



**Eno** Center for  
Transportation

# Transportation Permitting:

An Actionable Agenda for Policymakers

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## **Acknowledgements**

This research was supported with a grant from Arnold Ventures.

## Introduction

With so much attention on permitting reform, both in the context of a surface transportation reauthorization law and a stand-alone permitting law, there are ample opportunities for Congress to enact changes that meaningfully improve coordination, timelines, and outcomes. This paper argues that in the context of transportation projects, outside of a major rethink of how all the resource protection laws and environmental review laws work, the most straightforward and yet meaningful approach would be to focus on the existing authorities already in law that could be expanded or clarified to improve their uptake.

This paper starts with an overview of how environmental review and permitting requirements are often misunderstood and why they can lead to significant delay. Section 2 provides a brief review of the major changes that have been added to permitting processes for surface transportation projects in the last couple of decades. Finally, Section 3 proposes language to expand and clarify, examples in other infrastructure sectors that could be replicated, and provisions that are underutilized for reasons that should be better understood.

## Section 1: Understanding the Problem - What makes permitting and review difficult and time consuming?

The environmental review and permitting process for infrastructure projects is time consuming and can appear unnecessarily complicated. While some projects are approved through an efficient review that improves environmental outcomes far too many projects become a source of delay and frustration with no apparent beneficial updates to project design or reductions to environmental impacts. Stories of projects desired by the community, for which reviews seemed an unnecessary impediment, are as common as projects for which the environmental review and decision-making process didn't provide a genuine opportunity for public engagement.

Improving the delivery of transportation projects has been a priority focus for the last 25 years. Every surface reauthorization bill since TEA-21 has included numerous new provisions and authorities designed to aid efficiency. Still, many challenges remain. Several factors contribute to this outcome. For one thing, the changes written into law do not always directly address the underlying challenges. This can result from legal caveats that minimize changes or seek to preserve the benefits of reviews that congressional negotiators want to protect. It can also result from lack of full understanding on the interaction between multiple environmental laws. Changes to one section of law have limited impact without corresponding changes to other sections of

law. Moreover, the lack of data and transparency on review numbers and timelines has made it difficult to understand the obstacles much less prescribe solutions.

When permitting discussions remain overly broad they too often end up where they started, with high-level calls to “accelerate delivery without compromising environmental protection” but without any actionable or specific proposals to accomplish that goal or even a clear understanding of the complexity that results in long timelines or burdensome reviews. What is it then that makes projects difficult to deliver?

## **1. Interagency Coordination: One “Project”; Many “Actions”**

Communities and project sponsors primarily are interested in the outcome of the “project” under review. But National Environmental Policy Act (NEPA) practitioners understand that each project may have multiple “actions,” each governed by separate laws and regulations, and implemented by separate agencies.

One bridge project, for example, may involve dozens of federal actions, each of which are the responsibility of different agencies under separate laws. For instance, the U.S. Army Corps of Engineers has the responsibility to determine if there would be any discharge into Waters of the U.S. and, if so, their action would be to approve or deny a permit under Section 404 of the Clean Water Act. Section 7 of the Endangered Species Act gives NOAA Fisheries a separate action, which is to write a biological opinion on whether the building of the bridge would jeopardize the continued existence of a species, or destroy critical habitat. If the bridge spans a navigable river, then U.S. Coast Guard would have their own action under Section 9 of the Rivers and Harbors Act of 1899 to ensure the bridge won’t impede navigation. The list goes on depending on the historical, geographical, environmental, geological, cultural, and archaeological context of the project.

Although NEPA uses the language of federal “actions” not projects, agencies have long sought to address connected actions in a single environmental document. More recently NEPA has been amended to direct agencies, to the extent practicable, to rely on a single NEPA document for all necessary actions for a project. This sensible approach fails to address the underlying differences in requirements for each separate action involved in permitting a project. Nor does it automatically produce efficient interagency coordination, which remains challenging for agencies working on separate networks, looking at separate data and documents with different definitions.

A Federal Highway Administration action to approve funding makes FHWA the “lead agency” under NEPA; in order to have all permitting agencies rely on FHWA’s document, the analysis must also address all the other required federal actions for the

project. FHWA must therefore coordinate carefully with the agencies participating in the NEPA review. Producing one federal document for decision under NEPA doesn't change the responsibility held by all the other agencies under laws outside of NEPA to complete the other actions pertaining to the project. Nor would FHWA necessarily have the capacity or expertise on staff in topics such as maritime navigation, species biology, or hydrology to be able to complete those analyses with sufficient rigor to enable the resource agencies—e.g. those agencies with authority to implement laws that govern use or impacts to a specific protected resource— to complete their permitting actions. This is why input from the resource agencies into the NEPA document is critical, and why the statute and regulations typically direct agencies to rely on the lead agency's NEPA document "to the extent practicable" since it will not necessarily facilitate faster approval to limit an agency to rely on analysis that does not answer the questions that they're required by law to consider.

Statutory changes to improve interagency coordination should be aimed at increasing consistency between agencies. To that end, changes should expand project sponsor roles or allow for delegated authority. Technology solutions also can improve real-time document and database sharing.

## 2. Identifying Impacts

"Scoping" is the phase of NEPA review in which the agency establishes the overall project intent and scope of review. It happens very early in NEPA; in some cases, early scoping may even be conducted prior to the formal initiation of a NEPA process. USDOT's combined NEPA regulations for FHWA, FTA and FRA state that "the scoping process will be used to identify the purpose and need, the range of alternatives and reasonably foreseeable impacts, and the significant issues to be addressed" in the NEPA document.<sup>1</sup>

In other words, in theory scoping is a phase in which project details are still evolving, including fundamental project elements like the very purpose and location of the project. Yet the agency must also be ready, within that same phase, to identify all the "reasonably foreseeable impacts" of the action.

This presents several challenges, including that determining reasonably foreseeable impacts is difficult when many project details remain undecided; some impacts will only be discovered later as a result of public engagement or site surveys; and some impacts may be contingent on the design and construction methods chosen.

