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May 23, 2017

The Honorable Raúl R. Labrador  
The Honorable Mike Johnson  
Subcommittee on Oversight and Investigations  
Committee on Natural Resources  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Labrador and Vice-Chairman Johnson:

On behalf of the Associated General Contractors of America (AGC) and its 26,000 commercial construction company members, I appreciate your interest in identifying federal requirements and policies that are ineffective or excessively burdensome and exploring ways to reform them.

AGC has reached out to the Trump administration, Congress, the federal regulatory agencies and the U.S. Small Business Administration with recommendations that highlight the need for fewer and smarter regulations, greater industry assistance and involvement, and reduced barriers to approving and moving forward on important infrastructure projects.

The issues outlined below are under the jurisdiction of the House Committee on Natural Resources. Please consider AGC's recommendations on how to reduce costs, delays and inefficiencies in project delivery.

## **Endangered Species Act (ESA)**

The ESA<sup>1</sup> has not been significantly updated [since 1988](#); AGC applauds the 115th Congress for making its change a priority. The ESA is frequently used to stop or impede major federal infrastructure projects. It has the power to shape even local land use decisions across the nation. Over the past several years, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (the Services) have proposed and/or finalized rules to list numerous species as either threatened or endangered with ranges that extend across the country. In addition, because of settlement agreements with various conservation groups, the Services are required to issue listing decisions on hundreds of additional species over the next several years. These listings have the potential to significantly impact existing and planned infrastructure work. Additionally, the Services have been steadily rolling out new policies and regulations focused on the designation of critical habitat, mitigation options, and the listing process. Many of these rules are subject to litigation. AGC expects there to be greater citizen involvement, including pushback on any regulatory changes proposed by the Trump administration, as well as citizen suits to enforce the ESA's provisions.

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<sup>1</sup> 16 U.S.C. §§ 1531 – 1544.

### Listing Process

The Section 4 listing of a species as threatened or endangered (and its critical habitat designated) triggers the “take” prohibition.

**AGC continues to have concerns regarding the contents of listing petitions: Congress should establish a higher threshold for the petitioner to meet before the petition can be considered by FWS. AGC is aware of recent FWS rulemaking on the petition process;<sup>2</sup> however, legal experts report this amounts to merely a codification of current practice. A higher threshold of reliable data and species specific knowledge is warranted. AGC also has concerns with [the Service’s longstanding practice](#) of prioritizing listing and uplisting petitions over delisting and downlisting petitions.**

**AGC also points out that currently ESA does not allow the Service to consider economics when deciding whether to list a species; such considerations are allowed only in the designation of critical habitat. For example, in late 2016 the U.S. Court of Appeals for the Ninth Circuit reversed a district court opinion and held for the first time that a species may be listed under the Endangered Species Act based on projections about what could happen nearly 80 years from now in terms of habitat loss and species response.<sup>3</sup>**

### Critical Habitat

When a species is listed under Section 4, the Service generally must also designate “critical habitat” for the species. Critical habitat designations for listed species include areas, occupied or not, that are deemed essential to species survival and recovery.

**AGC is concerned that FWS has become bogged down with the critical habitat process. There continues to be widespread debate about whether critical habitat is for a species survival or its recovery. Recognizing that any construction project within any area so designated will need to be evaluated, there is merit to exploring ideas on how to make the critical habitat process more efficient and more transparent, including a better analysis of related economic impacts. See “Consultation” section below for further discussion.**

### Take Prohibition

The Section 9 “take” prohibition puts commercial contractors at risk of criminal or civil liability.<sup>4</sup> “Taking” is broadly defined under the statute and regulations, and has been broadened even further by caselaw to include construction (or land use) activities that destroy or alter critical habitat and thereby cause actual death or injury to a listed species (on federal or nonfederal land), which may include:

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<sup>2</sup> 81 Fed. Reg. 66, 462 (Sept. 27, 2016); 50 C.F.R. § 424.14.

<sup>3</sup> *Alaska Oil & Gas Ass’n v. Pritzker* (NMFS did not act arbitrarily and capriciously in concluding that the effects of global climate change on sea ice would endanger the Beringia bearded seals distinct population segment in 80 years) - <https://cdn.ca9.uscourts.gov/datastore/opinions/2016/10/24/14-35806.pdf>.

<sup>4</sup> The “no-take” provision of ESA mandates civil and/or criminal penalties for “taking” threatened or endangered species, and for attempting, soliciting another, or causing another to violate any of ESA’s provisions. 16 U.S.C. §§ 1538(a), (g). Criminal penalties may include jailtime. Additionally, citizen suits and injunctive relief are always available. Any person may commence a civil suit to enjoin any activity alleged to be in violation of the Act. 16 U.S.C. § 1540(g)(1). If the party bringing the suit prevails, he or she may recover attorney’s fees and costs. 16 U.S.C. § 1540(g)(4).

