

**Written Testimony of Professor Jamie Pleune,
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Subcommittee on Oversight and Investigations
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Hearing on “The Biden Administration’s Executive Overreach
and its Impact on American Energy Independence”**

Thank you, Chairman Gosar and Ranking Member Stansbury for the opportunity to testify today. My name is Jamie Pleune. I am an Associate Professor of Law (Research) at the S.J. Quinney College of Law, University of Utah and a Wallace Stegner Center Fellow.

The Wallace Stegner Center provides objective and actionable research on contemporary environmental issues. The non-partisan Law and Policy Program at the Wallace Stegner Center has done extensive empirical research into different aspects of the National Environmental Policy Act and its implementation. My testimony today reflects the results of that research and my personal observations. I do not speak on behalf of the University of Utah, and the views I express do not necessarily represent the views of the state of Utah, or the University of Utah.

I. Research Does Not Substantiate the Claim that NEPA Causes Delays.

The National Environmental Policy Act is often blamed for delays in the permitting process. However, research does not support that characterization. Multiple studies have found that the NEPA analysis is rarely the primary cause of delay, even though delays may be reflected in the NEPA process.¹ Analysis on a project may stop and restart for external reasons such as funding, engineering requirements, changes in agency priorities, delays in obtaining non-federal approvals, or political opposition to the project.² These delays create the appearance of a long NEPA process, because the NEPA process marks a public beginning and ending, even though the NEPA analysis did not cause the delay.³

¹ RYAN SUD, SANJAY PATNAIK & ROBERT GLICKSMAN, THE BROOKINGS INSTITUTE, HOW TO REFORM FEDERAL PERMITTING TO ACCELERATE CLEAN ENERGY INFRASTRUCTURE: A NONPARTISAN WAY FORWARD 14 (Feb. 2023).

² GOVERNMENT ACCOUNTABILITY OFFICE, GAO-14-379, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 15 (Apr. 2014); LINDA LUTHER, CONG. RES. SERV., R4279, THE ROLE OF THE ENVIRONMENTAL REVIEW PROCESS IN FEDERALLY FUNDED HIGHWAY PROJECTS: BACKGROUND AND ISSUES FOR CONGRESS 9 (Apr. 11, 2012) (“The environmental review process may start, stop, and restart for reasons unrelated to environmental issues. Local and state issues have shown to have the most significant influence on whether a project moves forward relatively quickly or takes longer than anticipated.”).

³ EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010-2018) 2 (June 2020) (“For some EISs, the timeline does not represent continuous activity. Delays may be attributable to the agency, the applicant, Congress, the needs of cooperating agencies, States, Tribes, and local interests, or public controversy.”); John C. Ruple, Jamie Pleune & Erik Heiny, *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, 46 COLUM. J. ENV’T L. 273, 304 (2022) [*hereinafter* Ruple et al. *Evidence-Based Recommendations for Improving Implementation of NEPA*] (conducting a detailed analysis of NEPA decisionmaking times and observing that complex projects can be completed quickly and simple projects subject to a truncated NEPA analysis may encounter delays); Executive Office of the President, Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018) 8 (June 2020)

Additionally, the NEPA process may provide the structure for multiple different and independent permitting decisions. As the Congressional Research Service observed, “Most agencies use NEPA as an umbrella statute—that is, a framework to coordinate or demonstrate compliance with any studies, reviews, or consultations required by any other environmental laws.”⁴ This can create confusion because the need to comply with another law may be identified during the NEPA process, but NEPA is not the source of the obligation.⁵ In fact, there is some evidence that the structure provided by the NEPA analysis actually reduces decisionmaking times.⁶

The NEPA process can also reduce costs by identifying design problems before implementation of a project begins. A study prepared for the Transportation Research Board emphasized this potential benefit. “Spending more monies during planning and design will reduce the time and cost required for construction by avoiding unforeseen conditions, reducing to a minimum design errors and omissions, and developing schemes that will support the most efficient approach to construction.”⁷ For these reasons, projects exempted from NEPA may not be faster or cheaper. Instead of achieving speed by exempting projects from NEPA, permit reform should distinguish between productive and unproductive delays in the permitting process,⁸ and focus on eliminating the latter.