## Defining Reasonably Foreseeable

The boundary of what should be considered “foreseeable” can be ambiguous, particularly regarding indirect and cumulative impacts, although the Supreme Court has now narrowed this space and directed agencies to set manageable boundaries to foreseeable impacts.<sup>2</sup> This change allows agencies to limit analysis only to the effects of the proposed action at hand and not analyze environmental effects from other actions that would be separate in time or place, or that fall outside of the agency’s regulatory authority. Prior to that decision, the boundary of reasonably foreseeable had expanded both from agencies seeking to limit their litigation risk by considering a wider range of foreseeable impacts, and also from executive orders seeking to address a larger suite of priorities.

Lack of consideration of impacts that could be considered reasonably foreseeable has been a frequent issue of NEPA litigation. In light of this, the same Supreme Court decision also directed courts to give deference to agencies on this and other questions so that agencies would not allow concern for litigation risk to lengthen review content and timelines.

Despite these changes, and the improved chances of prevailing in court may not change the way agencies approach implementation; after all agencies were already winning the majority of NEPA cases. The very existence of ambiguity means that agencies must make some judgement call on what impacts are “reasonably foreseeable” and any amount of ambiguity tends to slow agency decisionmaking.

## Short-Term and Long-Term Impacts

One aspect of NEPA reviews that may not be fully appreciated by policymakers and project sponsors is that the types of impacts analyzed in NEPA reviews include both temporary impacts, e.g. construction disturbances as well as any long-term impacts to environmental systems and land-use.

The short-term construction impacts could include the effects of clearing out trees and vegetation, or any erosion or sedimentation impact on water quality, as well as the noise and dust that may arise from construction, and the additional traffic and roadway impacts resulting from construction crews, dump trucks, and heavy machinery. For transportation projects, lane closures during construction are a regular short-term impact. Although these impacts are short-lived they’re not necessarily insignificant and are often easily quantifiable.

In contrast, long-term effects that will occur during the useful life of the asset tend to be much more uncertain, they may be projected on the basis of modeling and they depend on future conditions. Given the uncertainty and contingency on other factors, such

project impacts may also be considered indirect effects rather than the direct effects of building the project. Analysis of future impacts also require an agency to make a judgement call about how far into the future to look. Unfortunately, for many projects the long-term impacts are the ones that are most net-positive, since outside of job benefits, project benefits are typically experienced during the project's useful life.

### 3. Decision Timing

#### Analyzing Impacts to Make Decisions vs Analyzing Impacts of Decisions Previously Made

NEPA and environmental permitting often contains a temporal mismatch that produces misunderstanding and inefficiency. While NEPA is structured as a decision-making tool, in transportation, decisions are made during the planning process, years before NEPA is initiated. At the point that NEPA commences, agencies have generally already determined answers to many key questions on what project to build, where to locate it, and how to fund it. They may have already received grant funding for engineering and construction. Yet NEPA requires the agency to “decide” what action to take, to consider alternatives, and to rehash and sometimes change key decisions.

This isn't just inefficient, it can be counterproductive to the public transparency and community engagement goals under NEPA. NEPA requires solicitation of public feedback for decisions but if the decision has largely already been made, it can cause confusion and frustration, expensive design changes, and sometimes can engender opposition and litigation. Without question, community engagement in decision-making is critical, but misalignment with the decision timeframe undermines those benefits.

#### Contingent Decisions

NEPA practitioners describe the law as an “umbrella statute” under which other permits are also completed. However there are fundamental differences between NEPA, a procedural law that requires analysis and consideration of alternatives, and resource protection laws that require permits for activities. The lead agency must be able to defend the decision in their NEPA document and demonstrate that they have thoroughly considered the impacts, and while there may be a preferred alternative from the start, the alternative isn't selected until the Final Environmental Impact Statement. In contrast, permit applications typically require a project sponsor to identify the precise location, number of acres, specific construction times, etc so that the resource agency can properly determine the impact of the action on a resource. Most resources are protected under substantive laws, in which impacts may be required to be less than a certain level set by law or regulation. As a result, there are numerous permits that can't be completed until after NEPA is complete and an alternative is selected.

The timelines for each agency action are also highly interdependent because reviews and decisions made in the environmental review and permitting process often rely on inputs and decisions from other agencies. For instance, the lead federal agency may need to wait for state reviews and decisions to develop the NEPA schedule; agencies rely on project sponsor submission of application materials; permit timetables are also dependent on the NEPA schedule. As a result, delays in one action can set off cascades of timeline changes for other related or dependent actions.

## **Section 2: Reviewing Past Solutions**

Section 1 described some of the routine challenges faced in environmental permitting and review, which have motivated many of the reforms that have been adopted into both regulation and law in the last three decades. In many cases, these past provisions and approaches can serve as a model for additional ways that Congress and the administration can seek to improve the delivery of both complex and routine projects. In other cases, they represent unfulfilled potential due to barriers or ambiguity that could still be addressed in order to make implementation more effective.

### **Statutory changes specific to transportation project reviews**

Although NEPA applies to all major federal actions, many provisions have affected the implementation of NEPA for transportation projects specifically. In fact, since 1998, every surface transportation reauthorization has included environmental streamlining provisions that are tailored to federally-assisted transportation projects.

**TEA-21:** Enacted in 1998, TEA-21 included a subtitle on program streamlining and flexibility with several new authorities. Among other provisions, the subtitle established a coordinated environmental review process for major highway and transit projects with cooperatively determined time frames. Perhaps most significant, a provision on “Real Property Acquisition and Corridor Preservation” allowed a State or local government to acquire land for a project prior to completion of NEPA and credit that acquisition cost to the State share of the Federally assisted project which uses that land.

**SAFETEA-LU:** In 2005, SAFETEA-LU’s changes to environmental review of transportation projects were even more significant, expanding the language from TEA-21 and codifying it as a new environmental review process under 23 U.S.C. § 139. This precipitated major changes from the way NEPA was being implemented in other agencies, including formal statutory direction for the project sponsor to serve as joint lead agency and prepare the NEPA document as long as they are a government entity.

