

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>

Proposed Amendments: Programmatic Reviews

- **Summary:** Authorize federal agencies to conduct joint programmatic reviews under the National Environmental Policy Act (NEPA) and species assessments under the ESA for renewable energy projects and associated storage and transmission over large geographic areas, and require challenges to those programmatic reviews to be brought in the U.S. Court of Appeals for the District of Columbia Circuit within 150 days.
- **Issues to be Addressed:** Environmental review and permitting of electric infrastructure—including renewable power generation facilities, electric transmission and distribution infrastructure, and electric storage facilities—is notoriously difficult and time-intensive. Generally, siting decisions are made on a project-specific basis and can take years, if not decades, to complete. Such delays are inconsistent with the nation’s need for rapid electrification to reduce greenhouse gas (GHG) emissions. Congress and agencies have attempted strategies to expedite the siting process by conducting reviews on a programmatic basis. For example, Congress required federal land managing agencies to designate energy right-of-way corridors on their lands, for which the agencies prepared a Programmatic Environmental Impact Statement (EIS) (i.e., the West-Wide Energy Corridors under Section 368 of the Energy Policy Act of 2005), and agencies similarly prepared Programmatic EIS for Solar Energy on certain BLM lands. These programmatic reviews under NEPA help streamline the project-specific analysis by identifying ideal siting locations and reducing the analysis that must be done through tiered project-specific basis. However, project developers must still then undertake time-intensive, project-specific analysis under other statutes, notably including the interagency consultation process under Section 7 of the ESA.
- **Recommendation:** To facilitate efficient environmental review and permitting of electric infrastructure that will drive decarbonization, enact language that allows agencies to develop programmatic analyses for infrastructure-types (e.g., wind generation) over broad geographic areas that fulfill agencies’ NEPA and ESA responsibilities. To ensure the application of judicial expertise, establish the United States Court of Appeals for the District of Columbia Circuit as the only available venue for claims challenging compliance with NEPA and ESA using these programmatic approaches, as provided under the Clean Air Act (42 U.S.C. § 7607(b)(1)) and the Natural Gas Act (15 U.S.C. § 717r).

Option 1: This option works from the proposed Energy Independence and Security Act of 2022 (“2022 Draft Permitting Law”) ([available here](#)). To the extent that the 2022 Draft Permitting Law serves as a basis for future Congressional negotiations, these amendments can be valuable in showing how to address joint programmatic reviews within the context of a larger piece of legislation on the permitting of renewable energy infrastructure generally, which has already undergone considerable review and scrutiny.

This Options would revise the text of the 2022 Draft Permitting Law’s section entitled “Streamlining Process for Authorizations and Reviews of Energy and Natural Resources Projects.” This option may require edits to other provisions in that section to ensure application. For example, the definition of “Secretary concerned” in subsection (a) is too narrow, as it does not include the U.S. Army Corps of Engineers or electric utilities financing agencies within the U.S. Department of Agriculture, for example.

Amending language in red, italics and underscored.

(a) Definitions.—In this section:

...

(4) *Renewable Energy Infrastructure Projects.*—The term “renewable energy electric infrastructure projects” means projects that produce, generate, store, or transport renewable energy, including energy generated from solar, wind, biomass, ocean (including tidal, wave, current, and thermal), geothermal, and hydroelectric energy resources.

(5) SECRETARY CONCERNED.—The term “Secretary concerned” means, as appropriate—

(A) the Secretary of Agriculture, ~~with respect to the Forest Service~~;

(B) the Secretary of Energy;

(C) the Secretary of the Interior; ~~and~~

(D) the Federal Energy Regulatory Commission;

(E) The Secretary of the Army; and

(F) The Secretary of Defense.

(k) *Efficiency Judicial Review* of Claims.—

(1) IN GENERAL.—Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of an authorization issued or denied by a Federal agency for a project shall be barred unless the claim is filed by 150 days after the later of the date on which the authorization is final in accordance with the law under which the agency action is taken and the date of publication of a notice that the environmental document is final in accordance with NEPA, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed. *A claim arising under Federal law seeking judicial review of any authorization issued by a Federal agency pertaining to the review conducted under the National Environmental Policy Act and Endangered Species Act consistent with subsection (n)(2) shall also be barred unless the claim is filed in the United States Court of Appeals for the District of Columbia.*

(2) EFFECT OF SUBSECTION.—Nothing in this subsection—

(A) establishes a right to judicial review; or

(B) places any limit on filing a claim that a person has violated the terms of an authorization.

