

INFRASTRUCTURE LEGISLATIVE OUTLINE

PART 3—PERMITTING PRINCIPLES

I. FEDERAL ROLE

PURPOSE: These principles would protect the environment while at the same time delivering projects in a less costly and more time effective manner. This will be accomplished by:

- Creating a new “One Agency, One Decision” structure for environmental reviews to encourage collaboration and effective communication by establishing deadlines and requiring the Permitting Council to either grant agencies an extension to the deadlines or reassigning the decisions for the permit to the lead Federal agency.
- Eliminating redundancies by removing multiple reviews by multiple agencies.
- Delegating more responsibilities to States.
- Providing for additional provisions to facilitate environmental reviews across the applicable Federal Agencies.
- Authorizing pilot programs through which agencies may experiment with innovative approaches to environmental reviews while enhancing environmental protections.
- Reexamining certain judicial review standards to ensure that that issues are quickly resolved.

A. Establishing a New “One Agency, One Decision” Environmental Review Structure

SEC. 3000. PROTECT THE ENVIRONMENT THROUGH A NEW PROCESS THAT ESTABLISHES FIRM DEADLINES TO COMPLETE ENVIRONMENTAL REVIEWS AND PERMITS WITH APPEAL TO THE PERMITTING COUNCIL WHEN PERMITTING DEADLINES ARE MISSED.

- Under current law, project sponsors of infrastructure projects must navigate environmental reviews under the National Environmental Policy Act (NEPA) and permitting processes with multiple Federal agencies with separate decision-making authority and often counter-viewpoints, affecting the ability of the project sponsor to construct the project in a timely and cost-effective manner.
- This creates inefficiencies in project environmental protection, review and permitting decisions, which delays infrastructure investments, increases project costs, generates uncertainty and prevents the American people from receiving the benefits of improved infrastructure in a timely manner.
- This proposal would establish, by statute, a firm deadline of 21 months for lead agencies to complete their environmental reviews through the issuance of a Finding of No Significant Impact (FONSI) or Record of Decision (ROD), as appropriate.
- Courts reviewing the sufficiency of an agency FONSI or ROD issued within the 21-month deadline shall not deem an agency’s decision insufficient based on a lack of analysis if the court finds that the agency made a good faith effort to provide adequate analysis within the allotted time and resources available.

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- Additionally, the proposal would establish a firm deadline of 3 months after the lead agency's FONSI or ROD for Federal agencies to make decisions with respect to the necessary permits. This 3-month deadline for Federal agencies to make permit decisions after the lead agency's FONSI or ROD also would apply to any permits that were issued by State agencies under Federal law pursuant to delegations of authority from a Federal oversight agency to issue such permits and where such permits are a prerequisite to the completion of a Federal agency's ability to issue a permit.
- Where a Federal or State agency misses the 3-month deadline, the matter would automatically be reviewed by the agency members comprising the Federal Permitting Improvement Steering Council (Permitting Council) to consider whether the decision-making responsibility for the relevant permit should be reassigned to the lead agency.
- The Permitting Council, after considering the reasons for the delay, would either reassign the decision to the lead agency or grant an extension for the relevant Federal or State agency to make a decision. Where an extension is granted, if the relevant Federal or State agency misses the extended deadline, then the matter would again automatically be reviewed by the Permitting Council.
- Where the Permitting Council reassigns a permitting decision from a Federal agency to a lead agency, OMB would transfer the appropriate amount of budgetary authority from the Federal agency to the lead agency to make the relevant permit decision. In addition, where the Permitting Council reassigns a permitting decision from a State agency to a lead agency, OMB would transfer the appropriate amount of budgetary authority from the relevant Federal oversight agency to the lead agency to make the relevant permit decision. The funding transfer would only occur if the lead Federal agency incurred cost due to additional analysis, reviews, or labor cost as a result of the additional responsibility.

B. Reducing Inefficiencies in Environmental Reviews

SEC. 3001. REQUIRE A SINGLE ENVIRONMENTAL REVIEW DOCUMENT AND A SINGLE RECORD OF DECISION COORDINATED BY THE LEAD AGENCY.

- Currently, Federal NEPA reviews can be conducted by multiple Federal agencies on different aspects of the same project. Agencies can prepare a separate analyses and separate decision documents.
- These reviews can be numerous, duplicative, and difficult for a project sponsor to navigate. Decisions are not issued in the same time frame and frequently are spread out over months or years. Different agencies often will conduct separate but similar analyses. This additional time can add months or even years to the environmental review process, with little benefit to the environment.
- Requiring the lead Federal agency to develop a single Federal environmental review document to be utilized by all agencies, and a single ROD to be signed by the lead Federal agency and all cooperating agencies, would create a more efficient, timely review process by facilitating coordination among agencies and reducing duplication. Effective lead Federal agency coordination with other agencies early in the process, and throughout, will ensure sufficient analysis and information is obtained for all permitting agencies.

SEC. 3002. DEVELOP A SINGLE PURPOSE AND NEED TO BE USED BY COOPERATING AND PERMITTING AGENCIES.

- Under current law, a lead Federal agency and cooperating agencies can develop different purpose and needs for the same underlying action.
- Given that a project purpose and need is the basis for developing the range of alternatives, this sometimes results in the lead Federal agency and the permitting agencies arriving at different alternatives to consider in their reviews if the purpose and needs are not consistent across the associated agencies.
- Confirming that the lead Federal agency has final authority for determining the purpose and need for all agencies would eliminate inconsistencies in purpose and need statements. The lead Federal agency would develop the purpose and need in coordination with cooperating agencies, and the final purpose and need statement would be used by all Federal agencies in the Environmental Impact Statement (EIS) for the project. Agencies with permitting responsibilities on the project also would use the final purpose and need statement for their permitting reviews.

SEC. 3003. ASSIGN RESPONSIBILITY TO THE LEAD FEDERAL AGENCY TO DETERMINE THE RANGE OF ALTERNATIVES TO BE USED BY COOPERATING AGENCIES.

- Currently, the lead Federal agency and the permitting agencies can develop a different range of alternatives for the same underlying action.
- Given that the alternatives represent the range of potential actions that will be analyzed and selected, this sometimes results in the lead Federal agency and the permitting agencies analyzing different alternatives in their reviews if the range of alternatives are not consistent across the associated agencies.
- Assigning responsibility to the lead Federal agency to determine the range of alternatives, in coordination with cooperating agencies, would ensure consistency throughout the environmental review process. The lead Federal agency would have authority for determining the final range of alternatives, which would be used by cooperating agencies in their environmental and permitting documents.

SEC. 3004. EXTEND FLEXIBILITY TO COMBINE A FINAL ENVIRONMENTAL IMPACT STATEMENT AND RECORD OF DECISION DOCUMENT.