Several themes appear in SAFETEA-LU that continue to be a focus of streamlining efforts today, including reducing review timelines in statute (the law shortened comment periods for Environmental Impact Statements (EIS) and shortened the statute of limitations from 6 years to 6 months). Another new focus area was deference to the lead agency, who per the 2005 law, could determine the project’s purpose and need and the range of alternatives. Another such theme is the emphasis on interagency coordination, with lead agencies newly required to prepare “coordination plans” to be made public and shared with participating agencies. The law also required agency reviews to be completed concurrently “to the maximum extent practicable.”

SAFETEA-LU also tread new ground in the delegation of NEPA. The law allowed States to assume the federal responsibility for certain categorical exclusions (CEs) from NEPA, and further named five states allowed to participate in a pilot assigning federal NEPA responsibilities for highway projects to the state.

Building on changes in statute to incorporate environmental considerations into planning, FHWA in this period also administratively established the “Planning and Environmental Linkages” authority to better integrate the decisions already made during transportation planning. With appropriate engagement conducted at the planning stage, agencies could incorporate those planning analyses and decisions, including eliminating unreasonable alternatives from detailed consideration.

[MAP-21](#)– In addition to declaring a national interest in expediting project delivery and substantially reducing average timelines, MAP-21 focused on expanding existing authorities and the use of categorical exclusions. The law expanded authorities from earlier legislation, such as the state assignment of NEPA responsibilities, but also put certain constraints on other provisions, such as adding approval criteria in Planning and Environmental Linkages.

A major emphasis of MAP-21 was categorical exclusions (CEs). The law created three new legislated categorical exclusions.<sup>1</sup> The law also legislatively moved three existing CEs in regulations from being “documented CEs” and subject to a more rigorous review to being “(c) list CEs”. Finally, the law directed FHWA to conduct a survey of project sponsors to solicit ideas for new CEs to establish.

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<sup>1</sup> The typical process for creating new CEs is to compile an agency record of past experience implementing that type of action and demonstrating that it has minimal environmental impacts, and then providing an opportunity for the public to comment on the proposed CE. Legislative CEs abridge the need to compile a record (and don’t actually require that there be any evidence that the project type has minimal impacts) and also the need for public input.

**FAST Act**—Passed three years later, the FAST Act continued the focus on exemptions from specific review requirements, exempting at-risk bridges from requirements pertaining to nesting swallows, exempting mid-century bridges and rail lines from Section 4(f) requirements, making emergency reconstruction projects eligible for emergency exemptions, and broadening the use of CEs for multimodal projects.

Another notable change of the FAST Act was to require use of a public dashboard for project tracking – a transparency action already initiated by USDOT as an administrative effort.

**IIJA**—The project delivery subtitle of the Infrastructure Investment and Jobs Act, passed in 2021, had a focus on shortening and enforcing timelines. This included not only overall timelines for NEPA to be completed in one year for EAs and two years for an EIS, but also the timeline for other permit actions and authorizations completed after publication of the NEPA document.

## Changes Outside of Title 23

### Administrative changes

Administrative efforts to improve efficiency have been numerous, in fact many changes in statute are made subsequent to the change being piloted administratively. This includes not only the Permitting Dashboard, and Planning and Environmental Linkages, but also the adoption in IIJA of the One Federal Decision language instituted first by the Trump Administration.

FHWA’s Every Day Counts (EDC) initiative (which itself began as an administrative action and was then codified and authorized under the highways research title in the FAST Act) has helped the agency identify and deploy proven innovations and flexibilities in a variety of aspects of project delivery, including environmental reviews and permitting. Integration of planning and NEPA was an early EDC initiative. FHWA has also used EDC to expand the use of programmatic agreements, which allow agencies to establish a routine and streamlined procedure for actions or impacts that are commonly encountered.

### Other Changes to Statute

For many years the primary changes to statute that affected transportation projects were made in transportation laws.<sup>2</sup> Most recently, changes to the National

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<sup>2</sup> The environmental review procedures for transportation have often served as a model that Congress has replicated in other sectors. The “FAST-41” provisions in the FAST Act, which created the Federal Permitting Improvement Steering Council modeled the procedures established under Title 23 Section 139 for other non-transportation projects and expanded use of the project dashboard created by USDOT for projects covered under

Environmental Policy Act itself as part of the Fiscal Responsibility Act in 2023 narrowed both the universe of environmental effects for an agency to review to those that are “reasonably foreseeable” as well as the suite of alternatives to a proposed action to those that are “technically and economically feasible and fit the purpose and need of the project.” The amendments to NEPA also included provisions similar to those that had previously been adopted in statute for transportation, including the requirement to have a lead agency that oversees the preparation of documents from all cooperating agencies, the use of a single environmental documents, the development of a schedule to coordinate reviews, and the imposition of page limits and time limits.

### **Section 3: Exploring Potential Improvements: What changes within the current framework could improve timelines and certainty**

Certain aspects of environmental reviews and permitting are complicated because of the basic framework of the underlying laws, which have been created and implemented at different times with differing terms and definitions, have their own case law and interpretations, and don’t necessarily all fit neatly together. Each environmental and resource protection law was put into place for a reason and has a constituency eager to maintain the protections. Additional environmental reviews and permits arise from state and local laws, and are outside of the federal purview. Addressing the universe of laws, treaties, regulations, and executive orders that govern the review of major federal actions would require significant trust.

Rather than seeking to envision what a complete redesign of the environmental and permitting framework could look like, this paper focuses on specific if marginal changes that still could make significant improvements. Even in the transportation sector, which is the sector for which arguably the most statutory changes have already been made to environmental reviews, there remain achievable improvements to be made. Due in part perhaps to the separate committee jurisdictions in the Senate for highway, transit, and rail infrastructure, certain authorities that have been established for one mode are not available yet for others. Similarly, statute has limited flexibilities to certain types of non-federal entities, which could be expanded.

Much focus in recent years has been on speeding up the most complex and time-consuming reviews, while expanding the categories of projects that can proceed as categorical exclusions and less attention has been paid to actually making those CEs

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FAST-41. Several permitting reform bills that have been discussed in recent years have proposed adapting elements of 23U.S.C.139 for energy projects.

faster to complete. But small time savings in routine projects would translate into significant benefits economy wide given that the changes would apply to the vast majority of projects rather than the small number of highly complicated and impactful projects.

