History of NEPA reforms and rollbacks

Summary

- President Trump and Congressional opponents of transparent government have repeatedly advocated for weakening environmental reviews for infrastructure projects such as bridges and roads under the National Environmental Policy Act (NEPA).
- Such a "build-first-ask-questions-later" infrastructure policy would limit the ability of the public to meaningfully weigh in on massive projects impacting the health and economy of their communities; likewise, this approach fails to acknowledge existing authorities provided by existing laws recently passed by Congress.
- Creating additional NEPA reform measures before the existing authorities are formally implemented—and before agencies and the public can adequately assess their consequences—is dangerous counter-productive and will likely slow down agency reviews.[1]

Moving Ahead for Progress in the 21st Century Act (MAP-21)

- Passed into law in 2012, MAP-21 was one of the most significant legislative reforms of NEPA's environmental review process in history.
- MAP-21 encouraged states to commit resources to transportation projects before an adequate environmental review has been completed, creating an incentive for project approval and undermining impartial environmental review.
- MAP-21 also created sweeping new categorical exclusions (CEs), including one exempting projects costing up to $5 million from review. When utilized correctly, *agency CEs* are designed to reduce review for categories of actions a federal agency has researched and demonstrated do not individually or cumulatively have a significant effect on the quality of the human environment. By contrast, many *legislated CEs* have no consideration of actual impact – they are simply a pass on review and public input, regardless of environmental or consequences.
- MAP-21 established a framework such that once a hard deadline for the approval of an environmental review was established, agencies that do not meet their deadline can be fined between $10,000 and $20,000 per week, regardless of unanticipated project complications such as state permit requirements or engineering challenges. Fines further weaken agencies already struggling to meet legal requirements due to lack of funding.
- Congressional authorities have observed that MAP-21 "includes several broad new categorical exclusions from the NEPA. These new exclusions lack flexibility or adequate standards and will limit public participation and careful consideration of transportation projects that can have devastating impacts on neighborhoods and our natural, cultural and historic resources."

[1] "*Vulnerabilities Exist in Implementing Initiatives Under Map-21 Subtitle C to Accelerate Project Delivery*," *FHWA,* Office of the Inspector General (March 6, 2017). Available at: https://www.oig.dot.gov/sites/default/files/DOT%20Implementation%20of%20MAP-21%5E3-6-17.pdf

Water Resources Development Act (WRDA)

- Enacted in 2014, WRDA severely limited the ability of the Army Corps of Engineers and other federal agencies to carry out meaningful environmental reviews by establishing arbitrarily short deadlines and curtailed the ability of the public to weigh in on projects through NEPA-mandated public comment periods.
- WRDA continued the approach of fining underfunded agencies by imposing financial penalties on federal agencies if they do not meet arbitrary analysis deadlines. Agencies can be fined up to $20,000 per week for careful deliberation of important financial, environmental, and public health issues.
- WRDA established sweeping Categorical Exclusions (CEs) for water resources projects damaged by an event declared a major disaster or emergency area designated by the President under the Stafford Act, even though emergency NEPA procedures already exist for such events and provide ample flexibility.
- WRDA cut in half the time limit for citizens to challenge any federally issued permit under NEPA, the Endangered Species Act, and the Clean Water Act in half.

Fixing America's Surface Transportation Act (FAST Act)

- Despite the failure to fully implement MAP-21 and the absence of any study assessing the impacts of the limited environmental review provisions of that law, Congress pushed even more reforms in 2015 by passing the FAST Act in 2015.
- The FAST Act contained a pilot program that allowed five states with laws "at least as stringent as" NEPA to substitute state regulations in place of NEPA. There are serious concerns this will pave the way for a total delegation of permitting responsibility to states in the future, regardless of the stringency of their environmental laws or funding an training of state-based personnel charged with conducting critical environmental reviews.
- In addition, it remains unclear whether local communities, small businesses and regular citizens are eligible for reimbursement under the Equal Access to Justice Act (EAJA) for legal expenses if they successfully challenge an agency's decision under the FAST Act's state delegation program.

FAST-41 (refers to Title 41 of the FAST Act)

- FAST-41 created an entirely new and separate environmental permitting regime for selected non-highway infrastructure projects over $200 million dollars.
- The 20-page provisions in FAST 41 (Title XLI) bypassed the scrutiny of the normal legislative process – they were never subject to a hearing in the House or Senate, and were added at the last minute as a rider to the final bill.
- FAST-41 added a harmful amendment regarding the analysis of alternatives for infrastructure projects exceeding $200 million and restricted judicial review by making it more difficult to obtain a preliminary injunction.
- FAST-41 also established strict performance schedules for completion of environmental reviews and sought to restrict the ability of other federal agencies with subject expertise from submitting comments with substantive concerns about a project.