- Removal of large woody debris or riparian shade canopy, dredging, discharge of fill material, and draining, ditching, blocking or altering stream channels or surface or ground water flow
- Blocking fish passage through fills, dams, or impassable culverts

**AGC recommends that Congress clarify that the take prohibition only applies to actions that result in actual death or injury to a listed species.**

### Consultation

The incidental take permitting processes provide that a “take”—which is incidental to an otherwise lawful activity—may be permitted in certain circumstances and under certain conditions. Section 7 requires all federal agencies to “consult” with FWS or NMFS to “insure” that projects (on public or private land) that have a “federal nexus”<sup>5</sup> are not likely to “jeopardize” the continued existence of any listed species. Agencies must also ensure that their actions do not cause the “destruction or adverse modification” of designated critical habitat.<sup>6</sup>

**The designation of “critical habitat” under Section 4 is interrelated with the application of the “adverse modification of critical habitat” standard in the Section 7 consultation process. AGC is concerned by new federal regulations<sup>7</sup> that increase the likelihood that the Services will make adverse modification findings, and could make it more likely that the Services will designate critical habitat, and do so across larger areas of land than in the past. The revised regulatory regime provides discretion and flexibility for the Services, while creating much uncertainty for the construction and development community. This will increase costs for project proponents, who require federal permit authorizations or licenses, and restrict land use and activities.**

**Congress should consider removing the “adverse modification of critical habitat” regulatory standard under Section 7 and clarifying that the “jeopardy” standard addresses both habitat and direct impacts to species. AGC maintains that the act of evaluating and designating critical habitat, and application of the destruction or adverse modification standard through Section 7 consultation, duplicates the protection already provided by the jeopardy standard.**

**AGC also recommends that Congress provide additional support for the development of programmatic consultations and direct the Services to further streamline project-level Section 7 consultation activities as follows: clarify date of initial consultation; set a time limit on concurrences; increase the increase the applicant’s level of involvement in consultation. See also AGC’s related recommendations below - “Interaction Between NEPA and ESA.”**

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<sup>5</sup> Section 7 “consultation” applies to projects (on public or private land) that receive federal funding, a federal permit/license or other type of federal approval (e.g., U.S. Department of Transportation construction, the issuance of a Clean Water Act Section 404 “dredge-or-fill” permit, FERC licensing, etc.).

<sup>6</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02.

<sup>7</sup> The Services issued two rules and a policy that revise regulations governing the designation of, and Section 7 consultation on, critical habitat. First, the Services issued a rule to revise the criteria for designation of critical habitat, 81 Fed. Reg. 7,414 (Feb. 11, 2016). Second, the Services promulgated a revised definition of “destruction or adverse modification” of critical habitat, 81 Fed. Reg. 7,214 (Feb. 11, 2016). Finally, the Services adopted a final policy regarding the implementation of ESA Section 4(b)(2) for exclusion of areas from critical habitat designation, 81 Fed. Reg. 7,226 (Feb. 11, 2016).

### Mitigation

President Trump's [Executive Order on Energy Independence](#) rescinded the Presidential Memorandum of Nov. 3, 2015, "[Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment](#)," and directed a reexamination of the mitigation policies and practices of the federal government to balance conservation strategies and policies with the need for creating jobs. Per Department of Interior Secretary Zinke's related [Secretarial Order 3349](#), the reexamination will include FWS Mitigation Policy issued on Nov. 21, 2016,<sup>8</sup> and ESA Compensatory Mitigation Policy issued on Dec. 27, 2016.<sup>9</sup> Both policies emphasize FWS' goal to strive for a "no net loss" or a "net gain" for protected species, despite comments from stakeholders that there is no requirement under the ESA to achieve such an outcome.<sup>10</sup>

**We urge Congress to provide more certainty upfront regarding the requirements for and availability of suitable mitigation (see more below under "Interaction between ESA and NEPA"). AGC members support coordinated mitigation planning and efforts to reduce transaction costs.<sup>11</sup> Congress should provide greater flexibility for project sponsors to develop advanced mitigation programs and then receive credit for this mitigation. In addition, FWS should be required to give substantial weight to programmatic mitigation plans. Overall, a well-implemented, credit-based mitigation policy could provide high-quality, cost-effective mitigation.<sup>12</sup>**

**In addition, if a general contractor is fully implementing the required ESA mitigation actions adopted in the National Environmental Policy Act (NEPA) process and included as conditions in the project's permits, the contractor should be indemnified and "held harmless" for any unauthorized "take" of a listed species. (*Scenario: A bird got stuck and died in netting that was approved through a mitigation plan. The contractor is fined/sued for a taking and the project manager held personally responsible.*) On some complex infrastructure projects, this unreasonable risk is unnecessarily driving up the cost for design-build projects.**

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<sup>8</sup> 81 Fed. Reg. 83,440.