The following sections review the authorities currently held in law for a subset of federal agencies, and non-federal agencies and explores how they may be expanded, and also at how to facilitate low-risk, low-impact projects to proceed more quickly.

## 1. Expand agency authorities while also improving consistency between FHWA, FTA, and FRA

Despite having shared environmental regulations since the FAST Act, certain authorities and flexibilities continue to exist inconsistently across modes. This inconsistency is likely the result more of the split jurisdiction within the Senate rather than any basis in governing philosophy. Nonetheless it can put projects at a disadvantage by creating undue delay and cost increases and also can impede multimodal projects that use funds from multiple agencies.

Beyond the interest in consistency, expanding existing authorities to include other USDOT operating administrations has the benefit of being already tested and understood, which typically will enable faster implementation. At the same time, some authorities that have been enacted in past laws have seen limited uptake; Congress could use this opportunity to identify the barriers that have impeded broader implementation and address those obstacles as appropriate.

### 1.1 Advance Acquisition of Right of Way and other Pre-award Authorities

Under Title 23 Section 108, State agencies have been able to use FHWA funds to acquire property (at risk) prior to completion of NEPA in order to preserve the right-of-way for planned corridors for decades, however the Uniform Act still applies to projects being funded by programs authorized under Title 49 of US Code, which means that rail and transit projects cannot acquire real property until after NEPA processes are complete. As a result, transit and rail projects have to wait until much later in the project development process and will often face higher costs to acquire the right-of-way for planned projects. **An amendment to the statute in 49 U.S.C. § 5323(q) and other locations as necessary would enable FRA and FTA to acquire “real property interests” and improve interagency consistency with regard to property acquisition authority.**

USDOT grant programs also have significant variation in the activities that project sponsors are allowed to conduct “pre-award” beyond the question of real estate acquisition. FTA policy allows for pre-award authority for costs of environmental review as well as design and engineering costs and other costs before that recipient has been awarded a grant. In other words, as long as an entity complies with all federal requirements, they may incur expenses prior to being awarded a grant, in hopes of receiving an award and being reimbursed for those expenses.<sup>3</sup> At the FRA on the other hand, pre-award costs are only eligible to be incurred after an award announcement has been made and before a grant agreement has been signed, and even then, approval must be granted by FRA for the reimbursement of pre-award costs.<sup>4</sup> Yet this FRA policy for incurring advance costs itself is different for Federal State Partnership projects listed on the NEC Project Inventory, which allows for costs incurred before grant selection.<sup>5</sup> Improving consistency between and within modes helps to reduce complexity and confusion that grantees experience, particularly for agencies with responsibility for multiple modes.

## 1.2 Assumption of CE Determinations for Non-Highway Projects

SAFETEA-LU created Section 326 of Title 23, to allow FHWA to assign its NEPA responsibilities for CE determinations to States. This authority is limited to FHWA projects and State DOTs. Despite efforts to facilitate the assignment of CE determinations, only three states currently have taken on this authority: California, Utah, and Alaska. FHWA’s program readiness checklist for States considering the authority lists 50 criteria for the states to have addressed prior to beginning MOU negotiations.<sup>6</sup> Congress could seek to expand utilization of this existing authority among State DOTs for FHWA actions. The authority could also be broadened to apply to public agency project sponsors outside of State DOTs.

While the authority directs the Secretary of USDOT to establish a memorandum of understanding regarding the types of activities for which the authority will be delegated, it does not explicitly allow for delegation by FRA or FTA, nor refer to projects funded under Title 49. States and other non-federal agencies also do not currently have the authority to act on behalf of FRA or FTA in this same regard for projects funded under Title 49. **Congress could expand this authority to State and non-State agencies for projects funded under title 49 to put rail and transit CEs on an equal footing.**

## 1.3 Programmatic CE Agreements

Since 1989, FHWA has entered into programmatic agreements with states to allow the state to make CE determinations.<sup>7</sup> Under that programmatic structure, FHWA’s Division Offices would periodically review States’ procedures and documentation to

ensure states are properly considering potential environmental impacts and documenting their compliance with applicable laws and regulations. MAP-21 section 1318 then added this authority to statute, and Section 1315 of FAST Act expanded the authority, allowing states to approve projects as CEs even if the action isn't listed in regulation as long as it meets the criteria of a CE. Just six states currently have MOUs in place for programmatic CE determinations.

The statutory authority under MAP-21 refers only to FHWA's authority to enter into agreements with States, and does not allow other USDOT modes to enter into similar agreements with either States or other non-federal agencies. **Congress could expand the scope of the statutory authority to create a consistent approach for USDOT modes and for non-state entities.** Beyond this, investigating the limited uptake of the programmatic CE determinations authority and amending the statute to enhance utilization could help to ensure that small, low-impact projects are processed quickly as CEs and that staff capacity at federal agencies is available to focus on major projects.

#### 1.4 Enhance Access to Past Reviews

Past environmental documents provide a valuable resource, particularly in light of expanding authority to tier a review off of a prior review of a similar project in a similar location. EPA maintains a [database](#) of environmental impact statements across agencies, and FTA publishes a [list of environmental actions](#) for transit projects, however FHWA and FRA do not provide a comparable resource specific to FHWA-funded projects.

#### 1.5 Single Agency Regulatory Framework

Project delivery could benefit from better statutory and regulatory consistency across modes. This is perhaps most acute with regard to the differences in statute and regulations pertaining to Buy America, which currently differ between modes and sometimes between programs within a mode for highway, transit, and rail projects. These differences in compliance requirements for Buy America can pose a significant barrier to implementation for multimodal projects especially. However Buy America is not the only statute wherein inconsistencies abound between modes or programs. Labor protections and Disadvantaged Business Enterprise set-asides also may vary depending on whether dollars are provided under a Title 23 formula program or a General Fund appropriation to a roadway program not codified under Title 23.