II. NEPA Decisionmaking Times Vary Significantly and Projects That Encounter Extensive Delays Are the Exception, Not the Norm

Working with my colleague, John Ruple, and another colleague, Erik Heiny, at Utah Valley University, we analyzed 41,000 NEPA decisions made by the Forest Service at all levels of review.⁹ This is one of the most comprehensive investigations into NEPA decisionmaking times that has been undertaken.¹⁰

⁴ CONG. RES. SERV, RL 33152, THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): BACKGROUND AND IMPLEMENTATION 1 (Jan. 10, 2011).

⁵ *Id.*; see also Ruple et al. *Evidence-Based Recommendations for Improving Implementation of NEPA* supra note 3 at 317-322 (exploring this dynamic with the National Forest Management Act).

⁶ John C. Ruple et al., *Does NEPA Help or Harm ESA Critical Habitat Designations? An Assessment of Over 600 Critical Habitat Rules*, 46 Ecology L.Q. 829, 842 (2019) (finding that critical habitat designations subject to NEPA review were completed an average of 93 days faster than those that were not subject to NEPA review).

⁷ LINDA LUTHER, CONG. RES. SERV. R.42479, THE ROLE OF THE ENVIRONMENTAL REVIEW PROCESS IN FEDERALLY FUNDED HIGHWAY PROJECTS: BACKGROUND AND ISSUES FOR CONGRESS 36 (Apr. 2012) (citing H.R. THOMAS AND R.D. ELLIS, *AVOIDING DELAYS DURING THE CONSTRUCTION PHASE OF HIGHWAY PROJECTS*, TRANSPORTATION RESEARCH BOARD, NATIONAL RESEARCH COUNCIL, NCHRP 20-24 (Oct. 2001)).

⁸ Jamie Pleune, *Playing the Long Game: Expediting Permitting Without Compromising Protections*, 52 ENV. L. REP. 10893, 10896-07 (2022) [*hereinafter* Pleune, *Playing the Long Game*].

⁹ Ruple et al., *Evidence-Based Recommendations for Improving NEPA Implementation* supra note 3 at 294.

¹⁰ See also Forrest Fleischman et al., *U.S. Forest Service Implementation of the National Environmental Policy Act: Fast, Variable, Rarely Litigated, and Declining*, 118 J. of Forestry 403, 408 (2020) (conducting a descriptive analysis of a slightly different set of data from the Forest Service MYTR database); Exec. Office of the President, Council on Env't Quality, *Environmental Impact Statement Timelines (2010-2018)* 1 (June 12, 2020) (providing description of government-wide EIS decisionmaking times).

The first question we sought to answer was, “how long does the NEPA process actually take?” We found that the median time to complete an EIS was 2.8 years. For an EA, it was 1.2 years. And for a CE, the median was only 4 months.¹¹

More importantly, only 2 percent of all decisions were made through an EIS.¹² The other 98% of NEPA decisions faced less rigorous review. The median time for projects with well-understood and insignificant impacts was only 4 months.

This approach makes sense. Projects with insignificant and well-understood impacts should receive quick approval, and the research shows that they usually do. On the other hand, projects that will impose significant impacts on communities, create hazards to health, threaten clean water, compromise clean air, or destroy natural resources deserve more rigorous review. The permitting process ensures that each project adheres to basic environmental and safety standards. The NEPA process creates a mechanism to explore whether a potentially harmful project can be adjusted to avoid, reduce, or mitigate harmful consequences. This approach has protected communities and resources from poorly contemplated projects for over 50 years.

While there are ways, which I will discuss, to improve the efficiency of permitting and the NEPA process, eliminating environmental standards or reducing analytical rigor is a poor choice that does not address the true sources of unproductive delay.

III. True Causes of Delay Can Be Addressed Without Compromising Environmental or Safety Standards.

Permit reform should be driven by accurate data that defines the scope of the problem. The available data indicates that only a small percentage of NEPA decisions encounter excessive delays of the type that are commonly relied upon as anecdotal evidence.

For example, in 2016, the Government Accountability Office studied processing times for mine permit applications.¹³ Between 2010 and 2014, the BLM and the Forest Service approved 68 mine plans of operations. The majority (55%) were processed in less than 18 months, and 63% were processed in under two years. The remaining 37% were spread across a wide timeframe, with only six applications (less than 10%) taking longer than four years.

