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

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I. 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. Under one well-known scenario, this will require—along with many other actions—the construction of 230 wind farms the size of the proposed Cape Wind project in Nantucket Sound; 1,000 large solar generating facilities of

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about ten square miles each; 1,400 natural gas-fired electric generating stations; 800 carbon capture and sequestration systems at coal-fired power plants; and 850 new nuclear power plants.[1]

The Cape Wind project was first proposed in 2001.[2] It has endured a long series of permit proceedings and lawsuits, and more appear to be on the way. 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 greenhouse gas emissions will be imperiled.

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.[3] 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.

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1. Calculated by author from S. Pacala & R. Socolow, *Stabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies*, 305 SCI. MAG. 968, 969–71 (2004). *But cf*., Steven J. Davis et al., *Rethinking Wedges*, 8 ENVTL. RES. LETTERS 1, 1–6 (2013) (concluding that considerably more new renewable energy facilities are needed than shown in the Pacala & Socolow article).

2. *See* Letter from John H. Rogers, Ne. Clean Energy Project Manager, Union of Concerned Scientists, Comments of the Union of Concerned Scientists on the Materials Management Service DEIS on Cape Wind 1 (Apr. 8, 2008) (on file with Union of Concerned Scientists), *available at* http://www.ucsusa.org/assets/documents/clean_energy/ucs-comments-mms-cape-wind-deis-04-08-08.pdf.

3. MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 131–41 (2008).

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 executive orders have this objective.[4] Several of them require agencies to produce paperwork to demonstrate how they are reducing paperwork.[5] 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,[6] 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 onto some particular impediment and try to attack it, without an understanding of where it fits in the overall context.

II. THE PROJECT

This article is a preliminary report of an ongoing project to examine and assess the various forms of procedural relief that have been adopted or proposed to expedite the approval process for construction projects—especially, but not exclusively energy projects. The project involves the following components:

1. Compile the measures and proposals to expedite approval of physical construction projects, and categorize the techniques used 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.

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4. *See*, *e.g.*, Exec. Order No. 13,212, Actions to Expedite Energy-Related Projects, 66 Fed. Red. 28357 (May 22, 2001).

5. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., REGULATORY ANALYSIS REQUIREMENTS: A REVIEW AND RECOMMENDATIONS FOR REFORM 13, 15 (2012); Peter L. Strauss, *A Confluence of Concerns with the Accumulation of Regulatory Regimens*, REGBLOG (Apr. 9, 2012), https://www.law.upenn.edu/blogs/regblog/2012/04/a-confluence-of-concerns-with-the-accumulation-of-regulatory-regimens.html.

6. *E.g.*, Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 289, 325 (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.

III. PROCEDURAL RELIEF IN CONTEXT

Removing procedural obstacles is only one of the numerous ways that governments attempt to facilitate the construction of energy and other projects. These are among the others:

1. Economic assistance (grants, loans/guarantees, tax relief).
2. Guaranteeing markets (renewable portfolio standards, transmission lines).
3. Assured rates (feed-in tariffs, power purchase agreements).
4. Allowing rate recovery from customers of regulated utilities.
5. Leasing government-owned land.
6. Eminent domain over privately owned land.
7. Disadvantaging competing energy sources (e.g., carbon price).
8. Research and development.
9. Establishment of liability and property rules.
10. Raising or lowering trade barriers.

Moreover, procedural obstacles are only one set of the various factors that can delay the construction of projects. Among the other major factors that cause project delays are:

1. Difficulty in obtaining financing.
2. Changing prices of inputs (especially fuel).
3. Changing market conditions (e.g., cheaper alternatives).
4. Changing government incentives.
5. Changing government regulations.
6. Project priorities.
7. Land acquisition.
8. Contracting and labor rules.
9. Shortage of skilled labor.
10. Supply chain problems.
11. Lack of access to key infrastructure (e.g. pipelines, roads, transmission).
12. Engineering difficulties and site conditions.

13. Intellectual property rights to technology.

Thus, while removing "red tape" is often portrayed as a panacea for building projects and creating jobs, that is far from the reality.[7] These procedural issues are among the important impediments, however, and thus resolving them is an important enterprise.[8]

A. Forms of Procedural Relief

Object of Relief—Some types of relief are granted to specified classes of activities (such as electricity transmission lines or cellular telephone towers). Projects below a specific size or impact threshold are often exempt from certain requirements. Some special laws exempt specific projects or specific locations. Some approving entities (such as the President or a governor) are shielded from having to obtain certain approvals.