Inconsistencies in these regulatory frameworks create challenges particularly for multimodal projects that have received funding from multiple agencies. This can leave project sponsors seeking to comply with multiple sets of requirements. As a solution to

this, **Congress could apply the “single lead agency” approach to a broader set of regulations**, and direct USDOT to have only a single agency’s federal rules apply when funding from multiple agencies is combined.

## 1.6 Consistent Statutes of Limitation

The statute of limitations determines the time after a final decision document is released during which claimants can initiate legal proceedings. The 150-day period following FHWA projects ensures that agencies know what if any litigation a project will face in the immediate term, minimizing long-term litigation risk. As part of the FAST Act, rail projects were made subject to the environmental procedures under Title 23, however an exception in 49 U.S.C. § 24201 preserved a two year statute of limitations for railroad projects.

## 2. Expand and facilitate delegated authorities for non-federal agencies

Allowing states and local governmental entities to take responsibility for certain environmental review and permitting activities can offer numerous advantages. The structure can facilitate better coordination with state and local review requirements, helps ensure that the review is informed by those familiar with the community, and reduces demand on federal agency staff capacity.

FHWA and FTA’s implementing procedures for NEPA have been joint regulations since the first set of procedures were issued in 1980 (by FHWA and the Urban Mass Transit Authority at the time). Since that first rule, Statewide agencies (e.g., according to the rule, “all FHWA applicants”) have been accorded responsibility as joint lead agencies. Transit agencies at first faced a different treatment based on whether state environmental laws applies to them or not, but either way transit agencies also shared responsibility with the lead federal agency for developing an EIS. Today the law is consistent for State DOTs and transit agencies: in 23 U.S.C. § 139 there is a requirement that “any project sponsor that is a State or local governmental entity receiving funds under this title or chapter 53 of title 49 for the project shall serve as a joint lead agency.”

In other words, both State DOTs and transit agencies have a long history of experience working with federal agencies to develop environmental reviews. Despite this, authorities for State DOTs are not in all cases extended to transit agencies. In the case of federally funded transit projects located outside State rights-of-way, the projects would not typically fall within the State DOT purview, so replacing the federal agency with the State DOT would substitute in an agency that would not otherwise have a role in developing or approving the proposed project, and therefore may be of limited efficiency benefit.

Moreover, certain authorities that could be extended to States and other local agencies are still retained at the federal level, despite examples of delegation in other sectors such as housing.

Cities, counties, and other local public agencies have less history implementing environmental procedures at USDOT, but with a growing number of these local public agencies receiving federal funds through discretionary grants, more local government entities are gaining experience serving as joint lead agency. As a result, there is an opportunity to improve efficiency by delegating authority to those who have appropriate capacity.

## 2.1 Expand CE Determinations and CE Assignment to Other Non-federal Agencies

As noted above, the authority for making CE determinations is limited under statute to States. Many transit agencies, and other local governmental agencies such as city, county, or tribal DOTs or Metropolitan Planning Organizations would also have the capacity to enter into an MOU or programmatic agreement with the Secretary to determine whether designated activities are included within the CE class of action or to have assigned authority for NEPA for CEs. **Amending 23 U.S.C. § 326 and MAP-21 Section 1318 authorities for programmatic CE agreements to apply to a broader set of agencies could advance low-risk projects** with minimal oversight from the federal agency would enable those low-risk projects to move forward more quickly while also freeing up agency capacity for more complex and impactful actions.

## 2.2 NEPA Assignment for Transit and Rail Agencies

Under 23 U.S.C. §327, FHWA can assign a state DOT full responsibility for NEPA compliance. Currently nine states have NEPA assignment MOUs in place, though all states are eligible; FHWA has encouraged more states to take on this assignment authority.<sup>8</sup> The state DOTs that have taken on NEPA assignment have reported time and cost savings.

The authority under statute is structured to cover “one of more highway projects within the State” and if the state assumes that responsibility, then the Secretary “may also assign... the responsibilities of the Secretary with respect to one or more railroad, public transportation, or multimodal projects.” None of the nine agreements in place cover transit projects despite the authority in statute, although several states are now exploring this expansion. Separately, one agreement has been established with FRA for a state rail authority. There are likely transit and rail agencies that may be interested in

this authority but are either not state-level agencies or are located in states in which the State DOT has not taken on NEPA assignment for highways and therefore are ineligible for this authority. **Expanding the authority to include transit agencies and other entities at the sub-state level, without regard for prior assumption of highway responsibilities**, would create an opportunity for such entities to determine and demonstrate whether they have the necessary capacity, expertise, and administrative structures to take on federal responsibilities for NEPA and benefit from the time savings experienced by states.

### 2.3 HUD's "Responsible Entities" Model for NEPA assignment

Analogous to the USDOT's NEPA assignment structure, under the Department of Housing and Urban Development (HUD) statute at 42 U.S.C. § 5304(g), environmental reviews are completed by "responsible entities" which are generally the recipients of program funds. Each responsible entity designates a Certifying Officer—typically a chief elected or executive officer, who has the authority to assume necessary legal responsibility—to ensure compliance with NEPA and with the applicable Federal laws and authorities listed in HUD regulations. By assuming the responsibility of HUD, the responsible entity also accepts the jurisdiction of federal courts over decisionmaking and waives sovereign immunity, just as states must under USDOT NEPA assignment.

In a critical difference from the USDOT program that allows states to *opt in* to NEPA assignment, **under HUD regulations, the "responsible entities shall assume the responsibility for environmental review**, decision-making, and action that would otherwise apply to HUD under NEPA and other provisions of law that further the purposes of NEPA." The delegation under HUD programs includes all of HUD's responsibilities under NEPA as well as the agency's responsibility and consultation requirements under a wide range of related laws and executive orders listed in regulations at 24 C.F.R. § 58.5. This includes the National Historic Preservation Act, Endangered Species Act, the Clean Air Act (including conformity determinations, which State DOTs are expressly prohibited from assuming under Title 23), and other requirements.