A similar trend is visible in the Forest Service data. Only projects in the 75th percentile of EISs took longer than four years.¹⁴ Because there were only 870 EISs total, that means roughly 217 documents took longer than four years over 16 years. In contrast, at least 28,552 decisions were made in less than 1.2 years.¹⁵ In other words, efficiency is possible, and it happens. It is also

¹¹ *Id.* at 293.

¹² *Id.* at 289. *See also* GOVERNMENT ACCOUNTABILITY OFFICE, GAO-14-379, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 8 (Apr. 2014) (estimating that government-wide, less than 1% of NEPA decisions are EISs, 5% are EAs, and 95% are CEs).

¹³ GAO, HARDROCK MINING: BLM AND FOREST SERVICE HAVE TAKEN SOME ACTIONS TO EXPEDITE THE MINE PLAN REVIEW PROCESS BUT COULD DO MORE 6-7 (2016).

¹⁴ Ruple et al., *Evidence Based Recommendations for Improving NEPA* *supra* note 3 at 297.

¹⁵ *Id.* at 289 and 297 (showing that there were 6,881 EAs, 50% of which were completed in less than 1.2 years and there were 33,143 CEs, at least 75% of which were completed in less than one year).

important to keep the big picture in focus. The commonly cited statistic that permits take six years represents less than 1% of all NEPA decisions.

Moreover, analytical rigor does not appear to be the primary cause of delay.¹⁶ When we used a regression model to identify causes of delay, we learned that NEPA specific factors could not predict whether a project would encounter a delay.¹⁷ Instead, the most common causes of delay were functional and external to the NEPA analysis. Those were: (1) agency capacity, which includes both staff availability and appropriate expertise; (2) delays attributable to the operator including waiting for information, changed plans of operation, and shifting priorities; and (3) compliance with other laws, which includes coordination with other permitting authorities.¹⁸

Notably, both the GAO and the National Research Council made the same observations regarding delays in the mine permit application process.¹⁹ Three prominent causes of delay were: (1) insufficient resources, including staff, expertise, funding, or technology; (2) waiting for operator responses following vague applications or changes to a mine plan; and (3) compliance with other legal standards and/or ineffective agency coordination during the mine plan review process.²⁰

Even permits that can be processed quickly are affected by these factors. A 2014 investigation by the Office of Inspector General into BLM permit processing times for oil and gas wells emphasizes this point.²¹ The BLM receives approximately 5,000 new APDs each year, which are processed at 33 different field offices. According to the BLM, the average processing time in 2012 was 228 days, but this number only tells part of the story. Even though each field office is governed by the same legal standard, the permit processing times varied widely. Buffalo, WY and Miles City, MT took more than 300 days to process permits. In contrast, five field offices took less than 100 days. Anchorage, AK averaged 37 days.

This dramatic variation in permit processing times cannot be blamed on NEPA or environmental standards because each field office was applying the same legal standard to the same activity. Sources of delay were a lack of staff, poor data management, and weaknesses in oversight and accountability.²² Even though BLM had repeatedly identified staffing shortages as a problem, limited budgets combined with a high cost of living made it difficult to attract and retain employees. Field offices with staff shortages experienced prolonged review times. Permit coordination and management also mattered. Most field offices did not assign a manager to oversee the APD process, resulting in an open-ended process where applications languished and no one could predict when the application would be finished. Field offices that did assign field

¹⁶ *Id.* at 302-303.

¹⁷ *Id.* at 300-306.

¹⁸ *Id.* at 306-322.

¹⁹ GOV'T ACCOUNTABILITY OFF., GAO-16-165, *HARDROCK MINING: BLM AND FOREST SERVICE HAVE TAKEN SOME ACTIONS TO EXPEDITE THE MINE PLAN REVIEW PROCESS BUT COULD DO MORE* (2016); NATIONAL RESEARCH COUNCIL, *HARDROCK MINING ON FEDERAL LANDS* (1999).

²⁰ See Pleune, *Playing the Long Game supra* note 8 at 10900-10906 (discussing these studies).

²¹ OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF THE INTERIOR, *ONSHORE OIL AND GAS PERMITTING*, U.S. DEPT. OF INT., REPORT NO. CR-EV-MOA-0003-2013 (June 2014).