Grantor of Relief—Relief may be granted by any of several bodies. Examples include: Congress; state legislatures; federal executive officials or bodies; and state officials or bodies. Occasionally courts will announce that certain approvals are unnecessary.

Conveyance of Relief—The most overt mechanism by which procedural relief is granted is through Congressional or state legislation. Sometimes it arrives through provisions in appropriations or budget bills. It may also be conveyed through agency regulations, executive orders, interagency agreements, agency guidelines, or determinations made by agencies with respect to particular projects.

Scope of Relief—In some instances, a particular project is exempted from all governmental reviews.[9] More commonly, exemptions are granted from certain reviews, or from certain substantive requirements.

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7. For an examination of the numerous factors delaying the construction of highway projects, see LINDA LUTHER, CONG. RESEARCH SERV., R42479, THE ROLE OF THE ENVIRONMENTAL REVIEW PROCESS IN FEDERALLY FUNDED HIGHWAY PROJECTS: BACKGROUND AND ISSUES FOR CONGRESS 3–4 (2012), *available at* http://environment.transportation.org/pdf/proj_delivery_stream/crs_report_envrev.pdf.

8. One industry-sponsored report discussing permitting impediments is STEVE POCIASK & JOSEPH P. FUHR, JR., U.S. CHAMBER OF COMMERCE, PROJECT NO PROJECT: PROGRESS DENIED: A STUDY ON THE POTENTIAL ECONOMIC IMPACT OF PERMITTING CHALLENGES FACING PROPOSED ENERGY PROJECTS 16–20 (2011), *available at* http://www.projectnoproject.com/wp-content/uploads/2011/03/PNP_EconomicStudy.pdf.

9. *See, e.g.*, Holly Doremus, *The Story of TVA v. Hill: A Narrow Escape for a Broad New Law*, *in* ENVIRONMENTAL LAW STORIES 109 (R.J. Lazarus & O.A. Houck eds., 2005) (recounting Congressional action that cleared away all legal impediments to

Changing decision-maker—One frequent device is to lodge decision-making authority in a different office or body, often to higher or lower levels of government. For certain kinds of projects, the federal government preempts state control,[10] or states preempt local control.[11] At other times, the proposed move goes in the other direction. "One-stop shopping" is one favorite mode—consolidating all decision-making authority in one official or body, rather than requiring the applicant to seek approvals from several different entities. Short of that, one agency may be designated as the lead agency for coordinating the review being conducted by several agencies (though not given the authority to make actual decisions). Finally, some laws have removed or annulled private restrictions on project approval, such as land covenants.

B. Other Variables Regarding Relief

Absolute or conditional—Most forms of relief are available to any project that meets the eligibility criteria. However, some are conditioned on the project's meeting certain special requirements. For example, a building that meets specified "green building" criteria may receive special treatment. This can provide an incentive for applicants to add features that enhance the energy efficiency or other positive attributes of a project.

Immediate or delayed—Procedural relief typically is available at the outset. However, some forms are granted only after some time has passed. For example, the Federal Energy Regulatory Commission may supersede state control over electric transmission lines only if the state public utility commission has not acted on the application for at least twelve months.[12]

Emergency or standard—Most exemptions apply at all times. However, some are granted only in emergency situations, and their availability may end once the emergency ends. As one example, after Hurricane Katrina a number of temporary exemptions were afforded to several standard rules relating to such matters as debris removal.[13]

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the construction of Tellico Dam, notwithstanding U.S. Supreme Court decision upholding denial of project under Endangered Species Act).

10. Examples of federal statutes that preempt state or local authority over physical projects, to greater or lesser extents are: Atomic Energy Act, 42 U.S.C. § 2011 (2006); Nuclear Waste Policy Act, 42 U.S.C. § 10101 (2006); Telecommunications Act, 47 U.S.C. § 609 (2006).

11. For example, many states have statutes that preempt municipal control over hazardous waste and solid waste disposal facilities. Whether state law preempts municipal control over hydraulic fracturing operations to extract natural gas is a subject of current litigation in several states. S*ee, e.g.*, IDAHO CODE ANN. § 39-4402 (West 2012).

12. Piedmont Env't Council v. Fed. Energy Regulatory Comm'n, 558 F.3d 304, 313 (4th Cir. 2009).

13. *See* Michael B. Gerrard, *Emergency Exemptions from Environmental Laws After Disasters*, 20 NAT. RESOURCES & ENV'T, no. 4, 2006 at 10, 12.

C. Special Administrative Review Procedures

The most common kind of procedural relief is special procedures for administrative review. The types of special procedures we have found are enumerated below.