- Traditionally, and in accordance with the CEQ Regulations, Final Environmental Impact Statements (FEIS) and Record of Decision (ROD) documents are issued as separate documents with a minimum 30-day period between the FEIS and ROD. This 30-day waiting period served, among other things, to allow the decision-maker further time to make a decision and resolve any pending interagency disputes or any substantial unresolved controversy.
- Given that agencies select a preferred alternative in the in the FEIS, the 30-day waiting period sometimes only adds unnecessary delay. In 2012, statutory authority was given for surface transportation projects to combine the FEIS and ROD with the enactment of

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the Moving Ahead for Progress in the 21st Century Act, and this provision has been shown to save two to three months.

- Extending the authority to combine FEISs and RODs on all infrastructure projects will enable for this proven project review streamlining flexibility to be made available for all infrastructure projects.

SEC. 3005. REQUIRE THAT ONLY FEASIBLE ALTERNATIVES BE CONSIDERED.

- Currently, the heart of the NEPA process lies within its evaluation of alternatives. The development, analysis, and weighing of alternatives serves to ensure that Federal officials make informed decisions.
- However, the current standard of consideration of all reasonable alternatives requires agencies to consider alternatives that are outside of the agency's authority, incapable of being carried out by an applicant, or not authorized by law.
- Clarifying that agencies should not expend time and resources to analyze and consider alternatives that cannot be implemented would reduce unnecessary work without impacting the environment. Agencies would instead focus their resources and analyses on those alternatives that are actually legally, technically and economically feasible.

SEC. 3006. DIRECT THE COUNCIL ON ENVIRONMENTAL QUALITY TO ISSUE REGULATIONS TO STREAMLINE THE NEPA PROCESS.

- Council on Environmental Quality (CEQ) regulations and guidance provide the basis for the implementation of NEPA. The environmental review process under NEPA as it exists today is lengthy, inefficient and costly.
- CEQ's regulations were issued in 1978, pre-internet, and have been subject to only one revision since then. They need to be updated to provide for a more timely, predictable, and efficient NEPA process.
- Requiring CEQ to revise its regulations to streamline NEPA would reduce the time and costs associated with the NEPA process and would increase efficiency, predictability and transparency in environmental reviews.

SEC. 3007. ELIMINATE REDUNDANCY IN EPA REVIEWS OF ENVIRONMENTAL IMPACT STATEMENTS UNDER SECTION 309 OF THE CLEAN AIR ACT.

- Currently, Section 309 of the Clean Air Act requires that EPA review and publish comments on most EISs (42 U.S.C. 4332). Under this authority, EPA publishes comments on all aspects of EISs, both during drafting of the EIS and after it has been issued. EPA also provides a rating for EISs. In addition to their responsibility under Section 309, EPA has separate regulatory responsibility to review and comment on EISs on matters within its jurisdiction, and would typically be included as a cooperating agency for areas within its technical expertise.
- The extra review under Section 309 adds an extra step to the environmental review process which can cause delays without increasing protection to the environment. Lead Federal agencies must take time to respond to EPA additional comments in the Section 309 review, even if the comments are outside of EPA's jurisdiction. This extra review is no

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longer necessary, given that Federal agencies have gained significant NEPA experience since this law was enacted, and given that EPA has other authority to review and comment on matters within its jurisdiction.

- Eliminating the additional review and assessment of EISs by EPA would remove duplication and make the environmental review process more efficient. However, this change would not eliminate EPA's regulatory responsibilities to comment during the development of EISs on matters within EPA's jurisdiction or EPA's responsibilities to collect and publish EISs.

SEC. 3008. FOCUS THE SCOPE OF A FEDERAL RESOURCE AGENCY'S NEPA ANALYSIS ON ITS AREA OF SPECIAL EXPERTISE OR JURISDICTION.

- Currently, disagreements often occur regarding the proper scope of NEPA review, particularly a resource agency's review for a large or complex project. Federal agencies sometimes provide comments or raise objections to issues beyond the scope of their areas of special expertise or jurisdiction.
- These objections and comments create confusion for the public and result in untimely decisions and additional workload. Agencies with special expertise or jurisdiction must spend additional time to address and resolve these comments and objections.
- Focusing Federal resource agency authority to comment on portions of the NEPA analysis that are relevant to their areas of special expertise or jurisdiction would maximize the effectiveness of agency reviews as well as streamline project delivery.

SEC. 3009. REDUCE DUPLICATIONS BY ALLOWING A CATEGORICAL EXCLUSION ESTABLISHED BY ONE FEDERAL AGENCY TO BE USED BY ANY OTHER FEDERAL AGENCY

- Currently, each Federal agency establishes its own categorical exclusions (CEs) by developing a record to demonstrate that an activity would not result in significant environmental impacts. All categorical exclusions that a Federal agency proposes to establish are reviewed and approved by CEQ.
- Even when a CE has been documented by a Federal agency and approved by CEQ, it may not be used by another Federal agency without going through a separate documentation and approval process. A Federal agency that has not adopted the CE must prepare an environmental assessment (EA).
- Allowing any Federal agency to use a categorical exclusion that has been established by another Federal agency would reduce duplication and unnecessary environmental analysis for actions that already have been established as not creating a significant environmental impact. The use of CEs by another Federal agency under this provision would be tracked and catalogued by each agency that uses the CEs.

SEC. 3010. MORE EFFECTIVELY ADDRESS ENVIRONMENTAL IMPACTS BY ALLOWING DESIGN-BUILD CONTRACTORS TO CONDUCT FINAL DESIGN ACTIVITIES BEFORE NEPA IS COMPLETE.

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- Under current law, a contractor who designs and/or builds a project would not be permitted to commence final design activities until after the conclusion of the NEPA process (23 U.S.C. 112(b)(3)).
- This restriction diminishes the flexibility afforded with the design-build procurement method since States are permitted to allow designers to proceed with final design activities with their own funds under the traditional design-bid-build method.
- Allowing design-build contractors to conduct final design activities would facilitate better environmental reviews in conjunction with the design of projects and would facilitate more efficient and more effective efforts to address environmental impacts. The lead Federal agency would continue to conduct an independent review of the environmental documents and prohibit the agency from taking any action that would prevent the objective consideration of alternatives.

SEC. 3011. CURTAIL COSTS BY ALLOWING FOR ADVANCE ACQUISITION AND PRESERVATION OF RAIL RIGHTS-OF-WAY BEFORE NEPA IS COMPLETE.

- Currently, real property cannot be acquired for rail right-of-way prior to the completion of the NEPA environmental review process.
- While project sponsors might have an opportunity to purchase better and less expensive right-of-way in advance, the lack of clear statutory direction impedes preservation of rail rights-of-way in advance of project approval.
- Allowing the advance property acquisition and preservation of rail corridors for rail projects would help control costs and improve project delivery. Right-of-way purchase would still only be eligible for Federal funding if used for projects selected through the NEPA process. Bias in the evaluation of alternatives under these circumstances is minimal since project sponsors would be able to recoup the value of the property if a different alternative is ultimately selected.