²² *Id.* at 6.

managers processed permits in less than half the average time.²³ In other words, improving permit coordination resulted in faster permit processing times.

The consistency of these findings across time, agencies, and practice constitute reliable evidence as to the real causes of delay in permit processing. These delays can be summarized as: (1) agency capacity; (2) delays attributable to the operator; and (3) permitting coordination. These findings demonstrate that the choice between speed and environmental standards is a false dilemma. Each of the true sources of delay can be addressed without compromising environmental standards that protect safe, healthy, and clean communities.

IV. Permit Reform That Addresses the True Causes of Delay

We can improve permit processing times by bolstering agency capacity, fostering early communication with permit applicants, and improving permit coordination. Notably, improved communication and better coordination depend on sufficient agency capacity. So the first step for permit reform should be to focus on agency capacity.

1. Building Agency Capacity Requires Long-Term Funding and Strategic Workforce Planning.

Wisely, Congress has already taken a step in the right direction. The Inflation Reduction Act contained roughly \$1 billion directed toward improving agencies' environmental review processes and NEPA implementation. These funds are a critical—and encouraging—first step; however, the journey is not over. Agencies must rebuild from chronic shortages. Additionally, the funding must be reliable and sustained to allow agencies to implement strategic workforce plans, retain experienced staff, and engage in proactive planning that can facilitate faster decisionmaking. Finally, agencies must have flexibility to spend the funds in the area of greatest need.²⁴

Many agencies that were already understaffed suffered extreme losses of staff under the last Administration. The Bureau of Land Management offers an instructive case study.²⁵ Since 2011, it has been on the GAO's list of programs at high risk and vulnerable to waste, fraud and abuse due in part to a lack of staff. This problem was further exacerbated in July 2020, when the last Administration abruptly decided relocate BLM's headquarters from Washington D.C. to Grand

²³ The Field Office in Silt, CO which uses supervisors, averaged 108 days in FY2012 versus the bureau wide average of 228 days. The field office in Carlsbad NM uses a field manager, as well as an in-house automated tracking system. Its processing times average 110 days. *Id.* at 7.

²⁴ See OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF THE INTERIOR, ONSHORE OIL AND GAS PERMITTING, U.S. DEPT. OF INT., REPORT NO. CR-EV-MOA-0003-2013, 10 (June 2014) (noting that Congress had allocated funding to seven field offices as a pilot project for improving oil and gas processing times through expanded capacity; however those field offices no longer carried the heaviest workload due to shifting development patterns and the act did not allow BLM to transfer the special funding to offices with the greatest need).

²⁵ This discussion draws heavily from the following article. Jamie Pleune & Ted Boling, *This Permit Reform Works. Why Aren't Mine Projects Using It?* 53 *Env't'l L. Rep.* ____ (forthcoming June 2023) [*hereinafter* Pleune & Boling, *This Permit Reform Works*]. See also GOV'T ACCOUNTABILITY OFF., GAO-20-379R, BUREAU OF LAND MANAGEMENT: AGENCY REORGANIZATION EFFORTS DID NOT SUBSTANTIALLY ADDRESS KEY PRACTICES FOR EFFECTIVE REFORMS (Mar. 6, 2020) and GOV'T ACCOUNTABILITY OFF., GAO-22-104247, BLM, BETTER WORKFORCE PLANNING AND DATA WOULD HELP MITIGATE THE EFFECTS OF RECENT STAFF VACANCIES (Nov. 2021).

Junction, Colorado. The Headquarters Office, which develops guidance and regulations, should be staffed by 311 career positions. However, it was already severely understaffed with 132 vacant positions before the relocation announcement. In response to the relocation announcement, 81 more staff left, leaving the leadership at 31 percent capacity. The remaining leadership team were dispersed among multiple offices.