<sup>9</sup> 81 Fed. Reg. 95,316.

<sup>10</sup> The Presidential Memorandum's goal of "net benefit" or "no net loss" was in conflict with the ESA because the ESA provides no authority for FWS to impose on permit applicants mitigation measures that are intended to result in a net benefit or no net loss. ESA Section 7 "consultation" requires federal agencies to ensure their actions are not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2). Additionally, in the context of a private party obtaining ESA "take" coverage using a habitat conservation plan under ESA Section 10, FWS must ensure that the permit applicant will "to the maximum extent practicable, minimize and mitigate the impacts" of incidental take authorized by the permit. 16 U.S.C. § 1539(a)(2)(B).

<sup>11</sup> FWS has adopted the definition of "mitigation" that appears in the Council on Environmental Quality (CEQ) the National Environmental Policy Act (NEPA regulations ([40 C.F.R. § 1508.20](#)). FWS application of mitigation in the NEPA context is covered in the Services mitigation policy ([81 FR 83440](#), Nov. 21, 2016 – Appendix B), which is undergoing review and likely to be withdrawn. The policy states: "To the fullest extent possible, the Service should coordinate with State, tribal, local, and other Federal entities to conduct joint mitigation planning, research, and environmental review processes."

<sup>12</sup> To help improve FWS's ability to evaluate the effectiveness of its compensatory mitigation strategies and ensure that the agency appropriately plans the obligations necessary for this purpose, a 2017 GAO report recommends that FWS establish a timetable with milestones for modifying the RIBITS database to incorporate FWS's in-lieu fee program information. *U.S. Fish and Wildlife Service's American Burying Beetle Conservation Efforts*, GAO-17-154: Published: Dec 22, 2016. FWS concurred with this recommendation.

## Interaction between ESA and NEPA

NEPA drives the evaluation of biological resources associated with the project. All levels of NEPA documentation require an evaluation of impacts to federally-listed species. The detail of the analysis will depend on the scope of the project, ecological importance and distribution of the affected species, and potential impacts of the project.<sup>13</sup>

The NEPA and the ESA Section 7 “consultation” processes **should** interact in the early phases of the environmental analysis of a project. Statutory language and agency guidance<sup>14</sup> indicate that interagency coordination and consultation **should** begin prior to or at the time of the release of the Draft Environmental Impact Statement (EIS) or Environmental Assessment. When the final EIS is issued, Section 7 consultation **should** be completed, and the NEPA Record of Decision (ROD) for an EIS should address the results of Section 7 consultation.

In recent years, many newsworthy examples of listed animal, plant and insect species have halted or delayed infrastructure development projects across the country.<sup>15</sup> AGC contractors report of projects that are delayed in breaking ground (or stopped mid-cycle) because ESA consultations (or FWS concurrence) must occur before the necessary environmental approvals, permits or permissions are granted. Notably, the “consultation” requirement is triggered if project “may affect” listed species (plants or animals) or designated critical habitat. The provision also applies with equal force to actions that either have not yet occurred or actions that may be near completion. For that reason, construction projects are frequently halted mid-way – at extraordinary cost – if a protected species is discovered that may be adversely affected.

Unfortunately, for large infrastructure projects (including those that are vital to clean water, safer roads and bridges and a more reliable energy system), the typical environmental approval scenario plays out as follows: extremely lengthy NEPA review process (1,679 days, on average, to complete and EIS), followed by protracted federal environmental permitting process (e.g., 788 days, on average, to obtain an individual Clean Water Act Section 404 permit). What is more, inefficient bureaucratic processes are forcing the reevaluation of previously approved NEPA documents and decisions. Even a relatively minor modification to the project footprint may reopen environmental analyses. This invariably leads to excessive paperwork, duplicate consultation procedures and related inter-agency reviews, and inefficient project planning and construction phasing (due to, in the case of ESA, time-of-year restrictions relating to tree and brush clearing and species surveys).