SEC. 3012. ENHANCE INTEGRATION OF TRANSPORTATION PLANNING AND NEPA BY REMOVING AN UNNEEDED CONCURRENCE POINT FOR USING TRANSPORTATION PLANNING DOCUMENTS IN NEPA.

- Under past and current law, lead Federal agencies have been encouraged to adopt or incorporate by reference relevant documents into their NEPA documents. This includes documents from the transportation planning process. The transportation planning process includes robust study and public engagement to develop transportation plans for metropolitan areas. In the Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress formalized the practice of incorporating transportation planning documents but added a new requirement that cooperating agencies had to concur (23 U.S.C. 168(d)).
- Concurrence for incorporating transportation planning documents was not previously required and is not required for the adoption of other documentation. The transportation planning documents have already undergone review and consideration by agencies and the public during the development of the transportation plan. The additional concurrence point adds an unnecessary step that impedes efficient environmental review and the integration of the planning and environmental review process. It could also result in substantial duplication

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of work if a cooperating agency does not concur in the incorporation of documentation from planning.

- Eliminating the requirement for concurrence by a cooperating agency would reduce duplication and delay and facilitate the integration of the NEPA process with the transportation planning process.

SEC. 3013. REMOVE DUPLICATION IN THE REVIEW PROCESS FOR MITIGATION BANKING BY ELIMINATING THE INTERAGENCY REVIEW TEAM.

- The 2008 Mitigation Rule USACE and EPA jointly promulgated includes specified timelines for various tasks associated with the approval and oversight of mitigation banks. The Rule provides for an opportunity for public and agency review and comment on mitigation banks during the approval process. In addition to this review, the Rule requires a second review by an Interagency Review Team, consisting of reviewing agencies, tribal nations and the mitigation banking sponsor.
- Approval timelines often are extended beyond those specified in the 2008 Mitigation Rule due to protracted consultation among the Interagency Review Team. As a result, the final approval of a mitigation bank often is delayed because of the time it takes to resolve disagreements among the entities participating in the review.
- Removing the Interagency Review Team would enhance the efficiency of the mitigation bank approval timeframes. The members of the Interagency Review Team would still have an opportunity to review and comment through the public participation process required in the Rule.

SEC. 3014. AUTHORIZE ALL LEAD FEDERAL AGENCIES FOR INFRASTRUCTURE PROJECTS TO OPT INTO FHWA AND FTA STREAMLINING PROCEDURES.

- Highway and transit projects currently have specific statutory authority that promotes efficiencies in the environmental review process for their projects (23 U.S.C. 139). These establish more efficient procedures without changing any substantive environmental laws.
- The benefits of these provisions are limited because they do not apply to other types of infrastructure projects.
- Amending the current law to allow other lead Federal agencies to opt into these provisions could make environmental reviews on other infrastructure projects more efficient. This option would not apply to FAST 41 projects that are on the dashboard because they already have separate streamlining provisions.

SEC. 3015. INCREASE EFFICIENCY BY EXEMPTING CERTAIN SMALL TELECOMMUNICATIONS EQUIPMENT FROM NEPA AND THE NATIONAL HISTORIC PRESERVATION ACT.

- Current law requires that wireless deployers comply with both NEPA and the National Historic Preservation Act (NHPA) for small cells and Wi-Fi attachments in the same way that they obtain permits for large towers.

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- Small cells and Wi-Fi attachments do not have an environmental footprint, nor do they disturb the environment or historic property. However, despite this lack of impact, small cells and Wi-Fi attachments typically go through the same level of analysis and review under NEPA and the NHPA, adding both delay and cost.
- Amending the law to exempt small cells and Wi-Fi attachments from NEPA and the NHPA would eliminate unnecessary reviews without adversely affecting the environment.

SEC. 3016. CREATE INCENTIVES FOR ENHANCED MITIGATION.

- Current environmental laws focus primarily on adverse environmental impacts of infrastructure projects, without also recognizing their potential environmental benefits.
- As a result, a project sponsor does not have an incentive to find ways to improve the environment as part of its project development. Opportunities for enhancing mitigation or environmentally friendly designs often are lost because they delay project development without providing any benefit to the project sponsor.
- Establishing procedures that expedite environmental or permitting reviews for projects that enhance the environment through mitigation, design, or other means would provide incentives for project sponsors to propose more environmentally beneficial projects. This would streamline the environmental and permitting review process for those projects that demonstrate an improvement to the environment.

SEC. 3017. MODIFY THE FEDERAL POWER ACT TO PROHIBIT THE ABILITY OF FEDERAL AGENCIES TO INTERVENE IN LICENSING PROCEEDINGS.

- Under current FERC policy and regulations, agencies that participate as cooperating agencies in FERC's preparation of NEPA documents cannot also intervene in the FERC licensing proceeding. The rationale for FERC's policy is that cooperating agency staff will necessarily engage in off-the-record communications with FERC staff concerning the merits of issues in the proceeding. If the agency is subsequently allowed to become an intervenor in the licensing proceeding, it will then have access to information that is not available to other parties, in violation of the prohibition on ex parte communications in both FERC's rules and in the Administrative Procedure Act.
- FERC's rules force other Federal agencies to choose either to waive their rights to intervene in the licensing proceeding or participate as a cooperating agency in FERC's preparation of an environmental document. By choosing not to participate as a cooperating agency, FERC loses the benefit of the agency's technical expertise on important environmental issues and inhibits the identification and resolution of key issues early in the NEPA process.
- In order to ensure that agencies fully participate in the preparation of FERC NEPA documents, the Federal Power Act should be modified to prohibit the authority of Federal agencies to intervene in FERC licensing proceedings whenever they are invited to participate as a cooperating agency to a FERC NEPA review.

SEC. 3018. AUTHORIZE FEDERAL AGENCIES TO ACCEPT FUNDING FROM NON-FEDERAL ENTITIES TO SUPPORT ENVIRONMENTAL AND PERMITTING REVIEWS.

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- Currently, there is no universal authorization for agencies to accept funds from non-federal project sponsors, including private entities, to conduct environmental reviews and permit decisions. Legal authority exists for certain infrastructure sectors to contribute funds to Federal agencies to support such reviews and decisions, such as authority for public entities to support Federal agencies, States agencies and Indian tribes participating in environmental planning and review processes for transportation projects (49 U.S.C. 307), and authority for the U.S. Army Corps of Engineers to accept funds from non-federal public entities to provide priority review of their permit application (33 U.S.C. 2352), but there is no universal authority for infrastructure projects generally.
- This limits the ability of Federal agencies to obtain additional resources to help with the permitting and review process, thus causing further delays in project development.
- Amending the law to allow Federal agencies to accept funds from non-federal entities, including private project sponsors, to support their dedicated review of permit applications and other environmental documents would give additional resources to streamline project delivery and would help defray the cost of the environmental review. This provision would include appropriate controls for potential conflicts-of-interest and would maintain the Federal agency's responsibility to independently conduct its review. The private project sponsor would not have any rights or responsibilities with respect to the lead agency's decision by virtue of its contribution of funds.