Numbers do not tell the whole story. The BLM also suffered a loss of experienced staff. Every BLM staff member interviewed reported that the loss of experienced staff negatively affected their offices' ability to conduct its duties. For example, the loss of institutional knowledge about laws and regulations meant that the BLM could not provide knowledgeable input on proposed rules and legislation. Other staff admitted that the rapid loss of experienced staff hindered knowledge transfer. In a follow-up report, a year later, all BLM staff interviewed by the GAO reported challenges in completing their duties due to headquarters vacancies. As a result of delays in creating or clarifying guidance or policies, some staff relied on outdated policy guidance to make decisions. Other staff reported delays implementing upgrades to information technology systems, which GAO had previously recommended be updated. Obviously these institutional challenges would affect permitting times. Applicants could not receive good guidance from experienced staff, and staff members processing permits had little instruction on how to proceed effectively. The BLM is not alone. Multiple agencies with permitting or infrastructure responsibilities, are short-staffed and underfunded.

Filling vacancies requires strategic workforce planning, but few agencies have engaged in that process. When the GAO investigated the BLM's workforce planning in 2020, it found that the BLM had no way of tracking vacancies and no recruitment plan for filling vacancies.²⁶ When asking for data on the total number of positions and vacancies agency wide, the GAO was told that BLM does not maintain a list of vacancies for state offices. As a result, it was not possible to determine the proportion of positions that are vacant at any given time or the specific positions that are vacant. This lack of information obviously creates a problem for improving capacity in a way that results in improved efficiency. Strategic workforce planning is critical to ensuring that agencies spend wisely and build a workforce capable of fulfilling agency missions. Additionally, agencies must be confident that the funding will not disappear. Unstable budgets do not build durable workforces.

2. Pre-application meetings, early stakeholder engagement, permit sequencing, and transparent schedules are proven methods for improving efficiency without compromising environmental standards or public participation.

With expanded capacity, agencies can address other sources of delay such as communication with permit applicants, and interagency coordination. The best practices and procedural requirements of FAST-41 target both problems and serve as a valuable test case for their

²⁶ GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF LAND MANAGEMENT: AGENCY REORGANIZATION EFFORTS DID NOT SUBSTANTIALLY ADDRESS KEY PRACTICES FOR EFFECTIVE REFORMS GAO-20-379R, 10 (Mar. 6, 2020).

efficacy.²⁷ Wisely, Congress has also appropriated funding to support the Permitting Council, which should help propagate and further implement these practices.

Pre-application meetings with project proponents speed permitting by avoiding delays later in the process.²⁸ Meeting with regulators and stakeholders early allows project sponsors to incorporate environmental and social sensitivities at the design phase, when impact avoidance is still feasible and cost-effective. Additionally, project sponsors can benefit from agencies' experience with addressing controversial or complex impacts in other similar projects. This results in fewer modifications later in the process. It also reduces permit review times by minimizing the amount of additional information agencies must request during the review process. Especially in complex areas with conflicting or overlapping jurisdictions, the analytical and public comment procedures imposed by the NEPA process can actually speed project approval by providing a framework for analysis and bringing multiple permitting authorities to the table.

For example, the NEXUS Gas Transmission Project, was a 250-mile natural gas pipeline traversing Pennsylvania, West Virginia, Ohio, and Michigan.²⁹ During the pre-application process, which included extensive public participation, the project sponsors incorporated 239 route alternatives and variations in the pipeline design to address landowner requests, avoid sensitive resources, or respond to engineering restraints. This feedback resulted in a 91 percent change from the original proposed route design—a number of modifications that would have been prohibitively expensive at the end of the review process. Using this information at the beginning of the process improved efficiency and arguably resulted in a better end-result and a final application that was processed more expeditiously.³⁰

Early stakeholder engagement is also consistent with the results of recent research conducted by MIT investigating sources of delay for renewable energy projects.³¹ Two critical sources of delay were opposition from affected landowners due to real or perceived harms that the project would bring, and inconsistency between overlapping authorities, such as local, state, tribal, and federal jurisdictions. Based on their empirical research, they concluded that “incorporating all stakeholder perspectives from the outset of a siting process will probably save time and money.”³²

This is not to say that early stakeholder engagement will eliminate all opposition. The NEXUS Gas Transmission Project demonstrates a conundrum with finding permitting success stories. The ideal result of implementing a best practice, like pre-application meetings, is the avoidance of a

²⁷ For a thorough discussion of these issues, see Pleune & Boling, *This Permit Reform Works supra* note 25.

²⁸ *Id.* at Section IV.

²⁹ OFFICE OF THE EXECUTIVE DIRECTOR, FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES FOR PROJECT REVIEW AND PERMITTING FOR INFRASTRUCTURE PROJECTS FOR FISCAL YEAR 2018, at 17 (2017).

