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Expedited Approval of Energy Projects: Assessing the Forms of Procedural Relief

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Work in Progress Concept Note

Expedited Approval of Energy Projects: Assessing the Forms of Procedural Relief

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The Problem

If we are to prevent the worst effects of climate change, a major shift in the world's energy systems will be needed, including the construction of a massive number of clean energy facilities. The current legal system applicable to construction of new facilities in the United States is completely incompatible with this need.

At a conference in Copenhagen in December 2009, the parties to the United Nations Framework Convention on Climate Change agreed that the maximum tolerable increase in global average temperatures was 2°C above pre-industrial levels; any temperature increase beyond that would have catastrophic consequences. This objective has been repeatedly reaffirmed since then. However, the world is not on a course to meet this objective. To the contrary, global greenhouse gas (GHG) emissions have continued to climb, and a continuation of these trends would bring us to at least a 4°C increase and perhaps considerably more.

About 80% of global GHG emissions come from the combustion of fossil fuels. Thus a reduction in the use of fossil fuels is an urgent imperative. It is generally agreed that achieving this requires a combination of aggressive measures toward energy efficiency; the retirement of existing fossil fuel power plants, especially those using coal; and a rapid increase in the

construction of renewable energy and nuclear energy facilities. Little attention had been paid to calculating the number of new facilities that would be needed, but in September 2014 the Sustainable Developments Solutions Network and the Institute for Sustainable Development and International Relations published an important report, *Pathways to Deep Decarbonization*, that looked quantitatively at how 15 of the world's largest economies would effect a transition of their energy systems to get the world on a 2°C pathway.

In November 2014 these groups published a specific report for the United States. The report presented a number of scenarios, varying primarily with the amount of reliance on nuclear power and on carbon capture and sequestration (CCS). Under a mixed scenario that involved all technologies, *every year from 2016 through 2050* the United States would need to build 70 very large solar energy arrays; 102 very large wind farms; five nuclear power plants; and 21 natural gas combined cycle gas turbine plants with CCS. This actually understates the challenge, because by 2050 every one of the existing 100 nuclear power plants will presumably have retired (all of them having grown more than 60 years old), and no one has ever built a natural gas combined cycle gas turbine plant with CCS.

Many or most of these very large wind farms would be offshore. The total amount of U.S. offshore wind energy generation today is zero. The project that has advanced the furthest is called Cape Wind; it would be located between Cape Code and Nantucket in Massachusetts. The Cape Wind project was first proposed 2001. It has endured a long series of permit proceedings and lawsuits, and more appear to be on the way. As of December 2014, construction had not yet begun. Many other energy projects are in the midst of protracted efforts to obtain needed permits, or to keep them in the face of litigation.

At this pace, the energy transition needed to reduce GHG emissions to safe levels cannot occur. The approval process for new energy facilities is broken.

Those who believe we also need many more fossil fuel facilities such as offshore oil platforms and international oil pipelines have come to the same conclusion -- the current approval processes do not work for the scale of what needs to be done. But for them, the stated rationales are to create large numbers of construction jobs and to achieve energy security rather than to save the climate.

This phenomenon is not new. Michael Heller has written extensively about "regulatory gridlock" and the "banana" syndrome -- build absolutely nothing anywhere near anyone.[1] The problem is increasingly recognized, and we have seen over the last several years a proliferation of efforts to speed up the process, so that all manner of projects can be built in a much shorter period of time than before.

These measures to speed up project approvals are varied in many ways -- the nature of the techniques that are used, the level of government at which they are employed (federal, state, regional, local), the branch of government employing them (legislative, executive, judicial), the formality or informality with which they are adopted, and the generality or specificity of the techniques -- some apply to broad classes of activities, some only to one specific project, and everything in between. Moreover, these techniques are scattered in time. They pop up and sometimes they subside, making it harder for project developers to use them and for scholars to study them.

There are frequent efforts to reduce the burden of regulation. The Paperwork Reduction Act, the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and numerous

[1] Michael Heller, The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives (2008), pp. 131-141.

executive orders have this objective.[2] Several of them require agencies to produce paperwork to demonstrate how they are reducing paperwork.[3] Many federal and state agencies, trade associations and others have written reports with themes such as "unblocking the pipeline" and "unlocking the economy."

