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Hearing on the "Standardizing Permitting and Expediting Economic Development Act" (the "SPEED Act")

Thank you, Chairman Westerman and Ranking Member Huffman for the opportunity to testify today. My name is Robert Glicksman. I am the J.B. & Maurice C. Shapiro Professor of Environmental Law at the George Washington University Law School. I do not testify on behalf of GW Law School and the views I express are my own and do not necessarily reflect the views of GW Law or of the University. I base my testimony today on my own analysis of the proposed SPEED Act, which is the only one of the three bills that are the focus of this hearing that I intend to address, and the Act's impact on the National Environmental Policy Act of 1969 (better known as NEPA). That analysis is grounded in my own experience teaching, researching, and writing about NEPA. I have been teaching and writing about environmental and public natural resources since 1981. I am currently the lead co-author of the leading legal treatise on NEPA, NEPA Law and Litigation, published by Thomson Reuters. I and my co-authors publish a thoroughly updated version of the treatise each year. I am also the sole author of another legal treatise, Public Natural Resources Law, which analyzes the application of many statutes, including NEPA, to federally owned lands and resources. Many of my law review publications over the years have also addressed NEPA.

I am here today to testify in opposition to the SPEED Act. No statute is perfect, and NEPA is no exception. Congress has enacted amendments to NEPA in recent years, most prominently in the Fiscal Responsibility Act of 2023 (FRA). The changes to NEPA made by that legislation were designed in large part to expedite the process of environmental impact analysis required by NEPA for proposed major federal actions, such as infrastructure projects, with the potential to affect environmental quality. That legislation, along with other bills enacted in recent years, also expanded the availability of categorical exclusions, the least rigorous form of NEPA analysis. We do not have enough experience yet with these changes to be able to determine whether they have accomplished their goals. After these amendments to NEPA have been given time to work, it may turn out that further changes are unnecessary in that the goals of the FRA and similar legislation will already have been achieved. Or it may turn out that some members of Congress believe that further revisions are appropriate, although ample evidence exists that it is other factors, not NEPA that are primarily responsible for delays in the federal permitting process. In my view, it is premature to make that determination now. In addition, it seems to make little sense to try to speed up infrastructure by rewriting NEPA at a time when the number of officials available to engage in NEPA review is dwindling, programs are getting defunded, and some of the most important and valuable infrastructure projects—those that would result in clean energy production—are being blocked and defunded.

But even if further revisions are deemed necessary, they should not take the form of the provisions of the SPEED Act. This bill would not improve NEPA's operation, at least judged from

the perspective of the existing statute's stated goals. Rather, this bill would maintain the façade that we still have a functioning environmental assessment regime while in fact undercutting NEPA's purposes and effectively rendering the statute a dead letter. By enacting this bill, Congress would be repudiating a cornerstone of the nation's environmental law infrastructure. It would be turning its back on a statute that has served the nation well and been emulated by dozens of other countries around the globe with an interest in minimizing costly and irreparable environmental damage that results from governmental actions.

I will structure my remarks around four sets of problematic provisions in the SPEED Act. First, the bill narrows the scope of NEPA's application by allowing government agencies to avoid NEPA's procedures entirely notwithstanding their environmentally damaging potential. Second, the bill allows agencies to make their NEPA determinations in ignorance by limiting public input into the NEPA process and allowing agencies to ignore relevant information made available to them. Third, the SPEED Act would block access to the federal courts by those adversely affected by decisionmaking that occurs without compliance with NEPA's mandates. Fourth, it would shackle courts in the kinds of relief they are able to provide even when they determine that statutory violations have occurred. This last impact reflects an unwarranted and troublesome intrusion on the authority of a coordinate branch of the federal government, the federal judiciary, and on the traditional equitable discretion that the federal district courts have always exercised, with the Supreme Court's protection and blessing.