C. Reduce Inefficiencies in Protecting Clean Water

SEC. 3101. ELIMINATE REDUNDANCY BY AUTHORIZING FEDERAL AGENCIES TO SELECT AND USE NATIONWIDE PERMITS WITHOUT ADDITIONAL REVIEW BY THE U.S. ARMY CORPS OF ENGINEERS.

- Currently, Federal agencies are required to submit 404 applications to the USACE for projects that meet nationwide permit (NWP) requirements. Federal agencies review these projects before submitting the application to determine whether they meet the criteria for the applicable NWP. The USACE reviews the agency determinations and double-checks that the NWP criteria is met. This extra review by USACE is required even though many Federal agencies employ staff who are environmental experts and can determine the impacts of projects and appropriately evaluate and select the required NWP.
- This additional review by USACE duplicates work conducted by the Federal agencies and can unnecessarily add several months to the permitting process. This could result in further delays to critical project milestones such as advertisement and award of a project.
- Eliminating the USACE review and allowing Federal agencies to move forward on NWP projects would streamline the process and speed project delivery. This would allow the USACE to focus on projects that do not qualify for NWPs, which have greater environmental impacts. USACE would retain the right to reinstate its review for any agency that it finds has incorrectly determined that NWP criteria have been met.

SEC. 3102. CONSOLIDATE THE AUTHORITY TO MAKE JURISDICTIONAL DETERMINATIONS FOR 404 PERMITS WITH THE U.S. ARMY CORPS OF ENGINEERS.

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- Under current interpretation of the Clean Water Act, the Administrator of the EPA, not the Secretary of the Army, has final authority to construe the jurisdictional term “navigable waters” under Section 404 of the Clean Water Act (33 U.S.C. 1344). (1979 Department of Justice *Civiletti* Opinion).
- Since the enactment of the Clean Water Act, USACE has decades of experience and expertise in jurisdictional matters and provides to the public approximately 59,000 written jurisdictional determinations per year. Coordination with EPA on jurisdictional matters often delays permit decisions, and duplicates work USACE has already done.
- Establishing the Secretary of the Army’s authority to make jurisdictional determinations under the Clean Water Act would eliminate the additional time needed to coordinate with the EPA on jurisdictional matters under Section 404. EPA and USACE would continue to coordinate on rulemaking to ensure consistency in the definition of “waters of the U.S.” under the Clean Water Act, and to reconcile differences in determinations under other sections of the Clean Water Act.

SEC. 3103. ELIMINATE DUPLICATIVE OVERSIGHT BY REMOVING EPA’S AUTHORITY TO VETO A 404 PERMIT.

- The Secretary of the Army, acting through the Chief of Engineers, has authority to grant permits for the discharge of dredged or fill material under Section 404 of the Clean Water Act. Such decisions can be “vetoed” by EPA under Section 404(c). EPA can exercise this “veto” power prior to, during, and after a permit decision.
- While EPA has used the veto authority sparingly, the threat of the veto creates significant regulatory uncertainty. Often, the perceived threat of one of these actions by the resource agencies delays permit decisions because project proponents and USACE engage to address perceived concerns to avoid “elevation” or “veto” in advance. This also results in one Federal agency second-guessing the expertise and decision of another Federal agency.
- Amending the Clean Water Act to remove EPA’s authority to “veto” a 404 permit would make the permitting process more efficient and more predictable. Corresponding changes would need to be made to regulations and related memoranda of agreement.

SEC. 3104. ELIMINATE DUPLICATION IN THE SECTION 404 AND SECTION 408 PROCESSES UNDER THE CLEAN WATER ACT.

- Section 14 of the Rivers and Harbors Act of 1899 (commonly referred to as “Section 408”) authorizes the Secretary of the Army to grant permission for the alteration or occupation or use of a USACE civil works project if the activity will not be injurious to the public interest and will not impair the usefulness of the project (33 U.S.C. 408). To make this determination, Section 408 requires a very similar environmental review as the review required for a Section 404 permit. For actions where both Sections 404 and 408 apply, two independent environmental reviews are required.
- These overlapping requirements create unnecessary duplication of work and result in delays in issuing permit decisions when both Section 404 and Section 408 apply.
- Allowing environmental compliance reviews performed for Section 404 also to be used for the purposes of Section 408 on projects with comparable scopes of analysis would

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eliminate duplication of work. In this circumstance, the Section 408 permit review would focus on the remaining non-environmental technical review required to inform the Section 408 evaluation.

SEC. 3105. ELIMINATE DUPLICATION IN ENVIRONMENTAL DOCUMENTATION FOR AUTHORIZED U.S. ARMY CORPS OF ENGINEERS PROJECTS PURSUED BY NON-FEDERAL INTERESTS.

- Under current law, if a non-Federal entity intends to implement an authorized USACE Civil Works project without an executed agreement, the non-Federal entity would need a permit from the Department of the Army prior to construction (33 U.S.C. 403 and 33 U.S.C. 1344). To authorize the same Civil Works project, the USACE also will have prepared an environmental review and compliance document.
- Requiring both a permit and the environmental review and compliance process is duplicative. The permit process repeats much of the analysis and paperwork produced during USACE's environmental review process.
- Allowing the non-Federal interest to use the completed USACE environmental compliance document or decision (e.g., ROD or FONSI) as the Federal permit decision and forego any Department of the Army permit process would reduce duplication without removing any clean water protections.

SEC. 3106. CREATE AN APPEALS PROCESS FOR SECTION 401 CERTIFICATION DECISIONS AND REDUCE DECISION TIME FRAMES TO THREE MONTHS.

- Current law requires receipt of a State Water Quality Certification (Section 401 Certification) prior to USACE issuing a Department of the Army (DA) permit (Section 404 and Section 10) decision. Under current law, a State is given a period not to exceed one year to issue its Water Quality Certification or the requirement is "waived."
- In spite of the statutory time frame, States increasingly do not issue permits at all with no consequences, or they require applicants to re-file prior to one year lapse, which produces a "loop" of repeated lack of issuance and re-filing. Applicant-driven litigation against States to compel issuance, where the applicant prevails, leads to remand back to the same State authority that broadly interprets its delegated Federal authority under the Clean Water Act.
- Amending the Clean Water Act to change the time period for issuance of a State 401 Certification, by addressing the time periods for making a completeness determination, and the time for a State decision, would reduce this delay.
 - For any 401 certification request, a project applicant would submit an application to the State. Upon receipt, the State would have 90 days to make a completeness finding with regard to the application. If the State failed to make a completeness finding within 90 days of submission of the application, the project applicant could request that the Administrator make such a determination with regard to whether the application meets minimum criteria established pursuant to Section 401.
 - Where the State or the Administrator determined an application to be complete, the State would have three months to make a determination with regard to the

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Section 401 certificate. If the State failed to make a determination, or made a finding to deny the certification, the project applicant could appeal to the lead Federal agency.

