could strengthen an existing regulation (Fed.R.Civ.P 65(c)) to make bond posting a mandatory prerequisite to any preliminary injunctive relief or restraining order in a NEPA case. This would end what is known as the “NEPA exception” under which courts rarely require such bonds.

Sixth, Congress could make the District of Columbia the exclusive venue for all NEPA cases. This would have two benefits. It would standardize review of all cases by the same court by having an established and consistent review pool familiar with NEPA cases and reduce the caseload in the district courts that fall disproportionately on some regions.

Finally, Congress could amend the Equal Access to Justice Act to exclude expertise in environmental litigation as “distinctive knowledge” that can permit a court to award attorney fees based on market-based enhanced hourly rates, eliminating an “anomalous Ninth Circuit rule favoring environmental litigators.

5.3

ASSESSMENT OF LITIGATION REFORMS

The starting point for a bipartisan environmental litigation reform could be the initial proposals from BPC and IFP, which overlap regarding putting time limits on litigation, limiting those who may file suit, and bypassing district courts in favor of going directly to appeals courts. The CEI paper agrees about limitations on those who can file suit. It also makes a good point about establishing programmatic permits for any category of projects of which there are likely to be many upcoming examples (e.g., high-voltage transmission lines in the energy field and express toll lanes in transportation). Somewhat more controversial would be its proposal that if an EIS is “mostly right,” it could proceed without an injunction, as long as the defects were corrected prior to the record of decision (ROD),

The proposals from Utah State and the Federalist Society go further than those suggested by the previous organizations and could be reserved for future consideration. BPC and IFP would likely judge them as too controversial at this juncture, when reforming environmental litigation is still a relatively new subject for legislation. However, if or when

the political will to enact such changes could be amassed, the consequences for energy and transportation infrastructure projects would also be much larger.

Importantly, those seeking reform of environmental litigation need to be aware of purported reform measures that could make the process worse. A recent example was discussed by Christopher S. Elmendorf, the Martin Luther King Jr. Professor of Law at UC Davis.⁶⁹ His case in point is a partisan bill introduced in Congress in December 2023, the Clean Electricity and Transmission Acceleration Act, aimed at facilitating interstate transmission lines and related electrical infrastructure.

Elmendorf points out that “the bill undermines itself by setting up a succession of legal obstacles. This will allow NIMBY neighbors, fossil-fuel front groups, and other opponents of vital infrastructure to drag out the permitting process for years by concocting one procedural objection after another.” For example, it would authorize federal agencies to require a “community-benefit agreement as the price of any permit—not just for a clean-energy project that requires an environmental impact study under federal law.” The bill “would fill the coffers of groups that tie up projects. It calls for \$3 billion in federal spending for the sake of ‘increasing the capacity’ of nonprofits and local governments to participate in the environmental-review process.” Bipartisan environmental litigation reform must reduce barriers to reaching approval of much-needed energy and transportation infrastructure, rather than making the problem worse.

⁶⁹ Christopher S. Elmendorf, “Don’t San Francisco-ize Clean Energy,” *The Atlantic*, 28 January 2024.

PART 6

POLITICAL FEASIBILITY OF LITIGATION REFORM

6.1

ORGANIZATIONAL SUPPORT FOR LITIGATION REFORM

Part 1 of this policy brief documented the emerging support among opinion leaders for rethinking the obstacles to building new energy and transportation infrastructure. Part 5 noted an array of proposals aimed primarily at reducing the extent of litigation following the release of EAs and EISs under today's judicial practices. The final question this brief must address is whether there might be sufficient political support to permit the enactment of legislation to reform environmental litigation.

A bipartisan/centrist coalition would almost certainly be required for such legislation to be enacted. Very broadly speaking, many on the right side of the aisle would be motivated to reducing the costs and delays affecting major transportation projects, while many on the left side of the aisle would focus on energy/environmental infrastructure. The key to a centrist, bipartisan bargain would be for left and right to agree to easing the path to implementation for both energy and transportation infrastructure.

There are indications of support for such an approach. In March 2023, the U.S. Chamber of Commerce released a letter to members of Congress urging the modernization of the

permitting process for energy and transportation projects.⁷⁰ The letter was signed by 96 national organizations and by an array of business organizations in 46 of the 50 states.



