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Environmental Reviews and Permitting: Pending Legislation

Overview of the Review Process Under the National Environmental Policy Act

The *National Environmental Policy Act* (NEPA, 42 U.S.C. § 4321 *et seq.*) mandates *environmental review* of many agency actions, including issuing permits. NEPA requires that federal agencies consider the potential impacts of their actions that may affect the human environment. If a major federal action could result in significant impacts, NEPA requires the preparation of an *Environmental Impact Statement* (EIS) that analyzes effects of the proposed action and alternatives to that action. An agency may prepare an *Environmental Assessment* (EA) to decide whether to prepare an EIS or instead issue a *Finding of No Significant Impact*. An agency need not prepare either document if a proposed action is unlikely to have a significant impact and falls under a *categorical exclusion*—that is, if the action is a type of activity that an agency has already determined does not usually result in a significant impact. Categorical exclusions apply to the vast majority of agency decisions.

NEPA and Permitting Decisions

NEPA reviews often contemplate a wide range of potential impacts early in the decisionmaking process. An agency must include in a draft EIS a list of all federal permits, licenses, and other authorizations that must be obtained in implementing the proposal. Examples of laws that impose such requirements include the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; and National Historic Preservation Act, 54 U.S.C. § 300101 *et seq.*

Title 41 of Fixing America's Surface Transportation Act (FAST-41, 42 U.S.C. §§ 4370m–4370m12) contains additional permitting coordination requirements for “covered projects.” Those projects include federal infrastructure projects with costs over \$200 million likely to require multiple federal permits and/or EISs. FAST-41 establishes two-year completion goals and a unified schedule for environmental reviews of such projects.

Requirements, time frames, and processes can vary across agencies and authorities. Agencies typically promulgate regulations under both NEPA and their specific statutory authorities to address review requirements. Applicable state, tribal, and local requirements may also be included.

Considerations for the 118th Congress

The 118th Congress has seen more than 60 bills referencing NEPA since January 2023. The Fiscal Responsibility Act of

2023, H.R. 3746, contains provisions related to NEPA and permitting, including some provisions originally introduced in other bills. **Table 1** compares the provisions of H.R. 3746 to existing law. While proposals related to NEPA vary, many would address the following issues:

Single document: Existing NEPA regulations set a goal for agencies to develop draft EISs “concurrent with and integrated with environmental impact analyses” required by other federal laws and executive orders. Some proposals seek to require more collaboration, including a default requirement of a single document that incorporates multiple agencies’ analysis and/or permitting decisions for the same project. Some also set page limits on documents.

Time limits: Some proposals seek to impose statutory time limits for environmental reviews, including two years for a full EIS and one year for an EA. Others impose a two-year limit for overall permitting decisions. NEPA regulations contain similar goals, although they allow senior agency officials to extend deadlines as necessary. Some proposals require an agency that misses a deadline to pay a project sponsor. Others are silent on the consequences.

Inter-agency collaboration and cooperative federalism: Many permitting decisions fall outside federal jurisdiction. States, tribes, and local authorities can play important roles in permitting decisions. While some proposals would preempt existing state authority for specific decisions (e.g., transmission line siting), others encourage states, tribes, and local authorities to jointly undertake reviews and permitting decisions with federal agencies.

Community engagement and public comments: Many environmental reviews require an opportunity for public comment during the review process. Some proposals would extend public comment period times or require a new community impact assessment. Others would set time limits that could affect agencies’ abilities to solicit, consider, and respond to comments before a final decision.

Judicial review: Typically, the Administrative Procedure Act (APA, 5 U.S.C. § 551 *et seq.*) governs judicial review of agency decisions. The applicable statute of limitations provides six years to file a claim. Some proposals would provide shorter time limits to file a challenge to NEPA analysis, would exempt categorical exclusions from suit, would require a plaintiff to have first raised the matter with the agency, and would direct courts to expedite decisions.