Narrowing NEPA's Application

The SPEED Act includes several provisions which would eliminate agency duties to perform NEPA analysis of proposed actions currently covered by the statute and whose rationale for exclusion is unclear. For example, the bill would redefine the term "major federal actions" to exclude loans, grants, or other forms of federal financial assistance unless the federal agency providing that assistance exercises "complete control and responsibility over the effect of the action." It is unclear why it is appropriate to distinguish between financial assistance and other forms of federal approval of or participation in projects proposed by non-federal actors. Federally financed projects may have the same potential to generate serious adverse environmental impacts as these other kinds of government assistance.

Putting that mystery aside, however, the reference to "complete control and responsibility" creates an obvious risk that agencies will manipulate the terms of loan or grant documents to obviate the need to consider the environmental effects of what are clearly federally driven and federally controlled projects. The delegation of even minimal discretion over one aspect of implementation of a project that is entirely financed with federal funds would seemingly be enough to trigger this exemption. Projects that would not proceed but for federal financing should be attributed to the federal government for NEPA purposes, and the retention of artificially created discretion over minor aspects of project implementation should not matter. NEPA already excludes from the definition of "major federal action" non-federal actions with no or minimal federal funding and non-federal actions with no or minimal federal involvement. Congress should not expand that exemption to allow projects financed entirely by the federal government to escape NEPA review just because a non-federal actor has a modicum of discretion whose exercise may do nothing to minimize undesirable environmental consequences.

The SPEED bill includes other objectionable exclusions from NEPA's requirements. For example, it excludes projects which have already been reviewed under state or tribal environmental review statutes as long as the lead agency determines that the previous review meets NEPA requirements. It provides no guidance, however, on how the lead agency is supposed to make that determination. Similarly, it exempts proposed actions from NEPA review if an agency's compliance with another statute fulfills a "similar" function. The bill does not explain what would qualify as a "similar" function and there may not be any such statutes. NEPA processes provide a unique opportunity to review all aspects of a project's potential environmental footprint that is not replicated by any other federal statute. For that reason, the federal courts have determined that agency actions under NEPA differ from actions under another keystone environmental statute, the Endangered Species Act. The two statutes address different sets of risk and have different if overlapping objectives.

The bill also provides that if a lead agency determines that NEPA document is not required, "another agency may not prepare an environmental document with respect to such proposed agency action." The bill does not define the term "environmental document." If read expansively, it could include documents prepared under statutes that include the Endangered Species Act, whose focus, as indicated, is different than NEPA's. Negating the Fish and Wildlife Service's duty to prepare a biological opinion under the ESA just because an agency with no environmental expertise has determined that NEPA analysis is not required is highly problematic.

Even when the SPEED bill does not eliminate NEPA review, its provisions water down that review in unacceptable ways. One noteworthy provision requires agencies to define a proposed action's purpose and need to meet the goals of a private entity seeking federal action, such as an application to use federal land for mineral extraction or an application for a permit under statutes like the Clean Water Act. The courts have struggled with the question of whether agencies are required or even allowed to *consider* the goals of private project proponents in defining an action's purpose and need. They have split on the relevance of private party goals to an impact statement's purpose and need statement. But no court that I am aware of has ever concluded that a purpose and need statement *must meet* a private party's goals. That requirement turns NEPA on its head by displacing considerations of whether a project promotes the public interest with whether it satisfies the narrow, self-interested objectives of private project proponents. Doing so will effectively narrow the range of alternatives that an agency must analyze to one—issuance of the federal permission sought by the private party. Similarly troublesome deference to the goals of private project applicants is reflected in the SPEED Act's provision placing the decision on whether to extend the time needed to prepare a NEPA document in the hands of the applicant, not the agency.

The bill also makes it easier for agencies to avoid having to prepare an environmental impact statement (EIS). NEPA currently allows an agency to prepare a less comprehensive environmental assessment (EA) for a project not covered by a categorical exclusion only if it determines that a proposed action "*does not have* a reasonably foreseeable significant effects on the quality of the environment." The bill would allow an agency to prepare an EA, not an EIS, merely upon concluding that an action is "not likely to have" such an impact. This change would authorize agencies to forego preparation of an EIS simply because uncertainty exists about a

proposed action's impacts. But NEPA is designed to force agencies to consider the *risk* of adverse environmental impacts before deciding whether to proceed.