SEC. 3107. STABILIZE UTILITY INVESTMENTS BY LENGTHENING THE TERM OF A NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT AND PROVIDING FOR AUTOMATIC RENEWALS.

- Currently, the Clean Water Act places a five-year limitation on the term of permits granted.
- This limitation serves as a disincentive to public and private investments in investor and publicly owned utilities when major investments are typically financed over 20 to 30 years. Moreover, administrative resources in granting permit renewals can significantly impact the timeliness of permit renewal requests.
- Lengthening the permit time limit from five years to ten years and providing for automatic renewals of such permits if the water quality needs do not require more stringent permit limits would bring more stability to such investments.

D. Reducing Inefficiencies in Protecting Clean Air

SEC. 3108. ELILMINATE CONFUSION BY CLARIFYING THAT METROPOLITAN PLANNING ORGANIZATIONS NEED ONLY CONFORM TO THE MOST RECENT NATIONAL AMBIENT AIR QUALITY STANDARD.

- Currently, the Clean Air Act requires EPA to establish National Ambient Air Quality Standards (NAAQS) for certain pollutants. It also requires EPA to periodically review and, if necessary, update these standards.
- This creates a problem every time EPA promulgates a new updated NAAQS before prior standards are revoked. State Departments of Transportation (State DOTs) and metropolitan planning organizations (MPOs) may be required to demonstrate conformity to both the old and the new standards for the same pollutant, creating redundancy and uncertainty, and causing State DOTs and MPOs to spend their limited resources unnecessarily.
- Amending the Clean Air Act to clarify that conformity requirements only apply to the latest NAAQS for the same pollutant would avoid this confusion and reduce legal challenges.

SEC. 3109. REDUCE UNCERTAINTY BY ESTABLISHING MOTOR VEHICLE EMISSIONS BUDGETS BEFORE REQUIRING INITIAL TRANSPORTATION CONFORMITY DETERMINATIONS FOR NEWLY DESIGNATED AREAS

- Currently, the Clean Air Act requires a newly designated area to comply with conformity requirements one year after the effective date of the final nonattainment designation (42 U.S.C. 7506(c)). Conformity is typically demonstrated by showing that an area's transportation plans will not exceed the motor vehicle emissions budget established for that area.

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- This creates a problem for newly designated areas because the emissions budget usually takes longer than a year to establish and for EPA to approve. Therefore, in order to demonstrate conformity, MPOs in newly designated areas have to use other less suitable tests, such as “an interim emissions test” or a test based on emissions budgets developed for a previous standard for the same pollutant. These requirements have created confusion and uncertainty.
- Allowing transportation conformity to apply one year after EPA approves the emissions budgets adequate for conformity purposes would eliminate confusion and give MPOs certainty in meeting Federal requirements.

E. Reducing Inefficiencies in Protecting Species and Habitats

SEC. 3110. PROVIDE FLEXIBILITY TO NOAA IN ESTABLISHING GEOGRAPHICAL REGIONS FOR INCIDENTAL TAKE AUTHORIZATIONS UNDER THE MARINE MAMMALS PROTECTION ACT.

- Currently, for non-military readiness activities, the National Oceanic and Atmospheric Administration (NOAA) can only issue incidental take authorizations for takings that occur in a “specified geographical region” (16 U.S.C. 1371).
- This constrains NOAA’s ability to structure incidental take authorizations to cover activities that occur in a smaller region.
- Removing the “specified geographical region” requirement would provide more flexibility to NOAA to identify the appropriate geographic area for incidental take authorizations.

SEC. 3111. CLARIFY THAT REASONABLE AND PRUDENT ALTERNATIVES PROVIDED UNDER THE ENDANGERED SPECIES ACT DO NOT TRIGGER NEPA.

- Currently, when the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) makes a jeopardy determination in a biological opinion, it also provides the consulting Federal agency with reasonable and prudent alternative actions (RPAs). These RPAs are recommendations to the consulting Federal agency and are included as part of the biological opinion. However, recent Federal court rulings have indicated that NEPA is required for RPAs and any associated terms and conditions.
- This creates two problems:
 - First, NEPA typically is already well under way by the time a biological opinion with RPAs under the Endangered Species Act (ESA) is provided by FWS or NMFS. Adding a new Federal action (implementation of an RPA) to an ongoing NEPA process often adds considerable time and resources, which further delays finalization of NEPA and the originally proposed Federal action.
 - Second, where NEPA for ongoing Federal actions would not otherwise be required (Federal action has been ongoing without change since before NEPA was passed), having to do NEPA on RPAs has the effect of opening the ongoing Federal action, as well as the RPA, to NEPA compliance.
- Confirming that the RPA analysis is not an agency action that triggers a NEPA analysis would avoid untimely interruptions and delays that would result from having to

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incorporate the RPA recommendations in the midst of an ongoing NEPA process. This approach would be more consistent with the original purpose of a biological opinion as advice, rather than as direction, given to the consulting agency.

SEC. 3112. CREATE A MORE EFFICIENT PROCESS FOR LISTING AND DELISTING SPECIES.

- Currently, the ESA imposes statutory deadlines for the FWS and NMFS to take actions on petitions to list or delist species. Under the ESA, any person or entity may file a lawsuit to compel FWS and NMFS to take statutorily required actions if they have not already done so within the statutorily designated time frames. In addition, some listed species have incorrectly remained listed for years after the best available science shows that they no longer warrant listing status.
- Listing decision deadlines are rigid and difficult to meet. Missed deadlines frequently are used as triggers for legal action. This can result in rushed decisions by the FWS and NMFS, with incomplete science and an unengaged public. It also constrains FWS' and NMFS' ability to prioritize reviews of the most critical species. Further, species that remain listed longer than necessary result in ongoing adherence to ESA requirements that are no longer needed to protect the species.
- Providing new flexibility for current deadlines for petitions would allow FWS and NMFS to make better, more informed decisions. Using this flexibility, the FWS and NMFS would be able to prioritize petitions based on need, giving them more flexibility to implement the ESA on the most critical species while reducing the potential for future litigation. This would empower FWS and NMFS to set their own schedule rather than negotiate one in litigation.
- Additionally, commissioning a short-term independent panel within the FWS and NMFS to evaluate and complete reviews of petitions to delist species would enable the removal of unnecessary requirements when species should be delisted. This panel would operate under the statutory deadlines imposed under the ESA. It also would provide formal opportunities for stakeholder comment and would go through notice and comment rulemaking.

