

This [interview by Heatmap News](#) with a leading actor (Daniel Palken at the Arnold Foundation) in the permitting reform debates is informative and productive – both on the status of those talks right now, and on their history and why they are important. Here I just want to focus on one aspect of the interview where I have written the most before, and where I know the challenges are hard: Changes to NEPA.

As the interview describes, there are good reasons to pursue NEPA reform, in order to advance clean energy infrastructure and other important projects. But the problem is a difficult one to solve. I'll begin with some of the past fixes, and why they have been inadequate, and then talk about the issues on the table that the interview focused on.

The past fixes were enacted in 2023 amendments to NEPA. In particular, they imposed page limits for environmental review documents, and time frames for agencies to complete those reviews.

Page limits to my mind always seemed like a solution in search of a problem. If [the main issue with environmental review](#) is the uncertainty for project proponents and the risks that uncertainty creates for projects, page limits are not really connected to uncertainty. Setting an arbitrary page limits for environmental review isn't going to reduce the risk, for instance, that a lawsuit will be filed challenging the project, and be successful. Indeed, if arbitrary page limits cut short analysis or discussion, that can make environmental review documents more legally vulnerable (a point Palken makes) – and also not achieve the policy goals we want from NEPA (ensuring federal projects do not damage the environment). And in any case, page limits are easily evaded by putting additional materials into appendices (another point made by Palken)

There is one possible issue that page limits might address – unnecessary creep in the scope or expansion of what environmental review documents cover. Page limits perhaps reduce the analytic burdens and cost of what agencies must prepare. But again, note that the expansion of scope is at least in part the result of the risk of litigation which is not addressed by page limits – and if the scope expansion is necessary to do adequate environmental review, it's not clear what point artificial page limits are serving.

The **time limits** made more sense because delay can increase costs for project proponents. But again, if the upshot of a time limit is a rushed analysis and an

inadequate document that is challenged in court, that doesn't really help anyone. If those time limits do encourage more proactive agency efforts to process environmental review more efficiently and expeditiously, that is a good thing though.

Palken focused on several additional issues that he stated would be on the table in permitting reforms. I'll go through them in sequence.

Exhaustion: This is a legal concept that restricts the ability of people to sue to challenge agency actions unless they have raised their claims in the agency's own processes for public participation. I'm not sure why this is being discussed, since this has been part of NEPA law since at least the Supreme Court's decision in the Mexican Trucking case. Moreover, the current administration is actually taking steps that undermines the ability of courts to impose exhaustion requirements. Agencies under the Trump Administration have been eliminating Draft Environmental Impact Statements and public comments on those drafts. But if there is no public participation process for the agency's decision, then courts cannot impose exhaustion requirements on plaintiffs. (Note that the 2023 NEPA amendments do require public comment for the scoping stage in NEPA, which determines what issues will be considered in the environmental review. So without public comment on draft EIS, exhaustion would still apply to whether issues should be addressed at all, but not to challenges to the adequacy of the analysis in the EIS.)

Standing: This is a legal doctrine about who has the ability to sue to raise legal claims. There are constitutional components to this, but Palken made vague references to additional standing requirements being imposed (though perhaps he was just referring to exhaustion as a component of standing). I have not seen any versions of this in the bills that I have reviewed, so I'm not sure what is being considered here. Importantly, federal courts already generally require that plaintiffs have environmental interests to pursue NEPA litigation, with only limited exceptions (unlike California, which allows anyone with any claimed injury from an agency decision to bring a CEQA lawsuit, a doctrine I have criticized). The exceptions are fairly minor – for instance the Eighth Circuit allows plaintiffs with only economic harms to challenge the adequacy of analysis in an EIS, but not an agency refusal to prepare an EIS. Congress could override that outcome, and require environmental harms for all NEPA challenges. That's not a reform that I think Republicans would embrace, but it would reduce some NEPA litigation on the margins.

Statute of limitations: The proposal here is to shorten the current six year statute of limitations for filing NEPA lawsuits. This is easy to do, would add some certainty on the margin for agencies, and to my mind is not a major problem for legitimate claims to challenge agency NEPA compliance. I'm also not sure how big a difference this would make.

Deference: Palken mentions requiring courts to be more deferential to agency decisions under NEPA. There is always been a fair amount of uncertainty about what the standard of judicial review is under NEPA. Various Supreme Court decisions, including the most recent *Seven County* case, appear to call for courts to apply the generally applicable, and deferential, arbitrary and capricious standard of review for agency decisions under NEPA. But that sort of begs the question about what specific agency decision the court is reviewing under the arbitrary and capricious standard of review. For instance, in reviewing an agency decision not to prepare an EIS, the Ninth Circuit has indicated that it applies the arbitrary and capricious standard to whether there was a substantial question as to whether there are significant impacts that warrant an EIS. Note that by setting the standard for whether to require an EIS at the level of whether there is a "substantial question" as to whether there are significant impacts, the arbitrary and capricious standard is effectively made a more searching standard of review, as opposed to whether the question was just whether the agency's determination that there are no significant environmental effects is arbitrary and capricious.