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<sup>13</sup> For example, a “categorical determination” (CE) through NEPA does not exempt any project from sufficient environmental analysis to determine the likely presence and potential impacts of the project on listed species, unless a programmatic determination to that effect has been made at the local level with the concurrence of the Fish and Wildlife Service/National Marine Fisheries Service (Services).

<sup>14</sup> 16 U.S.C. § 1536 (c)(1); 42 U.S.C. § 4321 *et seq*; see e.g., [https://www.environment.fhwa.dot.gov/ecosystems/laws\\_esaguide.asp](https://www.environment.fhwa.dot.gov/ecosystems/laws_esaguide.asp).

<sup>15</sup> Media have reported on the desert tortoise in the Southwest, the northern spotted owl in the Pacific Northwest and the delta smelt on the West Coast. Plant species listed as endangered or threatened — such as running buffalo clover, which can be found in Indiana, Kentucky, Missouri, Ohio and West Virginia; or snow trillium, which can be found in 14 Midwestern states — also have caused significant impacts on development projects across the U.S. Even insects can be federally protected under the ESA. FWS recently proposed listing the rusty patched bumble bee (*Bombus affinis*) as an endangered species.

### Reevaluations and Supplemental EISs

Prior to proceeding with major project approvals or authorizations, the lead agency generally seeks to ensure that the environmental documentation for the proposed action is still valid. In some projects, such as certain highway projects, a final EIS is only valid for up to three years following the last major approval. If no action to advance the project has occurred in the last three years, a *written reevaluation* is required. This may be a case where a project has been “shelved” due to lack of funding or simply put aside due to changes in statewide or regional priorities.<sup>16</sup> The scope and breadth of the reevaluation generally is dependent on: the type and degree of public controversy, possibility or reality of litigation, and the original and anticipated types of environmental resources and project impacts.

A draft EIS or final EIS may need to be supplemented if an agency receives new information or a change is made regarding a project.<sup>17</sup>

In practice, AGC members report that even minor changes or adjustments to the project design or location – such as small additions or changes to right-of-way, small temporary or permanent easements or drainage pond features to accommodate schematics – will trigger another round of lengthy coordination at the federal and state level and public review and possibly a supplemental EIS. It is common for the project limits, as defined during preliminary design and used to establish the NEPA project footprint, to be inadequate to accommodate all project aspects – such as drainage features, utilities and construction access. Therefore, minor changes to the NEPA footprint are required to construct the project. Because of the overarching fear of litigation brought by advocacy groups alleging noncompliance with NEPA’s procedural requirements, agencies are overzealous in producing a “litigation-proof” EIS. This attitude results *not just* in the over documentation of minor changes (that should not trigger NEPA), but it also impacts value engineering the contractor performs during a design-build procurement by stifling innovation of design changes capable of capturing larger cost savings.

Per FHWA regulations, under no circumstances may a private entity have any decision-making responsibility in the preparation of any NEPA document (23 C.F.R. § 636.109(b)(6)). After the NEPA process is complete, project sponsors may only accept alternative technical concepts (ATCs) if they do not conflict with the criteria agreed upon in the environmental decision-making process. (23 C.F.R. § 636.209(b)). This also is hindering project sponsors’ ability to take advantage of private sector innovation.

#### **AGC recommends that Congress consider the following reforms:**

- **The completed NEPA documents and federal permit approvals should remain valid and in effect unless (or until) there is a material change to the scope of the project.**
- **Minor changes to a project should NOT result in reevaluation of the project under NEPA. *De minimis* impacts do not need a formal reevaluation, but could do a review with the owner to prove *de minimis*.**

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<sup>16</sup> Reevaluations are not required under NEPA (42 U.S.C. § 4321) or Council on Environmental Quality (CEQ) regulations (40 C.F.R. §§ 1500-1508). They are, however, required by the FHWA/FTA regulations at 23 C.F.R § 771.129. In cases of a draft EIS, where a final EIS has not been issued and where no action to advance the project has occurred in the last three years, [23 C.F.R. § 771.129](#) also requires a written reevaluation of the determination that the original document is still valid and formalizes the consultation between FHWA and a state DOT.

<sup>17</sup> [23 C.F.R. § 771.130](#).

The *de minimis* threshold could be based the definition of Section 4(f) properties codified in 49 U.S.C. § 303 and 23 U.S.C. § 138, as implemented by the Federal Highway Administration (FHWA) through the regulation at 23 C.F.R. § 774. (Also, amend FHWA regulations at 23 C.F.R. § 636.109(b)(6) and 23 C.F.R. § 636.209(b) for the reasons outlined above.)