Time limitations—Some legislation requires, with varying degrees of stringency, agencies to act on applications within a set period of time. The most severe of these grant default approvals provide that if the agency exceeds the deadline, the approval is automatically deemed granted. Short of that, the agency may face penalties for lateness, such as forfeiture of review fees. The approval may have a time limit that is judicially enforceable, such that an applicant may go to court after the deadline has been missed and seek an injunction. This also allows the agency additional time until the court acts and its order becomes effective. The least stringent time limitation is a goal that is merely aspirational and cannot be enforced.

Reporting—As a goad to action, some legislation requires agencies to file periodic progress reports on the status of various permit applications, or to create a web site that allows the public to monitor progress. On a more ad hoc basis, legislators sometime convene hearings or take other actions that require updates on particular projects.

Truncated procedures—Within a given review program, some procedures are more elaborate than others, typically based on the size and impacts of a project. For example, under the National Environmental Policy Act (NEPA), larger projects require environmental impact statements; smaller projects may get by with an environmental assessment, which tends to be a considerably shorter document that goes through fewer procedures. Legislation rarely makes this determination, but an agency that is eager to hasten a project may opt for the shorter procedure (though this may increase the risk of an adverse litigation outcome).

Limit substantive issues considered—Legislation may limit the issues that some agencies may consider in making decisions on applications. For example, the Telecommunications Act of 1996 provides that municipalities may not deny approvals for telecommunications towers based on electromagnetic frequency radiation.

Require special analyses—A number of enactments require the government to analyze the effect that projects (or, more commonly, proposed regulations) would have on employment levels. Others require projects to undergo cost/benefit analysis.

Prioritize favored projects—Some enactments require decisions on particular projects to be made by a set time. For example, in December 2011 Congress passed a bill requiring President Obama to make a decision on whether to allow the Keystone XL Pipeline within sixty days.[14]

Require written justifications for denials—Federal agencies typically issue formal "records of decision" when making formal decisions on applications for major projects, as a basis for possible judicial review. Many lower levels of government are not as systematic. The Telecommunications Act of 1996 required local governments to issue written statements of reasons when acting on applications for telecommunications towers; this helps ensure that the agencies have thought through the reasons for their decisions, and it facilitates judicial review.[15]

Reduce or eliminate discretion to deny applications—Congress has occasionally declared that a particular location has been selected for a named project, leaving the administration with limited discretion in denying the application or considering alternative locations. A classic example is Congress' designation of Yucca Mountain, Nevada as the location of a repository for nuclear waste.[16]

Programmatic or generic review of like actions—When certain kinds of projects share similar types of impacts, an environmental review may be conducted that examines these common impacts across a range of projects. This way the environmental review of a particular project may be limited to those impacts that are distinctive to a certain site. For example, the Bureau of Land Management has issued programmatic environmental impact statements for solar energy projects on federally owned lands in several Western states.[17]

Permit by rule—Some agencies grant blanket approvals for certain kinds of undertakings once they have determine that these actions will have acceptable impacts. These approvals often go through formal rulemaking processes and are thus referred to as "permit by rule." For example, the U.S. Army Corps of Engineers issues "nationwide permits" for classes of actions; an action that falls within the definitions need not

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14. Temporary Payroll Tax Cut Continuance Act of 2011, Pub. L. No. 112-78, 125 Stat. 1280.

15. Telecommunication Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

16. H.R.J. Res. 87, 107th Cong. (2002). Subsequent events have shown that this kind of designation may have limited impact.

17. *See* BUREAU OF LAND MGMT., *Obama Administration Approves Roadmap for Utility-Scale Solar Energy Development on Public Lands*, U.S. DEP'T OF THE INTERIOR, (Oct. 12, 2012), http://www.blm.gov/wo/st/en/info/newsroom/2012/october/NR_10_12_2012.html.

secure further approvals from the Corps, though certain filing and notification requirements may apply.[18]

Advance review—In an effort to induce the construction of desirable projects, some agencies conduct review in advance of receipt of a formal application. For example, the state of New York hoped to attract a semiconductor manufacturing facility to a particular upstate town.[19] It prepared an environmental impact statement so that an applicant who eventually appeared could proceed to construction much more quickly. This effort was ultimately successful, though it was not without controversy.[20]

Electronic systems for improving permit processing efficiency—When an agency is processing large numbers of permits, it is easy for some of the applications to be lost or forgotten. To address this problem, many agencies have adopted electronic systems to track information about permit applications. This also increases the transparency of the process.