³⁰ This is not to say that early engagement eliminated local opposition in every community. See Heidi Gorovitz Robertson, *Home Rule Symposium: Cities and Citizens Seethe: A Case Study of Local Efforts to Influence Natural Gas Pipeline Routing Decisions*, 122 W. VA. L. REV. 881, 907-934 (Spring 2020) [*hereinafter* Gorovitz, *Cities and Towns Seethe*] (describing FERC's extensive public engagement and local opposition in three Ohio towns).

³¹ Lawrence Susskind et al., *Sources of Opposition to Renewable Energy Projects in the United States*, 165 Energy Policy 112922 (2022).

³² *Id.* at 13.

bad result, like project delays from unexpected impacts or local opposition. If the best practice works, the bad result will not occur. Which means that that a success story must prove a negative. It makes sense intuitively that such substantial route alterations would address many concerns and reduce opposition, but there is no way to prove what would have happened if the pipeline design had proceeded as originally designed. Moreover, the absence of opposition is an unrealistic standard to demonstrate success. With large projects, like the NEXUS Transmission Gas Line, it would be virtually impossible to avoid all opposition.³³ Thus, recognizing success requires enough familiarity with the process to understand what could have happened in a given scenario.

FAST-41 procedures also focus heavily on avoiding delays caused by poor inter-agency coordination.³⁴ In early stakeholder meetings, agencies develop a Coordinated Project Plan that encourages the development of concurrent, rather than sequential, analyses. Early and coordinated stakeholder engagement enhances the efficiency of this process. The Permitting Dashboard creates accountability, reducing the likelihood that a decision will linger on the back of someone's desk. Finally, enhanced oversight from the Executive Director of the Permitting Council creates an opportunity for conflicts between jurisdictions to be addressed early, and in a coordinated manner. The Permitting Council's 2020 Annual Report to Congress offered both quantitative and qualitative evidence of the program's success. Between 2010 and 2018, the average time across all agencies for a project to complete an EIS was 4.5 years. In contrast, the average time to complete an EIS for projects that went through the FAST-41 process by 2020 was 2.5 years. Perhaps more persuasively, the report included testimonials from project proponents praising the transparency and efficiency of the process.

A GAO investigation, also found evidence of the program's success that extended beyond federal agencies.³⁵ Although FAST-41 only directly affects federal agencies, the opportunities for coordination extend to state, local, and tribal permitting authorities. Early engagement creates opportunities for permitting authorities to enter into Memorandums of Understanding establishing roles and responsibilities. As an example, the GAO report discussed the Mid-Barataria Sediment Diversion project, which was a complex FAST-41 project focused on restoring ecosystems damaged by coastal erosion and the Deepwater Horizon Oil spill, which oiled over 684 miles of wetlands across the Gulf of Mexico, particularly in the Barataria Bay.³⁶ With the Army Corps of Engineers as lead agency, six federal agencies entered into a memorandum of understanding with several Louisiana state agencies, accelerating the environmental review and permitting process by nearly two years.³⁷ Due to the complexity of this project, many project participants believe that it would not have been possible without the coordination procedures afforded through the FAST-41 process. The GAO attributed this

³³ Gorovitz, *Cities and Towns Seethe supra* note 30 at 907-934 (detailing some local opposition to the pipeline).

³⁴ For a thorough discussion of these issues, see Pleune & Boling, *This Permit Reform Works supra* note 25.

³⁵ GOV'T ACCOUNTABILITY OFFICE, GAO-20-19, INFRASTRUCTURE PROJECTS: ACTIONS NEEDED TO FULLY DEVELOP PERFORMANCE SCHEDULES FOR ENVIRONMENTAL REVIEWS 20-21 (Oct. 2019) [*hereinafter* GAO, ACTIONS NEEDED TO FULLY DEVELOP PERFORMANCE SCHEDULES].

³⁶ *Id.* at 22.

³⁷ *Id.*

efficiency to enhanced interagency coordination.³⁸ In summary, efficient permitting is possible without compromising environmental standards.

V. Renewable Energy Projects Face Permitting Delays Unrelated to Environmental Standards Due to Serious Problems with the Interconnect Queue and Regional Transmission Organizations.