The SPEED Act also provides that in preparing NEPA documents, an agency may only consider "effects that share a reasonably close causal relationship to, and are proximately caused by, the immediate project or action under consideration." In addition, the agency may not consider effects "that are speculative, attenuated from the project or action, [or] separate in time or place from the project or action." Pegging the scope of the effects that agencies must analyze in their NEPA documents to notions of proximate cause can only lead to confusion, uncertainty, and inconsistency in EPA practices given the notorious indeterminacy of the concept of proximate cause. The drafters of the Third Restatement of Torts recently declared that "the term 'proximate cause' is a poor one to describe limits on the scope of liability." Restatement (Third) of Torts" Liability for Physical and Emotional Harm 29 cmt. b (Am. L. Inst. 2010). In addition, this provision is transparently designed to allow agencies to ignore the extent to which their actions may contribute to an increase in the greenhouse gases that are largely responsible for harms related to climate change. The Supreme Court may have endorsed this kind of limit in its 2025 decision in *Seven County Infrastructure Coalition v. Eagle County, Colorado*. Rather than codifying that result, Congress should be amending NEPA to force agencies to think about the degree to which their actions will exacerbate the ill effects of climate change such as rising temperatures, increased wildfire risk, and more extreme weather events.

Finally, the SPEED Act would allow an agency to apply categorical exclusions that have been adopted legislatively for a different agency. As a result of the Fiscal Responsibility Act, agencies may already apply a categorical exclusion adopted administratively by another agency. The extension of this authorization to legislatively created exclusions is unwarranted. Before adopting a categorical exclusion, an agency must engage in notice and comment rulemaking, which allows interested persons to provide input on the wisdom or legality of the exclusion. No such opportunities for input are guaranteed when Congress adopts a categorical exclusion, especially if it occurs in the context of a reconciliation or other appropriations bill, which often move through Congress quickly and after negotiations that occur behind closed doors. This provision would encourage the proliferation of legislation creating categorical exclusions, which could then be applied far beyond the initial context in which Congress considered them.

Authorizing Determinations Based on Incomplete Information

In various provisions, the SPEED Act allows if not encourages agencies to ignore readily available information about the possible adverse environmental effects of their actions. Section 106(b)(3) of the current statute provides that an agency "is not required to undertake new scientific or technical research" unless that research "is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable." That provision, as others have pointed out, strikes an appropriate balance between requiring agencies to base their NEPA analyses on relevant information that is already available or could become available without unduly burdening the agency or unreasonably delaying decisions on whether projects should proceed.

The SPEED Act upsets that balance by authorizing agencies to ignore potentially important information about a project's environmental risks. It provides that agencies would not be required to "undertake new scientific and technical research after the receipt of an application, as applicable, with respect to such proposed agency action." To begin with, this provision is inscrutable. Presumably it means that if a private entity applies for agency action such as issuance of a lease or permit, the agency receiving the application need not undertake new scientific or technical research once it receives the application. But until an agency receives an application to approve private development, it has little reason to undertake such research; it would be doing so in a vacuum. The application describes the parameters of the project, revealing for the first time the kinds of environmental risks posed by agency approval. This is precisely the time that agencies *should* be engaged in gathering information about the environmental risks posed by a project. This provision also tries to solve a problem that doesn't exist. Even in the absence of this provision, the current statute would still limit an agency's research responsibilities. Cost and time constraints would still apply under § 106(b)(3). Moreover, the proposed provision would encourage private project proponents to file for federal approval as early as they can, even if development plans are still speculative and inchoate, and to locate projects in areas in which existing knowledge about environmental matters is least developed. It maybe that the less the agency knows at the time an application is filed, the less resistance the applicant can expect to face.