Pre-filing scoping procedures—Some agencies allow, encourage, or even require applicants to meet with them in advance of filing applications for the purpose of discussing the contents of the contemplated application and the studies that must be performed in order for the application to be deemed complete. This procedure helps expedite the ultimate preparation and processing of the application.

Added staff/consultant resources for review—The speed with which agencies may process an application is often a function of its staff resources. Some agencies charge hefty application fees—sometimes keyed to project size—that allow the hiring of staff or outside consultants to review the applications. Special staff training is often also required.

Allow applicants to prepare their own review documents—A mechanism that does not formally change the decision-maker, but that certainly grants a more central role to the applicant, arises when the applicant is allowed to prepare review documents—such as environmental impact

18. *See* 33 C.F.R. § 330.1(b) (2012).

19. KORENA BURGIO & EVAN CASTER, EVALUATING THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) THROUGH A CASE STUDY OF GLOBAL FOUNDRIES 4 (2011), *available at* http://www.skidmore.edu/academics/wri/2011%20PDF%20Papers/burgio_caster.pdf; *see also* Kenneth Adams, *New York State's Efforts to Promote Economic Development and Stimulate Job Creation*, U.S. DEP'T OF STATE (Oct. 31, 2011, 10:30 AM), http://fpc.state.gov/176467.htm.

20. BURGIO & CASTER, *supra* note 19, at 18; *see also History of the Luther Forest*, LUTHER FOREST TECH. CAMPUS, http://lutherforest.org/about_concept.php (last visited Dec. 10, 2012).

statements—itself, rather than having those documents prepared by a government agency. This technique has been praised for injecting environmental considerations into the planning process at an early stage, and criticized for impairing independent agency judgments, but it clearly has the potential to accelerate the approval process.[21]

Concurrent rather than consecutive reviews—Large projects often require approvals by multiple agencies. Some agencies prefer to delay their review until other agencies have already acted; this may reduce their workload and could save them from having to make difficult decisions. Ultimate approval may be accelerated if the various reviews are conducted concurrently rather than consecutively.

Facilitated public participation—Public opposition often derails projects. Some of the techniques to expedite approval are designed to steamroll over opposition by, for example, elevating decision-making authority to governmental levels that are not susceptible to local sentiment. However, other techniques attempt to involve the public more intimately in the decision-making process, partly in hopes that this will succeed in persuading the citizens that a project should proceed, possibly with modifications that reflect public input.

IV. MODIFY JUDICIAL REVIEW OF AGENCY DECISIONS

Another broad category of measures to expedite approvals involves modifying the judicial as opposed to the administrative review processes. Below are the types of modifications that have been adopted or proposed.

Allow judicial review of denials—Some statutes allow lawsuits that might otherwise be unavailable to challenge administrative denial of permits. For example, the Telecommunications Act of 1996 allows applicants for communications towers to challenge municipal denials in federal court.[22]

Allow early judicial review of denials—Ordinarily an applicant must await the end of the administrative process before challenging adverse agency action in court. Some have proposed that early review be allowed when interim agency action portends a negative outcome.[23]

Bar judicial review of approvals—Congress may declare that certain administrative actions may not be challenged in court, or it may limit the categories of plaintiffs who may bring challenges.

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21. Michael B. Gerrard, *The Effect of NEPA Outside the Courtroom*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10615, 10616 (2009).

22. 47 U.S.C. § 332(c)(7)(B)(v) (2006).

23. *But see* Las Brisas Energy Ctr., L.L.C. v. EPA, No. 12-1248, 2012 U.S. App. LEXIS 25535, at *2 (D.C. Cir. 2013) (rejecting early challenge to EPA new source performance standard).

Designate forum—Congress may designate the court or the venue for hearing certain types of lawsuits. For example, the district courts of the state where a project would be built might be thought to be more or less favorable to that project than the federal courts in Washington, D.C., and Congress may designate which court would hear a challenge.

Allow direct appellate review—Many months can be saved if a challenge is allowed to bypass the district court and go directly to a court of appeals. Such a procedure also makes it even clearer that review is limited to the record below, and that new factual material cannot be introduced. Some statutes provide for direct appellate review of certain kinds of administrative actions.

Shorten statute of limitations—A shorter statute of limitations reduces the period of uncertainty for a project. It also gives project opponents less time to mobilize. Some laws have shortened the statute of limitations. For example, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005[24] provided that the time period for challenging certain kinds of highway project approvals would be 150 days, rather than the standard six years.[25]

Give calendar preference to covered cases—Legislatures sometimes give a calendar preference to lawsuits on certain matters so that they can be heard earlier than would otherwise occur.