SEC. 3113. ALLOW DELEGATION OF AUTHORITY FOR THE SECTION 10 HABITAT CONSERVATION PROCESS TO STATES.

- Under Section 10 of the ESA, an application for an incidental take permit must include a Habitat Conservation Plan (HCP). An HCP describes the anticipated effects of the proposed taking and how those impacts will be minimized. The HCP must be approved by the FWS before an incidental take permit can be issued.
- The HCP approval process takes years to complete and costs millions of dollars in part because FWS lacks resources to staff these projects adequately. Waiting for approval of the HCP can significantly delay issuance of an incidental take permit needed for a project to proceed.
- Allowing States to assume or request delegation of authority for carrying out habitat conservation planning and issuing incidental take permits for intrastate activities would reduce the burden on FWS staff and allow for more timely decisions on HCPs. This

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would include delegation of both ESA Section 10 authority for approving HCPs as well as related NEPA responsibilities. States would have to demonstrate they have adequate staff and expertise to conduct these reviews.

SEC. 3114. ALLOW FWS AND NOAA TO ISSUE INCIDENTAL TAKE PERMITS DURING INFORMAL CONSULTATION WHEN A PROJECT IS NOT LIKELY TO ADVERSELY AFFECT A SPECIES

- Currently, the FWS and NOAA cannot issue an incidental take permit during informal consultation, even if the conclusion is that the project is not likely to adversely affect a species.
- This means that a formal consultation and biological opinion are needed even in circumstances where there is no risk of a jeopardy decision.
- Authorizing an incidental take permit to be issued by FWS and NOAA in the informal consultation phase and without a biological opinion would reduce the burden by eliminating unnecessary work without diminishing protections for species. This authorization only would apply when a project is not likely to adversely affect a species.

SEC. 3115. ENSURE FAIR TREATMENT OF CONSERVATION ACTIONS IN LISTING AND DELISTING DECISIONS.

- Under the current provisions of the ESA, when species are considered for listing or delisting, the FWS considers the regulatory prohibitions in State and other Federal laws to determine whether the species will be adequately protected. It does not consider other protections.
- This narrow consideration excludes consideration of many conservation actions in place to benefit a species. In addition to regulatory protections, these conservation actions also can provide significant protection for species.
- Allowing for consideration of conservation efforts (including voluntary efforts) would provide for a more balanced picture of protections that could support a delisting decision. This also would encourage voluntary conservation efforts to take action to support a species.

SEC. 3116. EXTENDING THE TIMING OF CRITICAL HABITAT DESIGNATIONS TO ONE YEAR AFTER THE DETERMINATION THAT A SPECIES IS ENDANGERED OR THREATENED.

- Agencies rarely meet the requirement to concurrently designate critical habitat with the determination that a species is endangered or threatened.
- Missing this deadline opens the FWS and NMFS up to litigation.
- Requiring the FWS and NMFS to designate critical habitat within one year of final approval of a species recovery plan and allowing recovery plans to inform critical habitat designations would ensure more accurate critical habitat designations and reduce litigation risk.

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SEC. 3117. REQUIRE TIMELINES TO BE MET UNDER THE MAGNUSON STEVENS ACT OR ALLOW AGENCY TO PROCEED WITH ACTION.

- The Magnuson Stevens Act allows for both an abbreviated consultation process (NMFS must respond within 30 days) and an expanded consultation process (NMFS must respond within 60 days) when evaluating effects to Essential Fish Habitat.
- Even with these relatively short timeframes, consultations tend to take much longer to complete and thus impact the delivery of infrastructure projects.
- Requiring NMFS to respond to all consultations within 30 days in all cases (unless a 30-day request for extension is received from NMFS and approved by the action agency) would improve timeframes and eliminate delays. If no response were received from NMFS within the required timeframe, the action agency could then move to final agency action.

F. Reducing Inefficiencies in Preserving Publically Owned Land and Historic Properties

SEC. 3118. REMOVE OVERLAPPING DOI, USDA, AND HUD REVIEWS FROM INDIVIDUAL SECTION 4(F) EVALUATIONS.

- Under current law, USDOT is prohibited from using parkland or historic sites unless it determines that there is no other prudent and feasible alternative. Current law requires consultation with the Department of the Interior (DOI), USDA, and the Department of Housing and Urban Development (HUD) in making these determinations. The FHWA/FTA Section 4(f) implementing regulations (23 CFR 774.5) require Section 4(f) determinations to be sent to DOI, USDA, and HUD for review and comment. The regulation currently provides DOI, USDA, and HUD with a minimum of 45 days to provide comments. It also provides for an additional 15-day period after the comment deadline for DOI, USDA, and HUD to transmit comments before the FHWA may assume no objection (49 U.S.C. 303 and 23 U.S.C. 138).
- This creates a problem because DOI, USDA, and HUD review times can delay project delivery. The review generally does not produce any changes in the determinations since these agencies have had little direct involvement in the project.
- Removing DOI, USDA and HUD responsibilities to review individual Section 4(f) determinations would reduce delays in the project development process while not reducing protections to parklands and historic sites.

SEC. 3119. ELIMINATE DUPLICATIVE REVIEWS OF HISTORIC PROPERTY IMPACTS FOR TRANSPORTATION PROJECTS.

- Under current law, potential impacts of transportation projects on historic sites must undergo a review under both Section 4(f) of the DOT Act and Section 106 of the National Historic Preservation Act. These two laws are different in approach (Section 4(f) results in a substantive determination and Section 106 is a process resulting in an agreement), but both are designed to protect the same historic resources. The FAST Act added an optional process for historic preservation reviews to address this issue, but it added new steps and concurrence points that do not exist in the current regulatory process.

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- Conducting two reviews to protect historic properties is redundant and creates substantial additional work. It is also inconsistent with requirements for other infrastructure projects, which only need to comply with Section 106. Because of the additional concurrence points, the optional process included in the FAST Act is a more cumbersome process and has not been used.
- Allowing USDOT to use an agreement reached under the Section 106 process to also meet its obligations under Section 4(f) for historic sites would reduce duplication and delay, without reducing protections for the historic properties.

SEC. 3120. ELIMINATE REDUNDANCY IN CONVERSION REQUIREMENTS WHEN LAND PURCHASED WITH LAND AND WATER CONSERVATION FUND MONEY IS IMPACTED.