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Transportation groups signing on included Airlines for America, Alliance for Automotive Innovation, American Association of Port Authorities, American Trucking Associations, American Council of Engineering Companies, Associated General Contractors, National Asphalt Pavement Association, National Stone, Sand and Gravel Association, and the Western States Trucking Association.

Energy and environment signer organizations included American Clean Power, American Council on Renewable Energy, American Public Power Association, Edison Electric Institute, Electric Power Supply Association, Energy Workforce and Technology Council, Industrial Energy Consumers of America, National Utility Contractors Association, National Rural Electric Cooperative Association, Power and Communication Contractors Association, and Solar Energy Industries Association.

Union signers included International Union of Operating Engineers, Laborers' International Union of North America, and North America's Building Trades Union. James Callahan, head of the International Union of Operating Engineers was recently quoted as saying, "Since its modest beginnings, NEPA has evolved into a massive edifice, capable of destroying project after project, job after job, in virtually every sector of the economy. Dilatory strategies employed by project opponents frequently exploit provisions in NEPA, weighing down projects, frustrating communities, and raising costs to the point that many applicants, whether public or private, simply walk away." When Sen. Dan Sullivan (R, AK) attempted in 2022 to use the Congressional Review Act to nullify the Biden administration's new CEQ

⁷⁰ U.S. Chamber of Commerce coalition letter to Congress, 7 March 2023. <https://uschamber.com/major-initiative/permit-america-to-build>

regulations, several of the above unions endorsed the measure, including the International Union of Operating Engineers, Laborers' International Union of North America, and North America's Building Trades Unions.⁷¹

Think tank signers of the Chamber initiative included the Bipartisan Policy Center, Digital Progress Institute, Progressive Policy Institute, and R Street Institute. Others that would likely be supportive include American Enterprise Institute, Breakthrough Institute, Cato Institute, Competitive Enterprise Institute, Institute for Progress, Niskanen Center, and the Volcker Alliance.

The breadth of support for the Chamber initiative is indicated by signers such as American Council for Capital Formation, Americans for Tax Reform, American Hotel and Lodging Association, American Society of Civil Engineers, Consumer Energy Alliance, Digital Liberty, Fiber Broadband Association, and Water and Wastewater Equipment Manufacturers Association.

Many other organizations have expressed concerns about obstacles to building needed new infrastructure. In transportation these include the American Road and Transportation Builders Association, the American Highway Users Alliance, and the American Public Transportation Association.

6.2

CONGRESSIONAL PROSPECTS FOR BIPARTISAN LITIGATION REFORM

Provisions to reform environmental litigation have been included in two bills that failed to be enacted. House Republicans introduced the Building U.S. Infrastructure through Limited Delays and Efficient Reviews (BUILDER) Act, and Senate Republicans introduced the Revising and Enhancing Project Authorizations Impacted by Review (REPAIR) Act, with better-focused litigation provisions in the latter.

Conventional thinking is that Democratic members of Congress are seen as more favorable to strong environmental policies than Republicans. This has led to a perception that Democrats would oppose significant NEPA reforms, and that Republicans oppose new

⁷¹ Sen. Dan Sullivan, "Over 40 Organizations Support Hard-Working Americans with NEPA Reform," 2 August 2022. <https://www.sullivan.senate.gov/newsroom/press-releases/over-40-organizations-support-hard-working-americans-with-NEPA-reform>

energy/environmental infrastructure. Those perceptions stand in the way of a bipartisan “deal” for NEPA/litigation reform.

An important development was the creation, in 2021, of the Conservative Climate Caucus in the House of Representatives, organized by Rep. John Curtis (R, UT). Its purpose is “to educate House Republicans on climate policies and legislation consistent with conservative values.”⁷² As this is being written in late 2023, the caucus has 81 members from 31 states, of which Texas has 11 members, Florida has six, and Arizona, California, New York, North Carolina, and Utah each have four members. This caucus would appear to be open to considering a bipartisan NEPA litigation reform proposal that included transportation infrastructure along with energy/environmental infrastructure.