### 2.4 EPA Model for Clean Water Act Substitution

Since 1977, Section 404(g) of the Clean Water Act has allowed States and Tribes to apply to EPA to administer their own dredged and fill permitting program in some waters of the United States, in lieu of the permit program administered by the Army Corps of Engineers (USACE). This is a substitution program rather than an assumption program, and states have had to demonstrate their jurisdiction for all assumable waters in the state and also the rigor of their state permit program. States must demonstrate that the

state legal protections they would substitute are more rigorous than the federal protections.

Beyond this, certain regulatory barriers make the program difficult, although updates to the regulations released in 2024 sought to improve clarity and feasibility to access the program, including clarifications on which waters' jurisdiction are not assumable (e.g. those waters that remain regulated by the Corps under Section 10 of the Rivers and Harbors Act). Currently only two states -- Michigan and New Jersey -- implement Section 404 programs for the assumable waters within their state boundaries.

As a substitution program, the permits under this program are issued under state rather than federal law; this has led to complications in achieving compliance with related federal laws, especially the Endangered Species Act, and other federal programs.<sup>9</sup> In New Jersey, after the State was assigned responsibility for 404 permits under this program, additional engagement was required with the Fish and Wildlife Service and eventually an MOU had to be created regarding responsibility for critical habitat in wetland areas.<sup>10</sup> **Clarifying protocol in areas of shared jurisdiction could enable more states to take on the CWA substitution authority** and allow USACE staff to focus on the non-assumable waterways that are more significant to interstate commerce.

## 2.5 Investigating Implementation of NEPA Substitution

In the FAST Act, Congress created Section 330 of Title 23, which directed USDOT to establish a new pilot program for up to five states to substitute their own state laws and regulations for the approval of projects instead of NEPA. The law required the administration to establish the pilot through regulations in such a way that would ensure the state requirements were at least as stringent as NEPA and other applicable federal laws. The Department issued regulations in 2017 and finalized them in December 2020, reducing the number of eligible States from five to two.

The authority under 23 U.S.C. § 330 has never been utilized to date; there may be several factors that have contributed to this lack of uptake. The eligibility requirement that State must already be a participant in the 23 U.S.C. § 327 Program limits the pool of potential applicants and the legal structure of multiple public comment periods for the application creates hurdles, as does the requirement for an additional waiver of sovereign immunity beyond that required under Section 327. Additionally, the program represented only a partial substitution of federal laws, and therefore maintained the need for federal interagency coordination. For instance, the program did not allow the substitution of state environmental laws for the Endangered Species Act, Section 106 of the National Historic Preservation Act, Clean Water Act. **Congress could revisit 23**

## **USC 330 to broaden eligibility for non-state agencies and address implementation barriers that have reduced uptake.**

### **3. Apply a risk-based approach that allows low-impact projects to proceed more quickly or by right**

It is an oft-noted reminder that approximately 95 percent of federal surface transportation projects are processed as categorical exclusions (CEs).<sup>11,12</sup> This is typically presented as context for the long timelines for major projects—a reminder that the characterization doesn't apply to the vast majority of projects, which are not subject to those most rigorous and time consuming reviews. There is a related point here that should be made more often- **since they represent 95 percent of USDOT actions, improving the processing of CEs could result in massive collective time-savings** because while relatively efficient, CE reviews can still take months in some cases. Moreover, since the projects that fall into the category of CEs are the lowest impact projects, streamlining those reviews would represent a lower-risk change to permitting and review procedures.

#### **3.1 General Permits, Program Comments, and Programmatic Approaches**

Many agencies have existing authority to process routine actions efficiently, though they go by different names. USACE has both nationwide permits as well regional general permits as alternatives to individual permits under the Clean Water Act, that enable efficient processing and faster approval of routine actions. Under the Endangered Species Act (ESA), National Marine Fisheries Service (NMFS) and US Fish & Wildlife Service have programmatic approaches that cover certain activity types in specific geographic areas and enable a project sponsor to avoid the need for an individual Biological Opinion. A great example of a programmatic example is FHWA's ESA programmatic agreement for the Indiana bat and Northern Long-eared Bat which provides a programmatic biological opinion and concurrence that covers 38 states.

The Advisory Council on Historic Preservation also produces program comments that facilitate faster Section 106 reviews of certain activity types or certain property types. (Currently the ACHP's program comment on certain housing, building rehabilitation, and alternative transportation has not been signed by USDOT and as a result the streamlined processes of that program comment are not available to transportation agencies.<sup>13</sup>)

There are two barriers to effective expansion of programmatic approaches to permits.

First, most significantly, creating a programmatic review for a specific geography or type of project or impact can involve dedicating significant time and resources upfront, to result in future benefits. Agencies may have difficulty justifying the expenditure of resources with future or unclear pay-offs; agencies may also not have the resources to dedicate to the development of programmatic approaches. **New funding could be made available by Congress to support development of programmatic approaches.** Alternatively or in addition, agencies could benefit from authority to receive and manage a pooled fund from external project sponsors to develop a programmatic approach. Unlike payments for an individual permit, which can create a perception of unethical treatment, contributions to sponsor development of a general permit would still have significant benefits to infrastructure developers but would not correspond to a specific project request.

Another challenge to programmatic approaches is to ensure that the resulting procedure removes individual permit requirements and doesn't become an additional step with no associated time or review savings. Ensuring that programmatic agreements replace or minimize the need for future individual reviews, rather than being additive, is partially a responsibility of the agency in implementation. However, Congress could also clarify the intent of programmatic agreements to suffice in lieu of additional individual reviews.

### 3.2 Automate Routine Tasks

Technology improvements -discussed below-offer agencies a range of opportunities in environmental review and permitting, but may be especially useful for speeding up low-complexity actions through automation. The U.S. Fish and Wildlife Service's Information for Planning and Consulting (IPaC) system can automatically deliver concurrence letters for implementation of programmatic consultations. FWS estimated that IPaC's **automated document delivery features saved the equivalent of 37 full time employees' time** in FY2023, enabling the service to dedicate their staff capacity more efficiently and continue to complete the growing permit workload.<sup>14</sup>

## 4. Employ technology for evaluation and coordination

New technology offers many opportunities for agencies to improve efficiency without reducing the quality of environmental reviews and protections or the opportunity for communities to engage in decisionmaking. Tools to improve reviews include enhanced databases to quickly identify potential resources that the project may impact, as well as portals for project sponsors to submit project information and track permitting progress. Such portals can also connect directly to project management tools that facilitate the multistep reviews and sharing of data and documents across agencies. Even low-tech systems such as fillable templates can enable project sponsors to better understand the permit requirements and reduce complexity for agencies. The Council

on Environmental Quality has sought to embrace technology and innovation reforms, issuing a call for tech solutions from businesses that can be demonstrated to agencies.