Mediation—A legislative body can require or encourage parties to submit disputes to mediation before they may institute litigation. For example, in 2010 the California Legislature enacted legislation encouraging mediation of disputes under the California Environmental Quality Act (CEQA).

Sanction frivolous or unwanted lawsuits—Challenges to what are seen as job-creating projects often anger elected officials. In 2010, the California Legislature adopted a law allowing courts to impose sanctions for "frivolous" litigation brought under CEQA. In both Louisiana and Maryland, law school environmental clinics that have represented clients in opposition to major employers have experienced difficulties with their respective governors.[26]

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24. 23 U.S.C. § 139(l)(1) (2006).
25. 28 U.S.C. § 2401(a) (2006).
26. Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J. L. & POL'Y 34, 47 (2000); Timothy B. Wheeler, *O'Malley Voices Disapproval of Law School Clinic's Pollution Suit*, BALT.

Many of the measures being adopted to encourage project construction go beyond procedural changes 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.[27] Such substantive modifications, however, are not the focus of this project.

V. CRITERIA FOR ASSESSING THE FORM OF RELIEF

Do the various forms of procedural relief achieve their objectives? Do they have collateral effects, either positive or negative? These questions are seldom asked and even more rarely answered. Pending the assembly of more detailed information (an element of this project that lies ahead), here are several specific criteria that should be addressed in assessing the impacts of the procedural changes discussed here.

First, these are criteria for assessing the *procedural* aspects of the revised approval processes:

1. *Applicability*—Do they apply to actual projects? Are the approved projects actually built?
2. *Speed gained*—How much time do they save compared to standard process? Do they address the rate-determining step? Do they save total time or simply defer issues?
3. Do they leave agencies with the appropriate degree of discretion? Do they allow agencies to modify or deny project approvals if adverse effects are predicted?
4. What effect do they have on opportunities for public participation? Are affected communities still able to make their views known, and to gather the information they need in order to comment meaningfully?
5. Do they allow meaningful judicial review? Are the courts still able to serve as a check on unlawful or arbitrary and capricious action?
6. Do these measures have serious opportunity costs, such that they transfer governmental resources from some projects to

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SUN (Nov. 18, 2011), http://articles.baltimoresun.com/2011-11-18/features/bs-gr-omalley-law-clinic-20111117_1_kristin-hudson-waterkeeper-alliance-law-school.

27. Among the changes that have been proposed or adopted are measures to loosen substantive environmental standards; allow early start of condemnation or construction before all permits are 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 and less ambiguous; eliminate obsolete or redundant rules; allow modification of permits with reduced or no oversight; and establish uniform standards for electrical/gas interconnection.

others? Is the net result positive in terms of overall employment and other objectives?

7. Do the measures vest so much unsupervised authority in one person, or a small group of people, such that there is undue susceptibility to corruption?

The following criteria address the *substantive* issues—i.e. whether the process led to the selection of the best site and technology:

1. What are the public health impacts of the approved projects?
2. What are the environmental, greenhouse gas, and ecosystem impacts of the approved projects?
3. What effect do the approved projects have on energy security?
4. To what extent do the approved projects affect fossil fuel use?
5. What are the environmental justice implications of the approved projects? Do the projects have disproportionate adverse effects on low-income and minority communities?
6. What are the financial costs of the approved projects? What costs do they impose on customers and taxpayers?
7. What are the total employment impacts of the approved projects?
8. Do the approved projects have a multiplier effect in the sense of allowing more projects to be built—e.g. an electric transmission line that facilitates the construction of more wind and solar projects?

VI. PRELIMINARY CONCLUSIONS

It is fashionable to blame "bureaucratic delays" for the long time it takes to approve projects. Inefficiency or redundancy certainly occurs, 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. The environmental permit requirements that are the subject of many of the complaints, however, 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, some very recent and important proposals 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.[28]

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 projects 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 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

28. ROMNEY FOR PRESIDENT, INC., THE ROMNEY PLAN FOR A STRONGER MIDDLE CLASS: ENERGY INDEPENDENCE 8 (2012) (stating "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").

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 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.

VII. 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, are expedited procedures enough to build the number of renewable energy projects that we need in order to reach our greenhouse gas reduction targets, 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. Can we continue to hold up a wind project for years because it would be bad for an endangered bat species, or block a beautiful view of the seashore, if the cumulative effect of all these little interferences is to prevent us from moderating climate change and protecting species, landscapes and people all over the world? Does something have to give, and if so, what is it, and who decides?

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 renewables 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.