Other provisions of the bill would impose similar constraints on an agency's duty to flesh out information about the effects of approving privately sponsored projects, even if that information could be obtained at reasonable cost and within a reasonable time. The bill would amend § 107(b) of NEPA by providing that no federal agency would be required to even *consider* any scientific or technical research that becomes publicly available after the date the agency receives an application to approve a privately sponsored project or the date of publication of a notice of intent or decision to prepare an environmental document for the proposed action, whichever occurs sooner. Thus, not only would an agency be excused from doing its own research about environmental risks once an application has been presented to it. It would also be free to ignore information about a proposed project developed by others and presented to the agency.

Relatedly, a new § 107(b)(2)(C) would *prohibit* agencies from delaying the issuance of an environmental document or a final agency action in order to wait for new scientific or technical information that was not available within the time frame referred to above. This prohibition would apply even if the agency anticipated that new information being developed by others would be highly relevant to whether a proposed action would have unacceptable environmental effects. This means that if the federal government proposes a project next to a small town, and people who live in the small town hear about the project and provide information about why it would put their town in danger, the federal government can simply ignore that information.

Another provision forbids an agency from rescinding, withdrawing, amending, or altering any environmental document prepared under NEPA unless a court has ordered it to do so. As explained below, the bill's provisions concerning judicial review make it much more unlikely that a court will be able to issue such a directive. Putting that aside, however, the provision is ill advised because it precludes agencies from updating NEPA analyses even if newly available information reveals defects or gaps in the original analysis. The Council on Environmental Quality's regulations, before they were rescinded, always *required* agencies to supplement their NEPA

analyses if an agency made substantial changes to the proposed action in ways that were relevant to environmental concerns or if significant new circumstances or information about the significance of a proposal's environmental effects arose. This provision of the SPEED Act is another example of the bill's efforts to limit the degree to which agencies are required to consider the latest and best information available about a project's potential environmental effects. This provision means that if an agency determines a project has a 49% chance of causing an environmental catastrophe, no EIS would be needed.

Likewise, the Act would amend § 107(a)(3) of NEPA by restricting the comments of cooperating agencies, including federal, state, tribal, or local agencies, to matters relating to the jurisdiction of that agency. Many matters are beyond the scope of cooperating agency authority but nevertheless within their knowledge. This provision would therefore limit input from governmental entities with the best knowledge of local conditions and of the desires and concerns of communities that would be affected by agency actions.

In short, the SPEED Act would put its stamp of approval on agency action under a veil of ignorance, even in circumstances in which an agency finds it prudent to delve deeper into a project's possible environmental effects before deciding whether to approve it and, if so, under what conditions to do so. Further, it is also designed to make it difficult for communities to have any say about what the federal government is doing in ways that affect their lives. In this way, it would take power away from the American people.

Limiting Access to the Federal Courts

The Supreme Court has recognized the importance of making judicial review of agency action available. It has interpreted the judicial review provisions of the Administrative Procedure Act (APA) and the Due Process Clause of the Fifth Amendment to the Constitution as sources of a presumption in favor of the reviewability of agency actions. Judicial review of agency actions is thus the norm. It is critically important that agency actions be reviewable in court to ensure that agency actions are consistent with applicable legal requirements and conform to the rule of law.

The Speed Act would undercut the ability of the federal courts to make federal agencies accountable in their efforts to implement NEPA. It would do so both by blocking actions to force compliance with NEPA and by limiting the relief courts are able to provide when they find that agencies have violated obligations imposed on them by NEPA. In other words, if the government lies or deceives in its environmental documents, and if it approves a project that will hurt a community, that community won't be able to get a judge to help. It might not get into court at all.