There have been a few academic studies of particular techniques,[4] but little or no systematic analysis of the full range of efforts. The government officials who adopt these measures, and the advocates and lobbyists who propose or oppose them, appear to have very little overall sense of the varieties of techniques that are available, what has been tried, and what has and has not worked. They tend to fasten on some particular impediment and try to attack it, without an understanding of where it fits in the overall context.

The Project

The project described here involves the following components:

1. Compile the measures and proposals to expedite approval of physical construction projects, and categorize the techniques to break the regulatory gridlock
2. Analyze these measures and proposals to determine what they would attempt to do and how they work.
3. Investigate whether the measures that have been adopted achieve their objectives of allowing construction to take place more quickly.

[2] *See, e.g.*, Executive Order No. 13212, "Actions to Expedite Energy-Related Projects," 66 Fed.Reg. 28357 (May 22, 2001).

[3] *See* Curtis W. Copeland, Regulatory Analysis Requirements: A Review and Recommendations for Reform (Administrative Conference of the United States, April 23, 2012); Peter L. Strauss, "A Confluence of Concerns with the Accumulation of Regulatory Regimens," RegBlog (April 9, 2012), https://www.law.upenn.edu/blogs/regblog/2012/04/a-confluence-of-concerns-with-the-accumulation-of-regulatory-regimens.html.

[4] E.g., Ashira Pelman Ostrow, "Process Preemption in Federal Siting Regimes," 48 Harvard J. Legis. 289 (2011).

4. Explore the collateral consequences of these measures, such as negative environmental impacts; other unforeseen physical problems; lost opportunities for meaningful public participation; and disproportionate adverse impact on low-income and minority communities.
5. Recommend a set of best practices that will allow reasonably speedy decisions while still preserving the values legitimately protected by the processes that have developed over the years.

The Appendix shows the varieties of procedural relief that have been identified. They tend to fall within the following categories:

Exemptions, such as rendering some legal requirements inapplicable to certain projects or classes of projects, or allowing them to be more easily waived.

Changing the decision-maker, which often involves consolidating authority in one entity, federal preemption of state and local authority, or to the contrary, giving greater power to the states.

Special administrative review procedures, such as imposing time limits on agency review, making it more difficult for agencies to deny approvals, reducing the number of steps required, or allowing some processes run simultaneously rather than consecutively.

Modifying the judicial review procedures, such as designating the forum, allowing direct appellate review, limiting the right of action, limiting standing to sue, shortening the statute of limitations, or altering the standards of review.

Many of the measures being adopted go beyond the procedural and modify the substantive rules, such as relaxing the technology standards or emissions standards, or reducing

the protections afforded to certain kinds of places or species or other natural features. Such substantive modifications are not the focus of this project.

Special Case: Species and Visual Impacts of Wind Projects

As noted above, more than 100 large new wind farms will be needed every year in the United States from 2016 through 2050. One of the major impediments to the construction of these projects is their effects on endangered species. For example, in the eastern and Midwestern United States, the endangered Indiana Bat covers a large habitat area, and several wind farms have been impeded because these bats could fly into the turbines and be killed. Another major impediment is that the greatest amount of wind is found on top of ridgelines, which means that turbines built there would be visible over a wide area. Many people do not like looking at wind turbines, and they have engaged in extensive litigation and political efforts to stop such facilities from being built.

One preliminary conclusion of this project is that visual impacts can no longer be allowed to stand in the way of renewable energy. There is no escaping this physical reality that in order to achieve the needed dramatic expansion in renewable energy, the sight of wind turbines on ridgelines and off coastlines is going to have to be accepted.

A second preliminary conclusion is that the impacts on individual species can no longer be allowed to stand in the way of renewable energy. We are facing an era of mass extinction. In March 2014 the Intergovernmental Panel on Climate Change issued a report that stated, "A large fraction of both terrestrial and freshwater species faces increased extinction risk under projected climate change during and beyond the 21st century, especially as climate change interacts with other stressors, such as habitat modification, over-exploitation, pollution, and invasive species (high confidence)."

We have had the luxury of declining wind projects because they will harm individual species, such as the Indiana bat. We no longer have that luxury. Entire ecosystems are threatened. Not only is the Indiana bat in bad shape because of these ecosystem-wide effects, but so are countless thousands of other species.

