

# Streamlining Energy Infrastructure Permitting

- The American Public Power Association (APPA) urges federal policymakers to streamline federal permitting rules to help facilitate the construction of cost-effective energy infrastructure necessary to maintain electric reliability and to accommodate a changing resource mix.
- Public power utilities need clarity and certainty in all aspects of the federal permitting process to make significant investments in electric generation, distribution, and transmission infrastructure.
- APPA supports conducting environmental reviews and permitting processes in a concurrent, coordinated, consistent, predictable, and timely manner so needed projects can move forward as quickly and economically as possible, while maintaining reasonable environmental oversight.

## Background

Providing reliable and affordable electricity to American consumers and businesses requires an expansive infrastructure system and the capital to plan, build, and maintain it. America's energy infrastructure includes power plants, hydroelectric dams, transmission and distribution wires, and fuel delivery systems, such as interstate natural gas pipelines. The need for cost-effective infrastructure to support reliable and affordable electricity, to balance intermittent resources, and to meet rising electricity demand is particularly acute today. Rapid growth in wind, solar, storage, and distributed energy resources and the need for flexible resources, such as natural gas-fueled generation, are all part of a quickly evolving generation resource mix. Electrification of the transportation sector and increased severe weather events are also driving more demands on the electric grid.

Streamlined environmental reviews under the National Environmental Policy Act (NEPA) are integral in ensuring that energy infrastructure projects move forward quickly and cost-effectively to meet rising demand. NEPA requires federal agencies to consider the environmental impacts of proposed major federal actions as part of an agency's decision-making process. Environmental reviews and authorizations that involve multiple federal, state, and local agencies are common. These reviews are often time-consuming, fragmented, inefficient, and costly to project proponents. In addition to siting and permitting generation and distribution infrastructure, in some cases, electric transmission siting authority resides with federal agencies, also requiring NEPA review.

The Federal Energy Regulatory Commission (FERC) plays a key role in hydropower, interstate natural gas pipelines, and bulk electric transmission lines. For more on permitting these specific resources that are not addressed in this issue brief, see APPA's issue briefs, "The Importance of Natural Gas for Electric Reliability and Affordability," "Hydropower," and "Electric Transmission Policies."

A clear definition of what constitutes "waters of the United States" (WOTUS) under the Clean Water Act (CWA) is also necessary to facilitate streamlined permitting for energy infrastructure projects. WOTUS is a key definitional term that defines the extent to which a project impacting WOTUS may need a federal CWA permit. Electric utilities routinely secure permits for pollutant point source discharges to a WOTUS. Utilities use various water features to manage, store, and treat water. Any change in converting these industrial water features from non-jurisdictional to jurisdictional will alter the point of compliance and create compliance issues, impose unwarranted new costs to public power utilities, and permit delays.

Also, under the CWA, the U.S. Army Corps of Engineers (Corps) can issue general permits to authorize activities with minimal individual and cumulative adverse environmental effects. The power sector relies extensively on these nationwide permits (NWP) to provide timely and reliable installation of transmission and distribution powerlines and to perform maintenance on those lines, which are critical to system reliability. A streamlined NWP process supports the secure integration and delivery of a balanced mix of central and distributed energy resources.

### **Congressional Action**

The Infrastructure Investment and Jobs Act (IIJA)(P.L. 117-58) provides over \$70 billion in energy infrastructure investment. Many public power utilities are actively seeking or have successfully obtained IIJA funding to support critical investments in grid resilience, electric vehicle charging, energy efficiency, and hydrogen infrastructure. Recognizing the necessity of an efficient and predictable permitting process, the IIJA included provisions to streamline the NEPA review process for “major projects” funded by the act. Specifically, the IIJA requires: (1) that one agency lead the NEPA process for each project; (2) the creation of a joint project schedule; (3) the completion of the review process within two years; and (4) the production of a “record of decision” within 90 days of the issuance of a final environmental impact statement. Finally, the IIJA reauthorized and amended parts of the Fixing America’s Surface Transportation Act to streamline the review of certain large infrastructure projects, including the Federal Permitting Improvement Steering Council.