(3) [TREATMENT OF] SUPPLEMENTAL OR REVISED ENVIRONMENTAL DOCUMENTS.—With respect to a project—

(A) the preparation of a supplemental or revised environmental document for the project, when required, shall be considered to be a separate final agency action; and

(B) the deadline for filing a claim for judicial review of that action shall be the date that is 150 days after the date of publication of a notice in the Federal Register announcing the action.

...

(n) Programmatic Compliance.—

(1) IN GENERAL.—The Secretary concerned shall allow for the use of programmatic approaches to conduct environmental reviews that—

(A) eliminate repetitive discussions of the same issue;

(B) focus on the issues ripe for analysis at each level of review; and

(C) are consistent with—

(i) NEPA; and

(ii) other applicable laws.

(2) RENEWABLE ENERGY INFRASTRUCTURE.—The Secretary concerned shall allow for the use of programmatic approaches to jointly conduct environmental review under NEPA and consultation under Section 7 of the Endangered Species Act (16 U.S.C. §1536) for renewable energy infrastructure projects. The joint programmatic approaches may be used to energy infrastructure projects with similar impacts in a region with similar environmental resources. The joint programmatic approaches shall—

(A) use combined process;

(B) result in combined documentation; and

(C) be consistent with subsection (n)(1).

(3) REQUIREMENTS.—In carrying out this subsection, each lead agency shall . . .

Option 2: Establish an entirely new section in the proposed legislation to address these projects. Amending language in red, italics and underscored.

SEC. __. PROGRAMMATIC REVIEWS FOR ELECTRIC INFRASTRUCTURE PROJECTS.

(a) Definitions.

(1) RENEWABLE ENERGY INFRASTRUCTURE PROJECTS.—The term “renewable energy electric infrastructure projects” means projects that produce, generate, store, or transport renewable energy, including energy generated from solar, wind, biomass, ocean (including tidal, wave, current, and thermal), geothermal, and hydroelectric energy resources.

(4) SECRETARY CONCERNED.—The term “Secretary concerned” means, as appropriate—

(A) the Secretary of Agriculture, with respect to the Forest Service;

(B) the Secretary of Energy;

- (C) the Secretary of the Interior; and
- (D) the Federal Energy Regulatory Commission.

(b) Renewable Energy Infrastructure Programmatic Reviews.— The Secretary concerned shall allow for the use of programmatic approaches to jointly conduct environmental review under NEPA and consultation under Section 7 of the Endangered Species Act (16 U.S.C. §1536) for renewable energy infrastructure projects. The joint programmatic approaches may be used to energy infrastructure projects with similar impacts in a region with similar environmental resources. The joint programmatic approaches shall—

- (A) use combined process;
- (B) result in combined documentation;
- (C) eliminate repetitive discussions of the same issue;
- (D) focus on the issues ripe for analysis at each level of review; and
- (E) be consistent with—
 - (i) NEPA; and
 - (ii) other applicable laws.

(c) Judicial Review.—

(1) IN GENERAL.—Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of any authorization issued by a Federal agency pertaining to the review conducted under the National Environmental Policy Act and Endangered Species Act consistent with subsection (a) shall be barred unless-

- (A) the claim is filed not later than 150 days after the date of publication in the Federal Register of notice of final agency action on the authorization, unless a shorter time is specified in the Federal law under which judicial review is allowed; and
- (B) the claim is filed in the United States Court of Appeals for the District of Columbia;
- (C) in the case of an action pertaining to an environmental review conducted under NEPA-
 - (i) the claim is filed by a party that submitted a comment during the environmental review; and
 - (ii) any commenter filed a sufficiently detailed comment so as to put the lead agency on notice of the issue on which the party seeks judicial review, or the lead agency did not provide a reasonable opportunity for such a comment on that issue.