There is certainly room for more cooperation between renewable energy developers and the conservation community in locating the best, or the least bad, sites for new facilities. There are a few extraordinary vistas that would warrant protection. But site-by-site battles and wholesale restrictions on visual impacts or on individual species impacts will keep us from getting to where we absolutely need to go in terms of a transition away from a fossil fuel based economy. There can be no escaping the necessity of a heartbreaking triage, in which some species are sacrificed so that the much larger number of them can survive.

Other Preliminary Conclusions

It is fashionable to blame "bureaucratic delays" for the long time it takes to approve projects. Inefficiency or redundancy certainly occur, but often – perhaps usually -- there are many other causes of delay, and the review process is not the rate-determining step. Market uncertainties or changes; shifts in public subsidies; difficulty obtaining financing, land, water, or skilled labor; lack of proximity or access to transmission lines or pipelines; engineering or construction problems; changes in fuel prices; and many other factors can all cause delays. But the approval processes are indisputably nuisances to those who have to go through them, and today the government agencies involved are frequently demonized, so there are many efforts to shortcut these processes.

The quest for both general and special exemptions has become common (almost pervasive) and embroiled in partisan politics. Whether this is a new phenomenon, and good projects once sped through, is more difficult to determine; however, the environmental permit requirements that are the subject of many of the complaints did not emerge until the 1970s and 1980s.

Unsurprisingly, the selection of beneficiaries is heavily influenced by the political winds of the moment and by the interest groups that are especially influential with the given decision-maker. Selection of modifications to established procedures is very results-oriented, and tailored to specific situation of the moment. For example, for many years federal preemption was seen as an important way to encourage the construction of new projects in the face of local opposition. However, during the 2012 presidential race, Mitt Romney issued a proposal that would move in the opposite direction and allow the states to play more central roles, presumably because some of the states are seen as more hospitable to development than Washington.[5]

There is only sporadic linkage between the projects that are selected for special treatment and the rationales for procedural reform. The most often heard justification is to create jobs, but there is almost never an analysis of the labor intensity of different kinds of projects, and which should receive favorable treatment because they will actually create a great many jobs. The second most heard rationale is to achieve low energy prices, especially for gasoline and electricity. But the projects that are receiving the most attention, such as the Keystone XL Pipeline (which would carry oil from Alberta to the Gulf Coast) and various Arctic and offshore oil drilling efforts, would have only a marginal effect on gasoline prices, due to the global nature

[5] Romney for President, Inc., "The Romney Plan For a Stronger Middle Class: Energy Independence" (August 22, 2012), p. 8 ("States will be empowered to establish processes to oversee the development and production of all forms of energy on federal lands within their borders, excluding only lands specifically designated off-limits; State regulatory processes and permitting programs for all forms of energy development will be deemed to satisfy all requirements of federal law").

of oil pricing. Moreover, there are significant policy questions about the desirability of low after-tax energy prices, since low prices lead to higher demand. The U.S. has some of the lowest gasoline and electricity prices in the world, and (together with Canada and Australia) by far the highest per capita energy consumption and greenhouse gas emissions.

In this context of facility siting, there are few rules and even less theory on how to balance the interests of applicants and society in prompt decisions against the interests of other stakeholders and society in fulsome procedures. Expedited approvals are a form of subsidy, both because they allow projects to proceed faster (and time is money), and because by allowing shortcuts in the review process, certain externalities may to go unrecognized and thus unmitigated. Who or what deserves such subsidies is seldom examined.

All these general and special exemptions are emerging as a chaotic overlay onto environmental and administrative law. The basic statutes are unchanged; Congress has enacted no major new environmental laws since 1990. Some of the techniques to speed approvals find their way into appropriations bills and some into regulations, but most of them are in executive orders, interagency agreements, unilateral agency determinations, and other informal actions that avoid the need to invite the public into the discussion (while still providing broad scope for input by project applicants and their allies). The net effect is to undercut many of the elaborate processes and standards that have developed over the last 40 plus years to make decisions on environmental matters. The general failure to evaluate these techniques' efficacy or their collateral effects should thus be a source of considerable concern.

Eventual Questions

This research is heading toward two further sets of questions, which may or may not be reached in the current phase of the work.

First, if certain permits or reviews can be dispensed with for certain projects, and there are few negative collateral consequences, do we need these permits and reviews at all? Every proposed project is important to someone, and arguments can almost always be mounted that a given kind of project warrants special treatment. The present inquiry may help identify some requirements that are obsolete and should not apply to anyone, and it may also help identify others that are more important than previously thought (because adverse effects of having done without them were found), and for which few if any exemptions should ever be granted.