In a new § 113(d)(1)(C), the SPEED Act would preclude judicial challenges to the establishment of a categorical exclusion. There is no apparent justification for such a preclusion on reviewability. It amounts to an attempt to unaccountably curtail NEPA's applicability in as broad a range of circumstances as possible. The application of a categorical exclusion allows a project to proceed with no NEPA analysis whatsoever. If agencies are shielded from judicial review whenever they adopt a categorical exclusion, they will be free to exempt whatever actions they like from NEPA's dictates. Congress adopted NEPA in 1970 in part to force agencies that regarded concern over adverse environmental issues as unwarranted obstacles to pursuit of favored projects

to consider those effects before deciding whether to proceed with those projects. NEPA was designed to make consideration of whether it is possible to mitigate the unnecessary environmental harms caused by agency actions part of the mission of every federal agency. Blocking judicial review of categorical exclusions would severely undercut NEPA's capacity to continue to serve that function. It would constitute yet another opportunity for agencies to proceed under a veil of ignorance and would eliminate an important avenue for courts to preclude agencies from riding roughshod over NEPA's procedural mandates.

The SPEED Act would also add a new § 113(d)(1)(B). This provision would bar any claim that an agency did not comply with NEPA procedures unless the plaintiff bringing the claim could show, among other things, that it would suffer direct harm if comments it filed during a public comment period were not addressed. That would essentially be an impossible burden of proof to meet. As the new § 2(b) of NEPA to be added by the SPEED Act would state, and as the Supreme Court has repeatedly recognized, NEPA is an entirely procedural statute. It does not mandate any specific environmental outcome or result. As a result, agencies are free to proceed with their proposed projects regardless of whether a NEPA document reveals that doing so would or would not cause significant adverse environmental consequences.

Even if a litigant submitted comments identifying such consequences, then, and even if an agency found the comments to be credible, the agency would not be obliged to change its proposed course of action in any way in response to the comments. It would therefore appear to be impossible to show that the commenters "would suffer direct harm if its comments were not addressed." This provision of the SPEED Act therefore has the potential to make judicial review of alleged noncompliance with NEPA widely unavailable. It also makes no sense to say that new information submitted during the comment period can be ignored by the agency and yet make that same information so important for access to judicial review. For the public, it's heads-I-win-tails-you-lose situation.

In addition, a new § 113(f)(1) would specify that the completion of a NEPA document such as an EIS or determination that a categorical exclusion applies would not be considered judicially reviewable agency action. Only a record of decision to proceed with an action covered in a NEPA document would so qualify. Of course, the farther along a project is, and the more resources have been committed to it by the agency and private proponents, the less likely it is that a court, in balancing the equities, will be willing to halt the project, regardless of the degree to which the agency has violated its NEPA responsibilities.

This last point assumes that courts will have the authority to halt projects pending NEPA compliance. As the next section indicates, that assumption would be unwarranted under the provisions of the SPEED Act.

Intruding on Judicial Discretion and Power

Perhaps the SPEED Act's most troublesome provisions are those that would curtail the authority of the federal courts to provide relief in the face of NEPA violations by federal agencies. The first thing the Act would do, in a new § 113(a)(1), could be to change the standard of review that applies in NEPA challenges. The courts have always applied the APA's arbitrary and capricious

standard in reviewing NEPA challenges. The Supreme Court in its recent *Seven County* decision emphasized how deferential the courts must be in applying that standard. Section 113(a)(1) would nevertheless go further, authorizing a reviewing court to find a violation of NEPA's procedural requirements only if "the agency abused its substantial discretion in complying with the procedural requirements of this Act." Replacing the well-established arbitrary and capricious standard with an abuse of discretion standard, which has never applied to NEPA and does not appear in the APA at all, would introduce an element of uncertainty as courts struggle to determine how the new standard is supposed to affect their analysis in NEPA cases. The use of the modifier "substantial" adds another layer of uncertainty because, as far as I can recall, it has no precedent in the context of the judicial review provisions of any federal environmental statute. The new standard presumably is meant to make to harder for a court to reverse agency action based on NEPA violations, but how the standard differs from mandate for courts to simply rubber stamp whatever an agency has done is not clear.