- Currently, parks and other sites that have been the subject of Land and Water grants of any type cannot be converted to other than public outdoor recreation uses without approval of the National Park Service (NPS). This includes approval of equivalent property to substitute for the converted area. This requirement applies to infrastructure projects that might use parks or other recreational facilities that were funded by Land and Water grants.
- Consulting with NPS and obtaining its approval for equivalent substitution property can be a lengthy process leading to delayed project delivery. The work of the NPS often duplicates the work of the lead Federal agency in identifying equivalent substitute property.
- Eliminating the requirement for NPS approval in identifying and procuring replacement property would eliminate duplicative work and speed project delivery (including where authority has been delegated to States).

SEC. 3121. REDUCE UNCERTAINTY BY ESTABLISHING RECLAMATION TITLE TRANSFER AUTHORIZATION.

- Currently, there is no blanket authorization for Bureau of Reclamation to transfer title to certain federally owned facilities currently operated by non-Federal partners, who are the primary beneficiaries. Congress provides title transfer authority with respect to individual facilities.
- Obtaining authority from Congress to transfer title for each facility individually is arduous and very time consuming, often taking several years. Delays in obtaining title negatively impact the ability of non-Federal partners to obtain private financing to perform required major rehabilitation and replacement needs. As a result, entities may need to request funding from the Federal Government to perform required work.
- Establishing new transfer authority in the Bureau of Reclamation would streamline the process and reduce delays for executing title transfers. This also would facilitate non-Federal partners' ability to seek private financing for major rehabilitation and replacement needs. Additionally, this would give non-Federal partners greater flexibility in setting operating criteria.

SEC. 3122. REDUCE UNCERTAINTY BY AUTHORIZING THE SECRETARY OF THE INTERIOR TO REVIEW AND APPROVE PERMITS FOR NATURAL GAS PIPELINES CROSSING NATIONAL PARK SERVICE ADMINISTERED LANDS.

- Current law delegates to the Secretary of the Interior authority to review and approve rights-of-way across lands administered by the NPS, but only for electric, water and communications facilities. For natural gas pipelines, specific Congressional authorization is needed for each proposed project crossing one of these lands.
- Obtaining congressional approval for each natural pipeline crossing is time consuming and delays construction of needed natural gas pipeline facilities. It also is inconsistent with the process adopted for other types of facilities.
- Authorizing the Secretary of the Interior to approve rights-of-way approvals for natural gas pipelines across NPS-administered land in a manner identical to that for other facilities would reduce the delays and uncertainties caused by requiring congressional approval.

II. DELEGATION OF RESPONSIBILITIES TO STATES

PURPOSE: These principles will streamline and expand existing procedures to delegate environmental review and permitting responsibilities to States. This also would avoid duplication by facilitating reliance on State and local reviews and documentation.

SEC. 3201. EXPAND EXISTING DEPARTMENT OF TRANSPORTATION NEPA DELEGATION PROGRAM TO OTHER INFRASTRUCTURE AGENCIES.

- USDOT surface transportation agencies currently have the authority to delegate their NEPA responsibilities to States, so long as certain conditions are met and the State signs a memorandum of understanding with the USDOT agency. This has resulted in successful delegation of NEPA to 8 States.
- However, the authorization to delegate responsibility only applies to FHWA and FTA.
- Authorizing other agencies to delegate NEPA responsibilities to States would extend the benefit of this program to other types of infrastructure agencies and projects, under requirements similar to those in the DOT NEPA assignment program.

SEC. 3202. ALLOW STATES TO ASSUME SOME OR ALL OF FHWA'S RESPONSIBILITIES FOR APPROVAL OF RIGHT-OF-WAY ACQUISITIONS.

- Currently, there is no specific authorization for States to assume FHWA's responsibilities for authorizing federally funded right-of-way acquisitions. In addition, FHWA regulations require States to obtain authorization before proceeding with any real property acquisition using Federal-aid highway funds.
- Waiting for FHWA can delay the project delivery process for Federal review of what has become a routine activity for States.
- Amending this section to provide States with authority to assume some, or all, of FHWA's responsibilities for approval of right-of-way acquisitions (subject to the same

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legal protections that currently apply to the right-of-way acquisition process) would eliminate these delays. USDOT would retain the right to terminate the delegation if the State were improperly carrying out its responsibilities for approving right-of-way responsibilities.

SEC. 3203. BROADEN NEPA ASSIGNMENT RESPONSIBILITIES TO INCLUDE TRANSPORTATION CONFORMITY DETERMINATIONS.

- Currently, the Surface Transportation Project Delivery Program (“NEPA assignment program”) allows States to fully assume Federal responsibilities under NEPA for highway and transit projects. However, it prohibits USDOT from assigning, and States from assuming responsibility for, any project-level conformity determination required under the Clean Air Act for the same projects (42 U.S.C. 7506).
- This inconsistent treatment of Federal responsibilities diminishes the effect of the NEPA assignment program. It requires the environmental review process that has been assumed by the State to be interrupted by requiring a Federal approval during an environmental review that has otherwise been fully assumed by the State.
- Allowing USDOT to assign, and States to assume, project-level transportation conformity determination as part of the NEPA assignment program would remove an impediment to efficient environmental reviews by States under the NEPA assignment program. Consistent with the requirements of the NEPA assignment program, States would need to demonstrate the technical capacity to make these determinations. This provision would not change EPA’s responsibilities under the Clean Air Act.

SEC. 3204. BROADEN NEPA ASSIGNMENT RESPONSIBILITIES TO INCLUDE NOISE AND FLOOD PLAIN DETERMINATIONS.

- Currently, the NEPA assignment program does not authorize States to assume responsibilities for determinations regarding flood plain protection and noise policies, which would affect determinations made by States during the environmental review process (23 U.S.C. 327).
- Excluding determinations regarding flood plain protection and noise policies diminishes the effectiveness of the NEPA assignment program by requiring States to get Federal approval of their noise policies and flood plain plans, which impacts environmental reviews. This adds additional time and costs and acts as a disincentive for additional States to participate in the NEPA assignment program.
- Allowing DOT to assign, and States to assume, determinations regarding flood plain protections and noise policies would create a more efficient NEPA assignment program and act as an incentive for additional States to participate in the NEPA assignment program. Consistent with the requirements of the NEPA assignment program, States would need to demonstrate the technical capacity to make these determinations.

III. PILOT PROGRAMS

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PURPOSE: These principles create pilot programs to experiment with new ways to address environmental impacts while delivering projects in a more timely and predictable way.

SEC. 3301. PERFORMANCE BASED PILOT.