A recent study by the Lawrence Berkeley National Laboratory found that there are over 2,000 GW of total generation and storage capacity waiting for approval to connect to the grid, 95 percent of which are solar, wind, or battery storage.³⁹ The combined wind and solar capacity actively seeking connection to the grid is approximately 1,250 GW, which is roughly equal to the current installed capacity of the entire U.S. power plant fleet and consistent with what is necessary to achieve the 2030 target.⁴⁰

The hurdles facing these projects involve issues with the interconnect queue, regional control of transmission, and a lack of high power transmission lines. The wait time for projects in the interconnect queue is steadily rising.⁴¹ Between 2000-2007, the time between an initial connection request and a fully built, operational plant was typically less than two years. Between 2018-2022, that timeframe doubled to an average of almost 4 years, with an increasing trend. By 2022, the median time between an interconnection request to commercial operations date reached almost 5 years.⁴² The increased volume of proposed renewable projects sitting in the queue promises to continue amplifying this problem. For example, at least two regional transmission organizations, the entities responsible for approving requests to connect to the grid, have announced pauses on accepting new projects until they can process their backlogs. The nation's largest electric grid operator, PJM Interconnection, coordinates electricity movement in 13 states and the District of Columbia.⁴³ It has announced that it will not process any new applications until the end of 2025.⁴⁴ Similarly, CAISO,⁴⁵ a California grid operator, declined to

³⁸ *Id.* at 22; see also Mark Schleifstein, *Louisiana Granted Final Funds for Unprecedented Coastal Restoration Project* NOLA.com (Mar. 9, 2023) (reporting that Louisiana was granted the final necessary funds to build the unprecedented Mid-Barataria Sediment Diversion project aimed at helping slow land loss devastating the coast).

³⁹ Berkeley Lab, *Queued Up: Characteristics of Power Plants Seeking Transmission Interconnection*, <https://emp.lbl.gov/queues> (last visited May 9, 2023); Energy Technologies Area, *Grid Connection Requests grow by 40% in 2022 As Clean Energy Surges, Despite Backlogs and Uncertainty* (Apr. 6, 2023) <https://energy.lbl.gov/news/grid-connection-requests-grow-40-2022> (last visited May 9, 2023);

⁴⁰ *Id.*; see also Emma Penrod, *Why the Energy Transition Broke the U.S. Interconnection System* Utility Dive (Aug. 22, 2022) (quoting Bhaskar Ray, vice president of interconnection and development engineering for energy developer Qcells USA as estimating that if all the capacity currently waiting in the interconnection queue today were built by 2030, the U.S. would meet the 80% clean energy share milestone).

⁴¹ Berkeley Lab, *Queued Up: Characteristics of Power Plants Seeking Transmission Interconnection*, <https://emp.lbl.gov/queues> (last visited May 9, 2023).

⁴² *Id.*

⁴³ Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia. <https://pjm.com/about-pjm/who-we-are/territory-served> (last visited Apr. 24, 2023).

⁴⁴ Institute for Energy Research, *PJM Plans for a Two-Year Pause on Reviewing Project Applications* (Feb. 22, 2022). <https://www.instituteforenergyresearch.org/the-grid/pjm-plans-for-a-two-year-pause-on-reviewing-project-applications/#:~:text=To%20implement%20it%2C%20PJM%20is%20proposing%20an%20interim,on%20those%20coming%20at%20the%20end%20of%202027.>

⁴⁵ California Independent System Operator <https://www.caiso.com/Pages/default.aspx>

accept any new projects in 2022 while they processed their backlog. Both entities are looking for systemic solutions to improve the grid connection process. The interconnect queue, regional control of transmission, and a lack of high power transmission lines are serious problems delaying implementation of green technology. These problems are worthy of permit reform and require Congressional attention. Strengthening federal authority to facilitate interstate transmission power transmission may be one solution. Regardless of the solution to these complex problems, delays caused by the interconnect queue should not be conflated with NEPA and environmental standards.