Critically, the direction to employ technology has limited impact without appropriation of funding to deploy. The Federal Permitting Improvement Steering Council directed a portion of their appropriation from the Inflation Reduction Act to support technology deployment at agencies; the council dedicated \$30 million for new investments but the requests from agencies greatly exceeded the amount available.

#### 4.1 Templates and Checklists

The surface transportation agencies each have their own checklists or worksheets for project sponsors to use to provide critical information about the project to the federal agency. Typically these CE checklists are used to demonstrate that a project does not have impacts although the templates are also a means to identify whether there are any extraordinary circumstances would prevent the project from being completed as a CE.<sup>15</sup> Section 1304 of the FAST Act required lead agencies of transportation projects to develop such an environmental checklist to help a project sponsor identify potential natural, cultural, and historic resources in the area of the project.

For more complex projects that are likely to have impacts, checklists and templates can still provide value in improving efficiency with which project sponsors can provide critical information to permitting agencies. The Fish and Wildlife Service has created checklists and resources to support Section 7 consultations, including templates structured around geography and templates structured around species. Not all agencies provide project sponsors with such resources, and expanding the availability of straightforward templates would facilitate efficient permitting.

Beyond clarity, checklists provide value to project timelines if clearly demarcate when a permit application is complete. Often review timelines begin at the point when an agency determines that an application is complete, but agencies may delay making that determination of completeness due to concerns about missing data and information or agency capacity. A detailed and specific checklist that ensures the agency receives complete, high-quality application materials can reduce the time necessary to make completeness determinations and ensure the permit moves into the review phase more quickly.

#### 4.2 Resource Maps and Databases

Clear information about potential resources that could be affected are useful for multiple reasons. First, such data facilitates scoping and enables a lead agency to quickly identify potential impacts and therefore the resource agencies that must be invited to

cooperate. Second, when such data is considered in advance during project planning, the agency may be able to plan the project in such a way that will minimize or avoid any impacts, and potentially obviate the need for the permit entirely.

The Fish and Wildlife Service has developed the Information for Planning and Consulting (IPAC) system that is available to the public to identify the locations of species and critical habitat that are managed by FWS.<sup>16</sup> The online program allows project sponsors to build a consultation package based on FWS data and recommendations, and identify conservation measures to facilitate a faster review. As discussed above, a high-quality database and permit application system can also enable agencies to automate routine functions.

### 4.3 Interagency Project Management System

A key challenge for complex projects is the need for agencies to collaborate on a shared document, including iterative drafting and revisions. Congress has repeatedly encouraged agencies to complete these processes concurrently, but separate networks and systems can impede real-time document sharing across agencies. Shared digital platforms that allow multiple agencies to access both the analysis documents as well as underlying data would improve the ability of agencies to complete concurrent reviews rather than each working separately on one section at a time.

However, agencies can also face hurdles in developing and maintaining tools to facilitate project management. FHWA had invested in one such program called “eNEPA”, an electronic tool designed to support interagency collaboration and concurrent reviews. Development of the tool began as early as 2012 with a consultant contracted for research on existing electronic tools and technologies. When launched in 2013, eNEPA allowed State DOTs to share documents, track comments, schedule tasks with participating agencies (including Federal agencies), and perform concurrent reviews for their environmental documents.<sup>17</sup> Yet after successive rounds of updates to improve functionality, FHWA found that the program had few users, in part because the number of EISes completed on an annual basis is so small, compared to the number of CEs. Agencies also tend to have their own project management systems and may be reluctant to switch to a different system, which makes entering data and documents into the shared system an extra step rather than a time savings. FHWA replaced eNEPA with a new program called the Interagency NEPA & Permitting Collaboration Tool (INPCT); the public website for that tool was taken down in 2025.

## 5. Penalties and Fees

Financial penalties and other similar tools have been established in multiple locations in statute, but to date have not been utilized. One challenge is enforcement: Project

sponsors may be leery of pursuing penalties for agencies that will still ultimately be responsible for issuing a permit for their project. Federal agencies may similarly be reticent to pursue penalties against other federal agencies. Another challenge is that for agencies that are delayed as a result of limited staff capacity to complete reviews, rescinding funding from the agency would be at counter-purpose to inducing more timely reviews. That said, a fee structure in which project sponsors paid a fee that covered the agency work to complete the reviews could both enhance staff capacity while also facilitating accountability.

In MAP-21, a financial penalties provision imposed penalties on resource agencies that had not completed their permits and reviews within 180 days of a Record of Decision being signed or the permit application being complete.<sup>18</sup> However as implemented, the resource agency holds responsibility to determine completeness and track their 180-day timeline, and similarly left up to each reviewing agency to determine, in accordance with Office of Management and Budget (OMB) policy, how it will implement rescissions.<sup>19</sup> The FAST Act gave a fee authority to the Federal Permitting Improvement Steering Council intended to reimburse reasonable costs incurred in completing environmental reviews. However, the optional nature of covered projects for the Permitting Council may make a fee system difficult to implement. The Permitting Council proposed regulations to implement fees that were never finalized.<sup>20</sup>

In 2025, the One Big Beautiful Bill Act included a permitting-related provision includes an amendment to NEPA that allows project sponsors to opt-in to pay a fee in exchange for faster processing of environmental assessments (EAs) or environmental impact statements (EISs). The fee, to be calculated on an individual basis by the Council on Environmental Quality, is intended to be 125 percent of the anticipated costs to prepare the environmental document.

