Analysis: Complexity and controversy cloud US permitting reform

Changes to the US National Environmental Policy Act aim to streamline the process of environmental review — but face partisan disagreement and NGO concern. Steve Gilmore explores the implications.

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A last-minute agreement to raise the US debt ceiling earlier this month involved significant reforms to the National Environmental Policy Act (NEPA), including limiting the environmental review process for new infrastructure developments. Whether these changes will make it easier to build energy infrastructure remains unclear. What the reforms do highlight, however, is the challenges inherent in making effective improvements to the country's contentious permitting process.

Permitting reform in the US has become highly divisive. Environmental organisations are often hostile to attempts to streamline the NEPA review process, because they worry they will help greenlight fossil fuel projects in spite of community opposition. But energy organisations — representing both renewable and fossil fuel industries — say the existing NEPA review process makes it too hard to build vital power infrastructure.

Reaction to the latest reforms has fallen predictably along these lines. Environmental NGOs and campaigners have condemned the new NEPA amendments, which are outlined in the Fiscal Responsibility Act of 2023 (FRA). The American Clean Power Association and the National Rural Electric Cooperative Association, on the other hand, are both positive on the permitting reforms, and want see additional action taken.

Exploring the implications

For the environmental and sustainability (E&S) consulting sector, wind and solar projects are among the hottest markets when it comes to environmental planning and permitting, and the NEPA reforms are likely to have impacts on these.

"The reforms will have implications for the E&S consulting sector and industry professionals are exploring what these changes really mean," says Kathleen Riek, a NEPA programme manager at consulting major Stantec.

Some of the NEPA reforms reflect previous regulatory changes, others are new. Importantly, the FRA translates these regulatory changes into law, which in turn makes them far harder for any future administration to alter.

More specifically, the FRA enshrines in law and clarifies the designation of a single, lead federal agency to coordinate with other participating agencies when considering a given proposal.

Any proposal must be assessed in a single environmental document. There is a two-year limit on conducting Environmental Impact Statements (EIS) and a one-year limit for environmental assessment. EIS and environmental assessments have strict page limits.

The American Wind Energy Association (AWEA) is among the organisations that suggest time limits, page limits and clarification on the role of a lead agency could all help improve the NEPA review process. In 2021, the average time to prepare an EIS across all agencies was 4.5 years.

Stantec's Riek notes that the latest reforms also narrow the definition of a "major federal action" — which triggers the NEPA process — in a way that could result in fewer actions. "The reforms also instruct the Council on Environmental Quality (CEQ) to study the potential for online and digital technologies to address delays and reviews, as well as improve public accessibility and transparency," she says.

One of the changes causing environmental campaigners the most concern surrounds the use of "categorical exclusions" to the NEPA process. They worry that exclusions will be used to push through fossil fuel projects in spite of community opposition. Hannah Perls, a senior staff attorney at Harvard University's Environmental & Energy Law Program, notes there are instances where an exclusion could be a useful and efficient tool, but also situations where the regulation could be open to abuse.

Similarly, there has been much focus on the scope of agency review, which the NEPA reforms have tailored. Agency review must focus on "reasonably foreseeable" environmental effects and impacts,

which includes the effect of not approving the proposal. A review must also consider "a reasonable range of alternatives" to a proposal that "are technically and economically feasible."

Interpreting language changes

This could mean that an agency has to consider the wider environmental impact of not approving a wind or solar project. But lawyers say much will depend on how these regulations are interpreted, and by which entity and administration.

"So many of these particular language changes will be interpreted through the course of a project's journey through the NEPA process," says Riek. "There could also be future case law that makes a decision on whether a project did or did not properly interpret these changes."

Another source of NGO concern is the ability of project sponsors to prepare an EIS or environmental assessment, under supervision and guidance from a lead agency. Campaigners are concerned that fossil fuel project developers will be able to take advantage of under-resourced federal agencies to push through proposals. Once again, the devil will be in the details. How the specific regulations are laid out and whether federal agencies have sufficient capacity to assess sponsor-prepared EIS remains to be seen.

Policy analysts argue that whether or not permitting reform makes it easier to build infrastructure will depend on identifying and addressing the underlying issues. Where permitting spans multiple agencies, departments and individuals, reforms clarifying the role of a lead agency could improve coordination. But where agencies simply lack staffing capacity, giving them a tighter time frame and page count may not help.

In the meantime, another round of permitting reform is on the horizon, and there are other permitting reform bills being promoted. "The industry is expecting a second round of changes to the regulations that implement NEPA, which will no doubt address the new amendments from the FRA," says Riek. "So there is more regulatory change to come."

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