

Issue Brief

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The National Environmental Policy Act: A Roadblock to Infrastructure and How to Fix it

With the recent enactment of the \$1.9 trillion American Rescue Plan Act, the Biden administration is in the process of turning their attention to the next item on the “Build Back Better” agenda. According to Congressional leadership and the president himself, it seems Congress will attempt to pass a large scale infrastructure, climate, and tax package. It remains to be seen whether congressional leaders will attempt to pass this package by party line vote through the unique budget reconciliation process or via a bipartisan effort. Either way, Washington will be consumed with the prospect of a long-elusive infrastructure bill for the next several months. However, the recent history of infrastructure policy has shown that talking about an infrastructure deal is much easier than turning it into actual policy.

The political reality of slim Democratic majorities in the House and Senate makes it difficult for Democratic leaders to use budget reconciliation, as they can only afford three defections in the House and not a single Senator to vote against their plan. On the flip side, the filibuster means any package will require at least 10 Republican Senators’ support in order for a package to reach the

Key Facts:



A large scale infrastructure package has the potential to become law, but any final legislation should include reforms to the outdated National Environmental Policy Act.



NEPA reviews have grown significantly since it was enacted 50 years ago, which has increased the time and cost of infrastructure projects.



Removing burdensome federal mandates can lower construction costs and boost transportation development.

president's desk for his signature. As it stands, there is little Republican appetite for a \$4 trillion spending bill. Consequently, if any infrastructure bill were to take shape, it would need to be bipartisan, targeted, and fiscally responsible in order for it to have a realistic chance at becoming law.

NTU supports congressional efforts to rebuild and modernize transportation structures, encourage private-sector investment in broadband, and improve overall infrastructure. In addition to raising important public safety concerns, outdated infrastructure hampers the ability of American businesses to remain competitive in a globalized world. Meanwhile, workers and self-employed Americans lose the equivalent of tens of billions of dollars in time and productivity, whether through traffic congestion or severely damaged roadways. A modernized infrastructure and transportation system will ensure that individuals and businesses maximize their growth potential.

Unlocking our nation's infrastructure potential is more important than ever, and we urge Congress to seriously make infrastructure a priority this year. It must be noted, however, that the biggest roadblock to building and repairing existing roads, bridges, and tunnels stems not from a lack of funding, but rather overly burdensome regulations like those contained in the National Environmental Policy Act of 1969 (NEPA). This 50 year old statute is designed to ensure infrastructure and energy projects consider environmental factors prior to development. Agencies must consider the aesthetic, historic, cultural, economic and social effects of proposed actions. This vague mandate sets the stage for stifling red tape, bureaucratic discretion, and endless legal challenges by environmentalists.

The overall goal of NEPA is well intended: to protect the environment and the American people from overbuilding, pollution, and noise pollution. However, 50 years since its enactment, it's clear that NEPA has had a negative effect on the economy and jobs, as well as the ability to complete new construction projects. In fact, [according to the Department of Treasury](#), the average time to complete a NEPA study increased from 2.2 years in the 1970s, to 4.4 years in the 1980s, to 6.6 years in 2011. Every delay increases project costs and postpones the benefits of modern — and safer — infrastructure with little evidence of an environmental benefit.

For taxpayers and private investors that finance these projects, it should be unacceptable that these needless delays continue to swell. The United States has a long tradition of building impressive structures, and the government-driven delays ingrained into our permitting process undermines this history.

So, as Congress yet again sets out on a goal to enact a large scale infrastructure bill, policymakers must pair new and existing spending with reforms to NEPA. Simply adding trillions of dollars in spending to the national debt without regulatory reform, proper oversight, and careful prioritization is financially unsustainable and irresponsible. Furthermore, such spending will only further metastasize a bureaucratic, federally driven process that has plagued Washington for decades.

It is imperative that the new administration and Congress focus on maximizing the value of every already-appropriated infrastructure dollar and retooling existing regulations that are inefficient or unnecessary. The federal government has a well documented history of squandering taxpayer dollars on projects that could be funded by the private sector, state governments, or not funded at all. Congress must include regulatory reforms to reduce the private sector costs associated with the planning, permitting, and construction of federally assisted infrastructure projects.

In a previous [issue brief](#), NTU offered a series of policy recommendations on regulations that should be included in any upcoming infrastructure package. Those proposals ranged from procurement and labor reform, to new revenue streams that can bridge the funding gap. In this piece, NTU explores solely reforms Congress should consider to NEPA. In our view these reasonable changes can foster a more competitive, nimble, and responsible approach to transportation and infrastructure in the United States.