- This pilot program would experiment with using environmental performance measures instead of an environmental review process to address environmental impacts of an infrastructure project. Up to 10 projects would be selected to participate in the pilot based on project size, national or regional significance, and opportunities for environmental enhancements.
- The project sponsor for a selected project would agree to design its project to meet performance standards and permitting parameters established by the lead Federal agency. The lead Federal agency would develop these standards with public input and in coordination with other cooperating Federal agencies. The project sponsor's agreement to meet the performance standards and permitting parameters would be in lieu of complying with NEPA.
- The performance standards would result in design elements and enhanced mitigation that meet what is needed to address the impacts of the project and to meet permit requirements. The pilot would support the goals and objectives of NEPA without being constrained by its procedural requirements. It would focus on good environmental outcomes rather than a lengthy environmental review process.

SEC. 3302. NEGOTIATED MITIGATION PILOT.

- This pilot program would experiment with negotiation of mitigation to address environmental impacts.
- This pilot would authorize the Secretary of Transportation (or other infrastructure agencies) to establish an alternative decision-making process based on negotiated mitigation agreements and supporting mitigation markets that address anticipated project impacts for a specific set of projects, such as identified high-priority transportation projects or projects obtaining financing through specific grant programs.
- Negotiated mitigation strategies could include purchase of offsets, avoidance of anticipated impacts, and in-lieu-fee dedicated to an advanced mitigation fund.

IV. JUDICIAL REFORM

PURPOSE: These principles would reform judicial review standards for environmental reviews to avoid protracted litigation and to make court decisions more consistent. These would also narrow the scope of judicial review by exempting certain actions or issues from challenge.

SEC. 3401. ASSIGN JURISDICTION OF FAST 41 PROJECTS TO THE COURT OF APPEALS.

- Current court decisions reflect varying interpretations of NEPA, resulting in confusion and uncertainty in how to apply it.

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- Inconsistencies among the courts often result in NEPA documents being drafted to meet the highest court standards to protect against legal challenges. This includes FAST 41 projects that are important infrastructure projects intended to be moved through an expedited environmental review process. In addition, projects that have completed the review process often get substantially delayed due to legal challenges.
- Assigning jurisdiction to the Court of Appeals for FAST 41 projects would mean that these projects, if legally challenged, would be resolved more quickly and consistently.

SEC. 3402. ALLOW THE STOPPING OF A PROJECT AS A JUDICIAL REMEDY ONLY IN EXCEPTIONAL CIRCUMSTANCES.

- Currently, a legal challenge to a project under NEPA can delay the start of a project due to the uncertainty it creates about whether the project will be able to proceed.
- This creates unpredictability regarding time frames for projects, which at the outset can discourage potential investors and in the end can postpone the public benefits of needed infrastructure projects.
- Limiting stopping of a project as a remedy only under exceptional circumstances would allow for environmental concerns to be addressed but without delaying the project in most circumstances.

SEC. 3403. REVISE STATUTE OF LIMITATIONS FOR ANY FEDERAL PERMIT OR DECISION ISSUED FOR AN INFRASTRUCTURE PROJECT TO 150 DAYS.

- Currently, for many infrastructure projects, the statute of limitations allows plaintiffs to file legal challenges to Federal permitting and authorization decisions for up to five years after the decisions have been issued.
- Infrastructure projects require significant investment in time and resources. Delays and uncertainty caused by legal challenges to environmental and permitting decisions inhibit investment in projects and impede the delivery of public benefits from improved infrastructure. These delays and uncertainties are exacerbated by long statutes of limitations, creating uncertainty well after decisions have been made.
- Establishing a uniform statute of limitations of 150 days for decisions and permits on infrastructure projects would reduce uncertainty and prevent substantial delays in project delivery, while still affording affected parties an adequate opportunity to bring legal challenges. A 150-day statute of limitations would be consistent with the statute of limitations Congress already has enacted for surface transportation projects.

SEC. 3404. REDUCE THE STATUTE OF LIMITATIONS UNDER THE FAST ACT PROVISION ALLOWING STATES TO SUBSTITUTE COMPARABLE STATE LAWS UNDER NEPA.

- The statute of limitations for legal challenges to be filed against surface transportation projects is 150 days. However, under the program in which States can substitute comparable State laws for NEPA (“NEPA substitution program”), the statute of limitations is two years (23 U.S.C. 330).

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- This longer statute of limitations is an impediment to States applying to participate in the NEPA substitution program.
- Revising the statute of limitations for the NEPA substitution program to 150 days would align it with the statute of limitations for other surface transportation projects and remove a barrier to States using this program.

SEC. 3405. EXEMPT THE ESTABLISHMENT OF CATEGORICAL EXCLUSIONS FROM JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURES ACT (APA).

- “Categorical exclusion” is a classification established in CEQ regulations but is not identified or defined in the NEPA statute. Categorical exclusions are developed based on agency experience and expertise as a way to create efficiencies in environmental review procedures for impacts that are not significant. CEQ reviews and approves the establishment of categorical exclusions, pursuant to CEQ NEPA regulations.
- Legal challenges to categorical exclusions reduce the time savings they are intended to create. These challenges also put courts in the position of second-guessing the expertise of Federal agencies.
- Clarifying that categorical exclusions developed by Federal agencies and approved by CEQ should be given deference by courts and not subject to judicial review under the APA would reduce delays without reducing protections to the environment. This clarification also would allow agencies to use their expertise and experience to determine what types of action can appropriately be classified as categorical exclusions.

SEC. 3406. CODIFY THAT A BIOLOGICAL OPINION IS NOT A FINAL AGENCY ACTION SUBJECT TO LEGAL CHALLENGE.

- Currently, the ESA requires the preparation of a Biological Opinion under certain circumstances to advise agencies that are taking actions that could affect endangered species. The ESA does not require that agencies follow the advice in the Biological Opinion.
- A Supreme Court decision (*Bennett v. Spear*) found otherwise, concluding that a Biological Opinion is determinative and may be the subject of a legal challenge. This decision is contrary to the clear language of the ESA and the commonly understood definition of “opinion.”
- Codifying that a Biological Opinion is advisory and not subject to legal challenge would help avoid premature law suits filed before actions are decided. This also would re-establish the discretion given to the acting agency to accept or reject the advice given in the Biological Opinion.

SEC. 3407. PROVIDE AGENCIES DEFERENCE ON CLAIMS BASED ON THE CURRENTNESS OF DATA USED IN FEDERAL ENVIRONMENTAL REVIEWS AND PERMITTING DECISIONS.

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- Environmental reviews and permitting decisions require in depth studies and data. These reviews can be costly and time consuming. Project sponsors and Federal agencies are expected to use current data in conducting their environmental and permitting reviews.
- With projects spanning several years, a project sponsor may need to conduct multiple studies to generate data on the same issue. While using complete and up-to-date data is necessary to make an informed decision, litigation risk should not be the primary driver in deciding whether to do a new study.
- Directing Federal agencies to establish guidelines as to when new studies and data are required would clarify requirements and create more certainty in the NEPA process. Courts would grant agencies judicial deference on whether the data was current, so long as agencies were in compliance with CEQ's guidelines.