VI. Good Decisions Are More Important Than Rushed Decisions.

The discussion around permit reform often focuses exclusively on decisionmaking times. A legitimate sense of urgency to implement clean energy projects drives many to seek shortcuts. However, rushed decisions have consequences. For example, the GAO recently investigated the Department of Energy's management of \$1.1 billion in funding for carbon capture sequestration projects.⁴⁶ It found that between 2009 to 2022, the DOE provided \$684 million to eight coal projects. Every project went over budget and exceeded timelines. Only one project went into operation, and even that project eventually shut down because it was not economically viable. In summary, none of the projects succeeded.

Rushed decisionmaking contributed to the DOE's poor judgment and money management, according to the GAO. Eager to spend funding from the American Recovery and Reinvestment Act of 2009, the DOE bypassed its usual selection procedures and committed to coal projects at their initial selection. Additionally, DOE used expedited timeframes for project negotiations—shortening them from one year to three months. Bypassing procedures reduced DOE's ability to identify and mitigate risks, resulting in a \$684 million loss for the American people.

Like mismanaged money, environmental resources, communities, and human health are not replaceable. The BP Deepwater Horizon Oil Spill offers a cautionary tale against expediting permitting by eliminating analytical rigor and environmental analysis.⁴⁷ The Macondo well never underwent NEPA's hard look requirement due to a broad categorical exclusion.⁴⁸ Additionally, staff within the managing agencies were subject to 30-day deadlines and instructed to approve permits as quickly as possible, without creating unnecessary delays.⁴⁹ Furthermore the industry had grown more quickly than the agency, resulting in offices that were short-staffed and lacked training or expertise to understand the implications of the technology being used.⁵⁰

⁴⁶ GOV'T ACCOUNTABILITY OFF., GAO-22-105111, CARBON CAPTURE AND STORAGE: ACTIONS NEEDED TO IMPROVE DOE MANAGEMENT OF DEMONSTRATION PROJECTS (Dec. 2021).

⁴⁷ NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (January 2011) [*hereinafter* DEEPWATER HORIZON COMMISSION REPORT].

⁴⁸ *Id.* at 82.

⁴⁹ *Id.*

⁵⁰ *Id.* at 73-74.

Due to NEPA streamlining procedures, short review deadlines, and insufficient agency capacity, risks that might have been exposed through the NEPA process went undetected. For example, BP’s emergency response plan for a subsea blow-out was to drill a relief well.⁵¹ When this became the only option for containing the spill, BP revealed that drilling the relief well would take at least three months. Meanwhile, the spill kept gushing over 50,000 barrels of oil per day into the Gulf.⁵² This risk should have been caught by agency staff at the permitting stage, but it wasn’t. Because the permit was not subject to public comment or circulated to other agencies, no one else saw it either. We cannot know if a more rigorous permitting process would have avoided the spill. But we can learn from the past.

Good decisions are more important than rushed decisions. Many reform proponents emphasize statutory exemptions for favored projects, expanding the use of categorical exclusions, imposing short deadlines and page limits, restricting public comment opportunities, and reducing the rigor of environmental analysis.⁵³ As the Deepwater Horizon example demonstrates, these reform proposals are likely to underestimate risks and overlook problems.

VII. Conclusion

Despite its ubiquity, the phrase “permit reform” is misleading. There is no single “permit law” that can be amended to eradicate delays. Complex projects, like transmission lines, mine permits, and renewable energy projects implicate a variety of legal standards and permitting authorities, each focused on protecting different resources such as clean air, clean water, endangered species, and cultural resources.

Used properly, the NEPA process can facilitate coordinated information gathering and decisionmaking and streamline the permitting process. Improved inter-agency coordination, shared data management, and strategic permit sequencing facilitate concurrent review between permitting authorities. Enhanced communication with the project sponsor, implementation of permitting best practices, and greater accountability for permitting authorities avoid inefficient delays. Early stakeholder engagement creates an opportunity to identify, avoid, and mitigate harms at the most cost-effective phase of a project’s lifecycle. All of these improvements depend on robust agency capacity. These reforms are not easily encapsulated in a pithy soundbite, but they do address the true causes of delay in permitting without compromising environmental or safety standards.

⁵¹*Id.* at 132.

⁵² *Id.* at 167.

⁵³ See e.g., The Building U.S. Infrastructure through Limited Delays and Efficient Reviews (BUILDER) Act (H.R. 2515) available at <https://transportation.house.gov/builder-act/default.aspx> (last visited Mar. 17, 2023).