What is the National Environmental Policy Act?

Beginning in the late 1950s and through the 1960s, Congress reacted to increasing public concern about the impact that human activity could have on the environment. After a decade of hearings, public input, and growing public support for legislation, the Congress crafted the “National Environmental Policy Act,” perhaps the most significant environmental legislation ever signed into law. Despite being a large scale piece of legislation that fundamentally changed how projects are constructed, the NEPA passed the U.S. Senate unanimously, and passed the House with relatively minor opposition - a feat that would be almost impossible in today’s political climate. It was signed into law by President Nixon on January 1, 1970. At the time of the bill signing, the President noted this law would allow the United States to regain a “productive harmony between man and nature.”

The purpose of the NEPA is to establish a balance between nature and environmental protection, and human activities. To meet this delicate balance, the law requires federal agencies to consider every significant aspect of the environmental impact of an action before proceeding with it. Additionally, it ensures that the agency responsible for the action will inform the public what the action is and that it has considered environmental concerns in its decision-making process.

In order to meet these requirements, NEPA requires federal agencies to provide a detailed statement of environmental impacts, subsequently referred to as an environmental impact statement (EIS), for every recommendation or report on proposals for legislation and other major federal action significantly affecting the quality of the human environment. The act also created the Council on Environmental Quality (CEQ) in the Executive Office of the President. Among other duties, CEQ provides oversight of NEPA’s implementation.

Unfortunately, Congress has not passed any NEPA reform legislation since its enactment despite significant changes to our economy and the construction industry. According to [expert testimony](#) to the House Ways and Means Committee during a 2019 hearing on infrastructure, DJ Gribbin stated “the current NEPA process is a train wreck of subjectivity, leaving project developers in a quandary as to what environmental impacts need to be studied and to what extent.” NEPA regulations are unnecessarily burdensome, lengthy, and open to costly lawsuits - all of which either increase the total cost of a project or result in needless delays. As a result, the average NEPA review now takes, on average, 4.5 years to complete, with many projects taking more than 6 years to complete. For these projects, the average length of a NEPA-required Environmental Impact Statement (EIS) averages 600 pages, according to the CEQ.

Changes to NEPA Under the Trump Administration

Several major Trump-era regulations concerning NEPA were either partly or fully in effect when President Biden took office. Here’s a brief overview of the current status for several of those initiatives:

July 2020 Modernization Regulations. On July 15, 2020, President Trump announced that the CEQ finalized a new set of regulations to modernize the NEPA process. These modernizations are the first significant update in more than 40 years and are meant to streamline environmental review of federally approved or funded projects. Specifically, these new regulations streamline the Environmental Assessment and Environmental Impact Statement processes. Additionally, under the revised regulations, EAs must be prepared within one year, and EISs in two years and cannot be longer than 150 pages. Smaller projects are also exempted from some of these regulatory requirements.

Executive Order 13927. This Executive Order was issued in June 2020 as a way to boost job creation by expediting the review process of infrastructure projects. Specifically, this Executive Order calls for

agencies to provide reports to the White House listing projects, activities, and decisions that the agencies will attempt to move forward under expedited review. As it relates to NEPA, this EO allows federal agencies and the CEQ to provide “flexibility” to comply with those existing NEPA regulations. Eliminating delays that hold up projects will have the same impact as increasing funding, and it will let workers get back on the job improving our infrastructure environment.

Executive Order 13807. This Executive Order was issued in August of 2017 and implemented a new federal directive called “One Federal Decision,” which gives singular responsibility to one agency for shepherding projects through multi agency reviews and keeping agencies to one timetable. Additionally, this EO required the CEQ to create a list of action items in order to reduce the average time for environmental review and approval. The EO also limits the number of pages of an Environmental Impact Statement (EIS) to 150 pages, with an allowance of up to 300 pages for “complex” projects, as well as a completion date within 365 days. The order also included provisions to assess process deficiencies at each agency, develop remedial action plans, bring transparency to the costs of reviews and approval delays, and add projects to the online Permitting Dashboard.

Executive Order 13766. This Executive Order was issued in January 2017 to expedite the environmental review process for high priority infrastructure projects currently under NEPA review. Specifically, this EO was used to streamline the permitting process for infrastructure projects, especially in terms of the environmental review process. EO 13766 recognized the need to “upgrad[e] critical port facilities, airports, pipelines, bridges, and highways” and set up a process to have such projects designated as “high priority” by the CEQ.