More broadly, judicial deference to agency decisionmaking has long been a tricky problem to solve. Think of it as a dial. It's easy to set the dial in legislation to 0 (no lawsuits) or 1 (de novo review where the court does not defer at all), and know what you will get in terms of outcomes. But in between deference is generally a standard, not a rule – e.g., whether the agency decision was "arbitrary and capricious" – which leaves a lot of room for judgment by courts. That means that in practice, there will be a lot of variance in outcomes. And there is no reason to believe that the variance in outcomes will correlate at all with whether an agency's NEPA review actually adequately analyzed important environmental harms. So the result could be a lot of false positives and false negatives. Perhaps we want more false negatives (project has negative environmental impact that is inadequately analyzed but we let it proceed), but that is a tradeoff that will happen. Palken, to his credit, notes this issue, where he states that we may want judicial intervention for "very legitimate deficiencies" but not for trivia.

However, there is a real challenge with any change to deference standards that

seeks to distinguish between legitimate claims and pedantic challenges that are bad faith efforts to stop projects. First, part of the point of environmental review is to provide insights into problems that are not obvious, — without adequate environmental review, how do you know what problems are legitimate ones? And second, the definition of what is a “real” environmental problem is very malleable, highly contested. That doesn’t mean that the problem of deference isn’t worth trying to solve of course.

One possibility is to pre-specify the standard of review to be applied to key questions, reducing some of the variation at the circuit court level: whether an agency properly applied a categorical exemption, an environmental assessment, and the adequacy of analysis in an environmental impact statement. That would reduce some of the uncertainty and variation of outcomes. But again, I think significant variation will remain regardless.

Remedies: This is an equally difficult problem to solve, but Palken also calls it the most important one. Again, think of a dial. It is easy to set the dial to 0 (no remedies) or 1 (any violation requires full remedy). The House SPEED bill set the dial to 0 for NEPA violations — meaning that agencies have little incentive to do adequate environmental review in the first place. The issue here is that courts have long been divergent about what the proper remedy is for an agency action struck down under the Administrative Procedure Act (APA) – whether the remedy always requires vacating the agency action (setting the dial at 1), or just in some circumstances. (the dial is in between) Courts that only sometimes vacate use a test that balances the seriousness of the agency’s legal failures and the disruption from vacating the agency decision. That balancing test leaves wide room for judicial judgment calls, and it is unclear if it also adequately considers environmental harms. (For a nice discussion of the relevant caselaw in the environmental context, see this [recent article](#).)

One possibility is to adapt the factors courts use in deciding to issue a preliminary injunction (the likelihood of a plaintiff’s legal claims succeeding, and the balance of harms to plaintiff and defendant from not enjoining the defendant’s actions during litigation). We might weigh the seriousness of the agency’s NEPA errors, and the environmental harms related to those errors that the agency’s action would otherwise produce, against the social costs of enjoining the agency action. There are challenges here again: What is a real environmental harm will often be hard to identify in this context and will be often contestable. One possibility is for Congress to explicitly identify circumstances in which harms are considered serious. For

instance, perhaps environmental harms that would violate other federal, state, tribal, or local laws should weigh heavily in favor of vacatur. This would allow courts to consider remand without vacatur in circumstances where the errors or harms are relatively minor. Still, this will only reduce variability to some extent in outcomes, as courts will still differ about what is a minor error and the social costs of enjoining agency action. It's not like preliminary injunction law is all that predictable either!

Scope: Finally, Palken notes the question of scope – what kinds of actions and impacts should be considered within the scope of what an agency should analyze in its environmental review process. A notable example of this issue is climate change – should a federal agency leasing lands for oil and gas development consider the climate change impacts of that leasing? In some ways, this issue has already been resolved by the Supreme Court in *Seven County*, which set limits on “indirect effects,” effects later in time and space, that should be considered under NEPA. And Congress in the 2023 NEPA amendments did require only analysis of “reasonably foreseeable” effects of agency actions. But Congress providing more specifics would probably still help, such as pre-specifying what types of upstream or downstream actions should count for scope.

There are some additional alternative changes to consider, though if the goal is a bill by the end of this Congress time is tight to develop them. I've [called for more bright-line certainty](#) in environmental review. That could involve greater Congressional involvement in identifying categorical exemptions from NEPA. Or Congress could make it easier for agencies to do enforceable mitigation measures such that their projects would qualify for environmental assessments by pre-specifying thresholds for common types of environmental issues. This latter approach probably would have to be done administratively (and one might be skeptical as to what the Trump Administration would do with that power) but with enough guidance from Congress, perhaps one could make some real progress on getting brighter-line rules that facilitate infrastructure projects while protecting environmental outcomes.