Even worse, a reviewing court would not be allowed to hold agency action to be in violation of NEPA unless it finds that "the agency would have reached a different result with respect to the final agency action absent such abuse of substantial discretion." For reasons described above, it is hard to understand how a court could ever support such a determination. NEPA is a purely procedural statute. Agencies are completely free to ignore the cautions revealed in the course of conducting NEPA analyses. They need not select the environmentally preferable alternative. They need not condition projects in ways that will mitigate environmental risks or harms. They need not alter their preferred course of action in any way in response to NEPA analyses. So it would seem to be impossible for a court to conclude that the agency *would* have reached a different substantive result if it had not abused the discretion vested in it by NEPA.

The federal courts have recognized the problem in establishing precisely this kind of linkage in the context of assessing a litigant's standing to sue. It is why they have ruled that when a litigant challenges agency action on procedural grounds, the litigant seeking to demonstrate standing to sue need not show that the agency would have reached a different substantive decision if not for the procedural error. Rather, the litigant only needs to show that the agency *might* have come out differently if it had followed proper procedures. At most, then, to justify reversal, § 113(a)(2) should only require a litigant challenging an agency's alleged NEPA noncompliance to show that the agency's final decision might have been different if it had not abused its substantial NEPA discretion.

The SPEED Act would not only alter the applicable standard of review. It would also dictate what a court can and cannot do in responding to NEPA challenges. In doing so, it would infringe on the authority of a coordinate branch of government and eliminate some of the equitable discretion that Article III courts are used to exercising. The Speed Act's addition of a new § 113(c) of NEPA, for example, would constrain judicial authority to order a remand of agency action by conditioning it on a duty to provide specific instructions to agencies to correct errors or deficiencies in compliance. It would compel courts to include in their remand orders uniform deadlines for agency response that could not exceed 180 days, regardless of the complexity of the project or the severity of the agency's initial deficiencies.

Most disturbingly, new § 113(c)(2) would require that a final agency action remanded because of NEPA violations remain in effect while the agency corrects errors or deficiencies found by a court. This provision would bar courts from enjoining projects pending compliance with the statute, at least if the violations identified are solely NEPA violations. It would sap agencies of the incentive to take their NEPA responsibilities seriously because they would know that, regardless of how sloppy or incomplete their efforts to comply with NEPA have been, they will suffer no adverse consequences if called out by a court. They will face no delays in the ability to implement their projects.

This incentive problem is why the default rule under the APA is that a remand of unlawful agency action is accompanied by vacatur of the action until the agency cures the relevant defect and the court determines that it is appropriate for the action to move forward. The threat of an injunction is one of the most powerful inducements for agencies to engage in good faith efforts to comply with NEPA. Without it, projects are more likely to reach advanced stages before NEPA compliance had occurred (if it ever does before the project is completed and the case becomes moot). The SPEED Act's judicial review provisions increase the chance that irreparable environmental harm flowing from agency noncompliance with NEPA will occur.

Conclusion

NEPA was designed to force federal agencies to look before they leap—to consider the possible adverse environmental effects of their actions before they commit to taking them, when there are still opportunities to achieve project goals while avoiding unnecessary damage to the environment. It was also designed to provide ample opportunities for input into the environmental evaluation process, by those with relevant scientific or technical expertise as well as by citizens, businesses, and communities whose interests might be affected if projects linked to environmental effects are allowed to proceed. Finally, the statute was designed to force agencies to publicly disseminate the information gleaned during the NEPA process so that policymakers could intervene to avoid environmental harms and so that the public could put pressure on policymakers to do so even if they do not do so on their own initiative. NEPA was based on the sound rationale that it is foolish to proceed in darkness, when it is possible to discover, based on the best available information, undesirable environmental consequences while there is still time to do something about them, instead or later ruing environmental disasters that could have been foreseen but were not because of short-sightedness.

The SPEED Act would undercut all of these objectives, returning us to a time when nasty environmental surprises caused by government action were the norm. Its provisions limiting the scope of NEPA reviews, allowing agencies to forge ahead with their projects in a state of ignorance about environmental consequences, restricting judicial review, and infringing on judicial authority to provide effective relief to redress NEPA violations all represent ill-advised steps backwards. Congress should not endorse them.