A Pro-Taxpayer, Market-Based Path Forward for Regulatory Reform through Congress

Building United States Infrastructure through Limited Delays and Efficient Reviews (BUILDER) Act: The BUILDER Act is arguably the most comprehensive NEPA reform legislation ever introduced in the U.S. Congress. At its core, this proposal would codify many of the modernization efforts by the Trump administration. The bill codifies clear timelines for environmental approvals, clarifies EIS and EA requirements for smaller projects, and improves public engagement. The reforms included in the BUILDER Act would help reduce costs and speed up project approvals so that more projects can be built safely and efficiently.

One Federal Decision Act. This legislation codifies into law President Trump’s One Federal Decision Executive Order of August of 2017. This legislation would reform the project permitting process by placing a two-year timeline for government completion of environmental reviews and by consolidating the process across federal agencies. The new two-year deadline for environmental reviews and authorization for major infrastructure will convey a greater degree of certainty in a growing market and reduce the capability of the federal government to unduly limit the potential of the construction industry. Additionally, the One Federal Decision Act streamlines the approval process by requiring only a single environmental document instead of multiple documents, as well as a single standardized permitting process.

Federal Permitting Modernization Act. This legislation brings much needed reforms to streamline the approval process and roll back burdensome delays. Specifically, it would establish deadlines for federal agencies to act under NEPA in order to minimize the number of delays. The new deadlines laid out in this bill would convey a greater degree of certainty in a growing market and reduce the capability of the federal government to unduly limit the potential of the construction industry. Importantly, by cutting delays, builders will be able to employ more workers and bring their infrastructure projects online ahead of schedule and under budget.

NEPA Data Transparency Act. This legislation would bring more transparency and accountability to the federal bureaucracy when they determine NEPA costs. Specifically, this bill would require each federal agency to report to Congress on their NEPA activity every year, and require OMB to tally the cumulative annual NEPA costs. It is important for American taxpayers and businesses to know the full cost of NEPA's regulatory burdens so they can plan for the future. Additionally, knowing how these burdens impact businesses could spur further reforms from Congress.

Reducing Environmental Barriers to Unified Infrastructure and Land Development (REBUILD) Act. This legislation would roll back unnecessary red tape in the bureaucracy that hinders the development of infrastructure resources. Specifically, the BUILD Act allows any state to enter into a Memorandum of Understanding with a designated federal agency, which has environmental review responsibilities under NEPA, and assume the review responsibilities of that agency. According to the bill sponsor this legislation is “modeled after a pilot program created in SAFETEA-LU (Section 327 -Title 23 USC) that allowed a limited number of states to take on the task of ensuring National Environmental Policy Act (NEPA) compliance for highway projects under the Federal Highway Administration (FHWA). In those states that chose to assume this responsibility, the length of time to complete a project review was reduced by an average of 17 months while also ensuring the goals of the NEPA process were not compromised.”

Unintroduced NEPA Legislation from 2018. A 2018 draft legislation by Rep. Bill Shuster, then-Chairman of the House Transportation and Infrastructure Committee, included language to create a pilot program to permit waivers from some NEPA rules and regulations for a select number of projects that adopt innovative practices. These practices can include integrating environmental harm mitigation strategies, enabling more public discussion in decision making, or focusing on environmental and transportation outcomes rather than processes. Section 403 from that draft legislation would encourage private sector innovation and potentially bring more projects online faster, all the while protecting the environment.

Conclusion

With policymakers in Washington set to make a run at enacting a comprehensive infrastructure package, it remains to be seen how likely such a package might pass the Congress. Reports peg the Biden infrastructure and climate package could total almost \$4 trillion—a significant sum following the recently enacted \$1.9 trillion COVID relief bill. The best way to revitalize America's infrastructure and modernize the transportation system is to ensure tax dollars are allocated efficiently and projects are not unduly tangled in red tape. Capitalizing on the power of market incentives and innovation will enable the infrastructure needs of the United States to be met in a fiscally responsible manner.

The most significant law on the book that must be reviewed and reformed is the National Environmental Policy Act, which hasn't been updated in any meaningful way since its passage over 50 years ago. Any infrastructure bill must include sensible reforms to this antiquated law. The bottom line is that NEPA reforms would be a major step forward for infrastructure projects and for taxpayers. Being able to deliver more projects on time will be a boon to Americans and taxpayers everywhere. As this issue brief illustrates, there are no shortage of proposals that would improve and reform NEPA.

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