Table 1. Comparison of Select Permitting Provisions in Existing and Proposed Legislation

	Existing Law Under NEPA and CEQ Regulations	Existing Law for FAST-41 Covered Projects	Proposed Provisions in the Fiscal Responsibility Act of 2023 (H.R. 3746)
Scope of analysis	Categorical exclusions are specific to each agency and require a case-specific decision on applicability. If a proposed action is not categorically excluded, the agency must consider direct, indirect, and cumulative effects and alternatives.	Federal Permitting Improvement Steering Council determines which projects are covered. A covered project application must clarify the purposes and objectives for a proposed project. If it is covered, the agency's preferred alternative may contain more detailed analysis than other alternatives.	An agency would be able to apply another agency's categorical exclusion. Would require an agency to clarify the purpose and need for its action and would require analysis of reasonably foreseeable effects and a reasonable range of feasible alternatives.
One document	NEPA: agencies should combine environmental documents "to the fullest extent practicable." Draft EIS should be prepared concurrently and integrated with other environmental review laws.	Single EIS must be prepared unless separate documents are more efficient.	One document would be required for NEPA "to the extent practicable." Would direct CEQ to explore a unified permitting portal.
Page and time limits	EAs are limited by regulation to 75 pages and must be completed in one year. EIS are limited by regulation to 150 pages if "standard" and 300 pages if complex and must be completed in two years. A senior official can extend length or timeline as necessary.	Lead agency prepares timetable for commonly required reviews and authorizations. Two-year goal for overall completion, or longer if necessary. A final decision must be made within 180 days after the information necessary to complete the review has been received.	EAs would be limited by statute to 75 pages and must be completed in one year. EIS would be limited by statute to 150 pages if "standard" and 300 pages if complex and must be completed in two years. Timelines may be extended for cause. Supplementation of a programmatic EIS or EA would be required after five years or new circumstances.
Inter-agency collaboration and cooperative federalism	Federal agencies internally agree on which is the lead agency. CEQ resolves disputes. Federal, state, tribal, and local agencies can participate as cooperating agencies based on specialized expertise or jurisdiction by law. Federal agencies should cooperate with nonfederal agencies to reduce duplication. Nonfederal agency can be joint lead agency for EIS.	Designates a facilitating or lead agency to coordinate agency permitting based on a unified plan and schedule. Participating agencies can be federal or nonfederal and coordinate on authorizations under the oversight of a permitting council. In consultation with CEQ, Office of Management and Budget resolves escalated disputes.	Criteria would guide which agency serves as lead agency designations, with CEQ to resolve disputes. A lead agency would supervise environmental review and develop a permitting decision schedule. Nonfederal agency could be a joint lead agency. Federal, state, tribal, and local authorities could participate as cooperating agencies.
Community engagement and comment period	Comments are invited for notice of intent to draft EIS and again for a draft EIS. Some agencies also receive comments on a draft EA. Agencies respond to comments.	There is a default 45-60-day comment period for a draft EIS and 45 days for other environmental reviews. Information and project status is posted on permitting dashboard website.	A notice of intent to prepare an EIS would include a request for public comment on alternatives, impacts, and information.
Judicial review	Not expressly addressed by NEPA. The APA provides for judicial review with an applicable statute of limitations of six years.	Two years to file claims challenging environmental review for covered projects. The claimant must have already raised issues with the agency. No review of permitting timetable changes.	Similar to existing law, with a new provision for judicial enforcement of review deadlines.

Source: NEPA, 42 U.S.C. § 4321 *et seq.*; FAST-41, 42 U.S.C. §§ 4370m–4370m12; Fiscal Responsibility Act of 2023, H.R. 3746 (as introduced); CEQ NEPA Implementing Regulations 40 C.F.R. §§ 1500–1508. Some provisions described here as "existing law" are regulations that are subject to change by the executive branch or challenge in the courts.

Note: CEQ = Council on Environmental Quality.

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