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Revisiting Judicial Review: The Next Step for Permitting Reform

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The agreement to raise the federal debt ceiling last month provided a long-overdue, first step toward modernizing America's federal permitting system. Among its various provisions, the agreement—more formally known as the Fiscal Responsibility Act—mandates both page- and time-limits for various forms of environmental reviews. Additionally, if federal agencies ignore their deadlines, the law provides project developers with the right to seek a court order to enforce compliance within 90 days. Moreover, when several agencies need to complete an environmental review, the Act compels them to develop a single environmental review document.

Though these reforms constitute an initial, incomplete effort to curtail bureaucratic slow-walking in the permitting process, federal agency decision-making remains vulnerable to activist litigation intended to prevent development projects. At the heart of the issue is the public's important right to challenge the legality of federal permitting decisions through a process commonly known as judicial review. Unfortunately, this process is frequently

abused by inter-state activists who oppose various types of projects on ideological grounds. Mandating stricter requirements within the judicial review of permitting decisions would erode this litigious stranglehold on large-scale developments. While there are many ways to improve the judicial review of permitting decisions, those proposed in H.R.1—the Lower Energy Costs Act—would balance public oversight of federal agency decisions with guardrails on activist efforts to inhibit development.

In principle, environmental regulation should serve to protect American communities, workers, and the natural environment from unnecessary damage and degradation. Far from its initial purpose, the National Environmental Policy Act (NEPA) has been re-tooled to slow-walk bureaucratic decision-making for unfavored industries. Yet, a competitive energy industry and a vibrant economy require "a predictable, transparent, and efficient permitting process." Recognizing this need for reform, the recent debt deal enacted the first substantial reforms to NEPA since 1982.

These permitting reforms, as described above, focus primarily on keeping the approvals process moving within federal agencies. Although bureaucratic backlogs and slow walking have historically challenged the progress of federal permitting decisions, drawn-out litigation over those decisions constitutes yet another chokepoint. NEPA itself does not provide an avenue for judicial review. However, the Administrative Procedures Act (APA) is often used to argue that NEPA reviews are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Without reforming judicial review of NEPA compliance, the current status quo risks tipping the scales against project developers and the communities that benefit from infrastructure development. The preparation of environmental reviews is made more efficient, but the floodgates for litigation—and potential claims that these more efficient NEPA reviews are insufficient—remain open.

Restrictions on who can bring legal cases concerning NEPA compliance are already well-established in law. For example, cases against agency decision-making under the APA are subject to a general six-year statute of limitations. Similarly, in *Lujan v. National Wildlife Federation* (1990), a 5–4 majority in the Supreme Court ruled that merely enjoying public land "in the vicinity" of areas that the Bureau of Land Management has designated for mining was insufficient to confer the requisite standing to challenge the agency's compliance with NEPA. Alleging a violation of NEPA, the National Wildlife Federation had sought to set aside the Bureau's decision to allow mining to occur on select public lands through its "land withdrawal review" program. In a related case concerning the application of the Endangered Species Act of 1973, *Lujan v. Defenders of Wildlife* (1992), the Supreme Court of the United States further ruled that standing under Article III of the Constitution requires "injury in fact" that there be a causal link between the injury and the action being challenged and that it be likely that the Court's action could redress the injury.

The merits of these limits to bringing a case over NEPA compliance are evident in recent litigation concerning the Tennessee Gas Pipeline Company's Agawam upgrade project. The company operates an 11,000-mile pipeline network that shuttles natural gas across the east coast. After receiving approval from the Federal Energy Regulatory Commission (FERC) to build two additional miles of pipeline and to upgrade its preexisting facilities in Agawam, Massachusetts, in 2019, the project was subject to years of litigation by two environmental activist groups over FERC's compliance with NEPA.

While eventually siding with one group of activists, the U.S. Court of Appeals for the D.C. Circuit nonetheless ruled that the other group lacked standing, consistent with *Lujan v. Defenders of Wildlife* (1992). The group in question used a single affidavit to claim injury from the project because one of its members had previously enjoyed a visit to a nearby Six Flags amusement park. As the court noted, the individual claimed that her view from atop the amusement rides at an undetermined point in the future "would be impaired by the

noise and pollution associated with the proposed construction, as well as the possibility that the pipeline, once operational, might explode." Restrictions on bringing a claim put an end to these frivolous efforts to impede infrastructural development.

Judicial review reforms within H.R. 1 would similarly strike a common-sense balance between facilitating public input and limiting efforts by opportunistic activists to hamstring developments. Section 20202 of the Act would make judicial review claims contingent upon the prior submission of public comment during an agency's administrative proceedings. The law would also only allow judicial review claims based on issues raised within those previously submitted comments. Moreover, claims could only be brought within 120 days of the agency announcing its action within the Federal Register.

For claims made in good faith, these requirements would encourage agencies to address the public's concerns at their earliest opportunity while also requiring that all avenues of resolution within the agency are exhausted before turning to the courts. Similarly, the 120-day deadline effectively invites the public to "speak now or forever hold its peace." Under NEPA, environmental assessments are holistic but fundamentally time-limited; they do not serve as an avenue for running an analysis of a project's potential environmental impact. For claims made in bad faith, these reforms would prevent activist opponents from fielding a scattershot array of capricious concerns over months or years in the hope that one might eventually hinder the project. Though these reforms would not stop every frivolous attempt to stop project development, they would nonetheless establish guardrails to repel the most opportunistic of activist lawsuits.

Congress' efforts to reform NEPA through the recent debt deal constitute a useful, but incomplete, step forward for project development, particularly in the energy industry. Though seeking to mandate efficiency within the bureaucracy, these reforms fall short of eliminating all federal bureaucratic barriers and leave open the floodgates for activist

litigation that seeks to delay or deny development. However, reforming the rules concerning judicial review of NEPA compliance is not without its own pitfalls. Overly restricting access to judicial review risks empowering federal agencies at the expense of public oversight. Among the many ways to increase the efficiency and predictability of the judicial review process, the reforms proposed within H.R. 1 strike a healthy balance between community concerns and the need for predictability and efficiency in the permitting process. These procedural requirements prioritize community involvement at the agency level while discouraging opportunistic activist opposition to project development.