Another potential supporter is the House Problem Solvers Caucus, a strictly bipartisan, centrist group that as of late 2023 had 64 members.⁷³ Its co-chairs are Rep. Brian Fitzpatrick (R, PA) and Josh Gottheimer (D, NJ). The group’s Executive Council consists of the two co-chairs, four vice-chairs, and two whips, evenly split between the two parties. A review of the Problem Solvers Caucus membership list finds that 15 of its 54 members are also members of the Conservative Climate Caucus. The Problem Solvers Caucus, in particular, is a promising candidate for developing an environmental litigation reform proposal. There is no Senate counterpart to the House Problem Solvers Caucus. However, the Caucus website includes two instances in which the Caucus worked on legislation with a bipartisan group of senators. One was in 2020, with a joint announcement of a bipartisan four-month COVID-19 emergency relief package. The second was in 2021 when the Caucus supported the Senate infrastructure deal that became the Infrastructure Investment and Jobs Act (IIJA) and urged the House to adopt it, which the House did.

Finally, in a 2023 article, *The Economist* reported promising signs for NEPA permitting reform. It quoted Conservative Climate Caucus vice-chair Rep. Mariannette Miller-Meeks saying “one of our top priorities is permitting,” and that “We need to partner with the other side.” Later in the same article, House member Rep. Scott Peters (D, CA) is cited as urging his colleagues to accept that “climate action involves building a lot of things . . . this is a break-the-glass moment.” And it goes on to say that with regard to NEPA, Peters says it is in need of updating: “You can’t sit on this old law as Biblical.”⁷⁴ The article also quotes Manish Bapna, head of the Natural Resources Defense Council, as understanding the need for

⁷² The Conservative Climate Caucus, <https://conservativeclimatecaucus-curtis.house.gov>

⁷³ Problem Solvers Caucus, <https://problemsolverscaucus.house.gov>

⁷⁴ “America’s Energy Transition: The Irresistible Nation,” *The Economist*, 8 April 2023.

changes in the way projects are approved. While upholding the need for NEPA, the group accepts the need to implement it more efficiently. “This is not just about playing defense to stop bad projects, but also about going on the offense to build,” the article quotes him as saying.

6.3

CONCLUSION

There is growing support among opinion leaders and a large array of business, labor, and public policy organizations that the NEPA process as it has evolved since the legislation’s enactment in 1970 has gone too far, placing obstacles and delays in the way of needed energy and transportation infrastructure projects. This brief has focused on the litigation aspect of NEPA law and practice.

A number of public policy and legal organizations have responded to these concerns by suggesting and explaining the case for an array of legal reforms that in most cases would require Congress to enact reform legislation. Given the long-time support of NEPA in Congress and by environmental organizations, any meaningful litigation reform legislation would need bipartisan support in Congress.

The growing support for NEPA reform by centrist opinion leaders, along with support from many organizations in both energy and transportation infrastructure, suggests that a bipartisan, centrist approach might well succeed in producing and enacting some of the litigation reforms summarized in this report. This should be a priority for the new Congress that will take office in January 2025.

ABOUT THE AUTHOR

Robert W. Poole, Jr. is director of transportation policy and the Searle Freedom Trust transportation fellow at Reason Foundation, a national public policy think tank based in Los Angeles.

His 1988 policy study proposing supplemental privately financed toll lanes as congestion relievers directly inspired California's landmark private tollway law (AB 680), leading to similar public-private partnership legislation in about two dozen other states. In 1993 Poole introduced the term HOT (high-occupancy/toll) Lane, a concept which has become widely accepted since then.

Poole has advised the Federal Highway Administration, the Federal Transit Administration, the White House Office of Policy Development and National Economic Council, the Government Accountability Office (GAO), and the California, Florida, Georgia, Indiana, Texas, Utah, Virginia, and Washington State Departments of Transportation. He has served on various transportation committees throughout the U.S.

Poole is the author of dozens of policy studies and journal articles on transportation issues. His popular writings have appeared in national newspapers, including *The New York Times* and *The Wall Street Journal*; he has also been a guest on such network TV programs as "Crossfire," "Good Morning America," and "The O'Reilly Factor," as well as ABC, NBC and PBS. He produces the monthly e-newsletter *Surface Transportation Innovations* and writes a

monthly column for *Public Works Financing* newsletter. *The New York Times* has called him “the chief theorist for private solutions to gridlock.”

Poole received his B.S. and M.S. in mechanical engineering at MIT and did graduate work in operations research at NYU.