Despite these efforts, however, lengthy, inefficient, and costly federal permitting processes make it difficult for utilities to make needed infrastructure investments and there is bipartisan agreement in Congress that building new infrastructure projects takes too long and costs too much. Congressional Republicans are interested in reforming laws like NEPA, CWA, and the Endangered Species Act to streamline the federal permitting process. Congressional Democrats are particularly interested in reforms that would change how transmission lines are permitted, sited, and paid for (cost allocation), with the goal of expanding the transmission system to accommodate increased renewable resources.

In early 2023, House Republicans passed H.R. 1, the Lower Energy Costs Act, an energy permitting reform bill that would have reformed NEPA by increasing interagency coordination, including requiring the development of a joint schedule, imposing deadlines, and page limits on certain environmental reviews, and creating limits on what qualifies as a major federal action (thus triggering a NEPA review). These reforms were all generally supported by public power and the electric sector. Ultimately, these NEPA reforms were included in H.R. 3746, the Fiscal Responsibility Act (FRA), which was signed into law in June 2023. While positive, neither Republicans nor Democrats were fully satisfied with the reforms in H.R. 3746 and, since its passage, members in both parties have expressed interest in continuing to negotiate additional permitting reform measures.

To that end, the House and Senate held several hearings on energy-permitting reform concepts and proposals to further influence the permitting reform debate. The leaders of the Senate Energy & Natural Resources and Environment & Public Works Committees each introduced permitting reform legislation. In May 2023, APPA developed a “Permitting Reform Priorities” document to provide input for ongoing congressional discussions and guidance on draft legislative proposals.

### **Regulatory Action**

In response to the NEPA reforms contained in the FRA, the Council on Environmental Quality (CEQ) finalized its Phase 2 amendments to NEPA. The Phase 2 final rule includes extensive changes to current NEPA regulations. Some provisions are likely helpful, such as confirmation that effects must be “reasonably foreseeable,” requirements for deadlines and schedules for NEPA review, and allowing contractors (not just the federal government) to prepare environmental impact statements and environmental assessments. Other new procedures and policy elements could result in more complicated, time-consuming, and legally vulnerable NEPA reviews, such as the shift in perspective from NEPA as a procedural statute to one that is “action-forcing,” evaluation of alternatives outside of the action agency’s jurisdiction, and requirements to evaluate environmental justice and climate change effects at multiple stages of the NEPA process. APPA is concerned that these new requirements will provide a basis to challenge NEPA reviews. The new provisions and the overall emphasis on climate and environmental justice reflect potential tension between CEQ’s objectives – to show more focus on climate change and environmental justice yet provide more efficient NEPA reviews.

While NEPA reform is one aspect of streamlining permitting, the utility sector also believes a clear definition of a WOTUS will further facilitate energy infrastructure permitting. Over the years, the courts, the Corps, and the Environmental Protection Agency (EPA) have struggled to develop a durable WOTUS definition. In January 2023, the Corps and EPA finalized the “Revised Definition of Waters of the United States,” which adopts a definition “founded” on the pre-2015 WOTUS definition (the 1986/88 regulations defining WOTUS) and updated to reflect its broad interpretation of multiple U.S. Supreme Court decisions and guidance. However, the rule is on hold in certain states due to ongoing litigation. Additionally, on May 25, 2023, the U.S. Supreme Court issued a decision in *Sackett v. EPA* (No. 21-454) limiting the scope of WOTUS under the CWA. The court found that the CWA extends to only those “wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right,” so they are “indistinguishable” from those waters. The decision suggests that many of the provisions in the 2023 WOTUS rule are invalid and will likely require additional rulemaking or guidance. Thus, the agencies have issued a series of implementation memos to provide the regulatory community with more guidance.

The current suite of NWP's went into effect on March 15, 2021, and will expire by March 15, 2026. The Corps is currently developing the proposed rule to reissue the 2021 NWP's. The Corps is planning to publish a proposed rule this fall to complete the re-issuance before the expiration of the 2021 NWP's.

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The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government and protect the interests of the more than 54 million people that public power utilities serve and the 96,000 people they employ.