Second, in order to build the number of renewable energy projects that we need in order to reach our greenhouse gas reduction targets, are expedited procedures enough, or do we need to provide substantive relief from environmental permits? Even if we speed up the processes as much as we can while still affording at least a modicum of due process to all concerned, can we review these projects and give them the approvals they need under existing law fast enough to build all the required wind, solar and other projects? Or do we need to move beyond process and start cutting out some of the substantive requirements? It is quite possible that there simply are not enough sites in the U.S. that meet all the currently applicable requirements. The issue of the visual and species impacts of new wind turbines as mentioned above; there may well be other similar requirements that will require reexamination.

Or is what is really holding back renewable energy the absence of a price on the emissions of carbon, and the long-standing favorable treatment that fossil fuel sources enjoy under environmental law, tax law, and many other bodies of law? Fossil fuels can continue to generate externalities with impunity, disadvantaging the renenewables that do not benefit from their positive environmental features. A focus on facility approval procedures addresses one important set of problems but should not obscure possibly more important ones.

APPENDIX:

THE VARIETIES OF PROCEDURAL RELIEF

Relief granted for:

- Classes of activities
- Projects below specific size or impact thresholds
- Specific projects
- Specific locations
- Approving entities

Relief granted by:

- Congress
- State legislatures
- Federal executive officials or bodies
- State executive officials or bodies
- Courts

Relief granted via:

- Legislation
- Appropriations/budget limitations on agency action
- Regulations
- Executive orders
- Interagency agreements
- Agency guidelines
- Project-specific agency determinations
- Court orders

Nature of relief

- Exemptions
  - From all reviews
  - From certain reviews
  - From certain substantive requirements

Changing decision-maker

- Preemption of state, municipal approvals
- Devolution or delegation to states, municipalities
- Nullification of private restrictions
- One-stop shopping
- Lead agency for coordinated review

Special administrative review procedures

- Limit time (goals, mandates, penalties for lateness, default approvals)
- Reporting on timing and programs
- Truncate procedures for classes of projects or specified projects
- Limit substantive issues considered
- Limit document length
- Require job impact or cost/benefit analysis
- Prioritize favored projects
- Require written justifications for denials
- Reduce or eliminate discretion to deny applications
- Programmatic or generic review of like actions
- Advance review and pre-approval; permit by rule
- Extend permit expiration dates
- Electronic systems for improving permit processing efficiency
- Pre-filing scoping procedures
- Added staff/consultant resources for review; staff training
- Allow applicants to prepare their own review documents
- Concurrent rather than consecutive reviews
- Reduce or waive application fees
- Facilitated public participation

Modify judicial review of agency decisions

- Allow judicial review of denials
- Bar judicial review of approvals
- Designate forum
- Allow direct appellate review
- Shorten statute of limitations
- Reduce or increase deference to administrative decisions
- Give calendar preference to covered cases
- Limit remedies court can provide
- Limit right of action or standing to sue
- Allow applicants to pay for expedited review
- Mandatory mediation
- Sanction frivolous lawsuits

Modify permit provisions

- Loosen substantive environmental standards
- Allow early start if condemnation or construction before all permits issued
- Allow mitigation payments in lieu of meeting standards or avoiding impact
- Standardize rules across jurisdictions
- Create standards for previously unregulated activities
- Make standards more specific, less ambiguous
- Eliminate obsolete or redundant rules
- Allow modification of permits with reduced or no oversight
- Establish uniform standards for electrical/gas interconnection

Other variables regarding relief

- Absolute or conditional?
    - Procedural relief as incentive for desirable attributes
- Immediate or delayed?
- Emergency or standard?
- Degree of administrative decision in granting relief

Criteria for assessing form of relief

- Applicability (helps actual projects)
- Speed gained
    - How much time does it save compared to standard process?
    - Does it address the rate determining step?
    - Does it save total time or simply defer issues?
- Leaves agencies with appropriate degree of discretion
- Effect on public participation
- Allows meaningful judicial review
- Opportunity costs and project displacement
- Susceptibility to corruption

Criteria for assessing outcomes: Were best site, technology chosen?

- Public health impacts
- Environmental/GHG/ecosystem impacts
- Energy security impacts
- Displacement of fossil fuel use
- Environmental justice impacts
- Financial costs
- Employment impacts
- Energy multiplier effect (e.g. transmission lines allow renewables)