### 5.1 Fees to support staff capacity

Many state and local agencies charge fees to cover the permit administration and monitoring, but fee structures are more rare for federal permitting agencies and where they do exist are often waived for public agencies, such as the majority of sponsors of transportation projects. One example of an agency that conducts cost recovery is the Bureau of Land Management, which imposes fees to recover agency costs for issuing and subsequently monitoring rights-of-way and other land use authorizations pursuant to the Federal Land Policy and Management Act (FLPMA) and Mineral Leasing Act (MLA).

## 5.2 Fees to enforce schedule accountability

In Pennsylvania, a program known as “Payback” tied permitting and licensing fees to agency issuance timelines. Under the program, agencies established standards for permit processing timelines; if complete applications exceed the standard processing timeline, the responsible agency is required to refund the application fee to the project sponsor. The program, paired with other permitting initiatives, enabled the PA Department of Environmental Protection to eliminate its permit backlog of 2,400 permits.<sup>21</sup> (Notably, the program has led to faster timelines and greater certainty but has resulted in very few refunds of permit application fees. According to a state press release, out of 40 million applications that have been processed statewide, only five refunds have had to be issued for delays.<sup>22</sup>)

## Conclusion

Building infrastructure involves understanding potential impacts to the human and natural environment and requires compliance with laws and regulations designed to minimize and mitigate those impacts. In many cases, the choices for how and where to build infrastructure or the type of infrastructure to build create controversy.

Infrastructure often creates concentrated harms and diffuse benefits. These tradeoffs are the subject of the reviews and permits with which project sponsors must comply.

Legal changes that remove opportunities to engage in decision making can lead to an inadequate understanding of the project context, identification of impacts late in the review period, and the need for supplemental analysis. Modifying NEPA without recognizing the complex overlay of other federal permitting requirements can easily lead to litigation shifting if litigants still have standing under other statutes outside of NEPA. Too often, changes made by Congress that are intended to simplify reviews instead end up being unimplementable or integrate poorly with existing review structures or actually add additional steps and administrative actions that take staff capacity away from the work of efficiently completing project reviews.

However, these are merely cautions to think carefully about the existing processes and authorities before making changes and are not reasons to avoid efforts to seek improvement in environmental review processes. The time involved in completing environmental reviews imposes costs on projects that may provide significant benefits but are stalled in review. At the same time, there are already many well-intentioned authorities have already been created and remain underutilized; Congress could do much good by understanding and addressing the reasons in each case for the limited uptake. Other authorities are limited to one operating administration or one type of project or project sponsor and could easily be expanded to increase the application of

existing flexibilities, and likely face a much swifter implementation because it will be building on an existing regulatory structure.

In the Infrastructure Investment and Jobs Act, Congress sought to achieve this goal of using the existing authorities more effectively, but did so in the most vague and therefore ineffective way possible, merely adding to statute that “the Secretary shall exercise all existing flexibilities under... the requirements of title 23, United States Code and... other requirements administered by the Secretary.”<sup>23</sup> Federal agencies seeking to implement legislation require precise unambiguous direction, particularly when attempting to disentangle incongruous statute or interpret statutory language in a high-litigation-risk environment.

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<sup>123</sup> C.F.R. § 771.123(b)(1) (2025). <https://www.ecfr.gov/current/title-23/section-771.123>

<sup>2</sup> *Seven County Infrastructure Coalition v. Eagle County*, 145 S. Ct. 1497 (2025).

<sup>3</sup> Federal Transit Administration, “What’s FTA’s Policy on Pre-Award Authority?,” U.S. Department of Transportation, accessed May 18, 2026, <https://www.transit.dot.gov/what-fta%E2%80%99s-policy-pre-award-authority>

<sup>4</sup> Federal Railroad Administration, “Pre-Award Authority FAQs,” U.S. Department of Transportation, September 22, 2023 [https://railroads.dot.gov/sites/fra.dot.gov/files/2023-09/Pre-Award%20Authority%20FAQs%20-%209.22.23\\_PDFa.pdf?utm\\_source=chatgpt.com](https://railroads.dot.gov/sites/fra.dot.gov/files/2023-09/Pre-Award%20Authority%20FAQs%20-%209.22.23_PDFa.pdf?utm_source=chatgpt.com)

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<sup>6</sup> Federal Highway Administration, “NEPA CE Assignment Readiness Assessment Checklist,” U.S. Department of Transportation [https://www.environment.fhwa.dot.gov/nepa/documents/NEPA\\_CE\\_Assignment\\_Readiness\\_Assessment\\_Checklist.pdf](https://www.environment.fhwa.dot.gov/nepa/documents/NEPA_CE_Assignment_Readiness_Assessment_Checklist.pdf)

<sup>7</sup> Federal Highway Administration, “Categorical Exclusion Documentation and Approval,” U.S. Department of Transportation, [https://www.environment.fhwa.dot.gov/nepa/documents/memo\\_ce\\_documentation.aspx](https://www.environment.fhwa.dot.gov/nepa/documents/memo_ce_documentation.aspx)

<sup>8</sup> Federal Highway Administration, “NEPA Assignment Program,” U.S. Department of Transportation, [https://www.environment.fhwa.dot.gov/nepa/program\\_assignment.aspx](https://www.environment.fhwa.dot.gov/nepa/program_assignment.aspx)

<sup>9</sup> National Association of Wetland Managers, *Expanding States’ Role in Implementing Clean Water Act Section 404 Assumption* (2010), [https://www.nawm.org/pdf\\_lib/expanding\\_states\\_role\\_implementing\\_cwa\\_section\\_404\\_assumption\\_111810.pdf](https://www.nawm.org/pdf_lib/expanding_states_role_implementing_cwa_section_404_assumption_111810.pdf)

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<sup>12</sup> American Association of State Highway and Transportation Officials, “Environmental Process Overview,” <https://environment.transportation.org/focus-areas/environmental-process/environmental-process-overview/>

<sup>13</sup> Advisory Council on Historic Preservation, “Housing Program Comment Information,” [https://www.achp.gov/program\\_alternatives/program\\_comment/housing\\_building\\_info](https://www.achp.gov/program_alternatives/program_comment/housing_building_info)

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