- For infrastructure projects previously analyzed under NEPA for the original construction, a streamlined process or CE should exist for repairs, upgrades or replacement.
- If unforeseen, undisclosed listed species or critical habitat are encountered during a construction project, the contractor should be allowed to manage and resolve the issue quickly through proactive mitigation efforts. (*Scenario 1: Ongoing multi-phased infrastructure project previously cleared with a Categorical Exclusion for upgrade and improvements; general contractor in second year of planning and permitting – ready to perform bridge work; Section 404 permit conditions re-evaluated to push work window into June 1 to Sept. 30 timeframe, based on species spawning; schedule not possible to meet and project at a standstill. Scenario 2: Site excavation and grading underway for large highway project; uncover shallow cave that is preferred habitat of a listed spider species; instructed to stop work for prescribed “wait period” to allow performance of biological studies and species surveys – including “baiting” to see if spider is in fact present.*)
- Conditions for species protection, mitigation plans, approved construction windows that limit the impact on species, and other related requirements should be included as part of the ROD in order to: streamline and provide consistency for permitting; facilitate agency coordination; and ensure that project limitations are realized by the owner and properly addressed by the contractor during bidding and scheduling.
- Project owners/operators (e.g., general contractors) in compliance with the required mitigation and protection measures should be protected from environmental enforcement action. See also AGC’s related recommendations above under “Mitigation.”
- Project funding should be available before a public sponsor initiates any environmental reviews or studies. Funding priority should be given to those projects that have completed environmental approvals.
- Federal environmental reviews and permitting processes for capital projects should be time-limited to avoid inefficiencies and costly delays.

## Federal Permitting

Endangered species present tough permitting challenges for a considerable number of projects. ESA issues often arise late in the land acquisition, entitlement or construction process. The law is confusing and often misapplied, by both agencies and consultants.

As a threshold matter, and as clearly depicted on “[AGC’s Flowchart of Environmental Approvals and Permits Applicable to Construction](#),” any construction project that requires a federal license, or permit, or approval, or that utilizes federal financial assistance, must comply with:

- NEPA
- ESA Section 7 Consultation
- National and Historic Preservation Act (NHPA)
- Coastal Zone Management Act (CZMA)

### Redoing Permit Documentation and Analyses Wastes Time and Money

Time and money is wasted on redoing project analyses and review and on collecting duplicative information from permit applicants. Challenges with environmental documentation and permitting processes are root causes for delays on infrastructure projects. The environmental permit approval process generally entails sequential reviews by multiple agencies and various requests for project-specific information. Even though each agency has slightly different forms and different information requirements, some of the information (like project descriptions) is duplicated across applications. This means that there can be multiple forms requesting the same information in different ways.

#### **AGC recommends the following reforms:**

- **The monitoring, mitigation and other environmental planning work performed during the NEPA process must satisfy federal environmental permitting requirements, unless there is a material change in the project.**
- **Implement an integrated “one-stop” permitting system by creating a single form that collects all information needed for major permits. That way, applicants only need to provide information once (and to fill out one long form and file it once);**
- **Also, build an online database of technical information (e.g., on distributions of endangered species, critical habitat, biological opinions or previous permit requirements) so that new information does not have to be gathered anew for every project operating in a similar watershed or geographic area;**
- **Allow environmental reviews to adopt material from previously completed environmental reviews from the same geographic area; and**
- **Require federal agencies to use regional- or national-level programmatic approaches for authorizations and environmental reviews for frequently occurring activities as well as those activities with minor impacts to communities and the environment.**

### **Citizen Suit Reforms**

Conservation organizations devote great effort toward ensuring that agencies adhere strictly to the requirements of the ESA, but such efforts can lead to litigation-driven agendas that divert available resources away from other, potentially more beneficial, conservation actions.

Ninety percent of the settlements federal agencies entered into with plaintiffs under ESA were with environmental groups. Environmentalists have been aggressively filing suits against FWS and NMFS for missing statutory deadlines under ESA Section 4. Two dozen environmental groups filed 79 percent of the 141 ESA deadline suits during fiscal years 2005 through 2015, according to a 2017 Government Accountability Office (GAO) report.<sup>18</sup> The suits involved 1,441 species and cited a range of Section 4 actions, but most suits were related to missed deadlines for making findings on petitions to list or delist species as threatened or endangered. See also AGC’s related recommendations above - “ESA – Listing Process.”

AGC is increasingly concerned by reports that the citizen suit provisions in 20 environmental statutes are being used to challenge all types of projects, land restrictions and permit requirements relating to the projects. These lawsuits can take years to resolve and the delay not only impacts the ability to secure the necessary

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<sup>18</sup> *Information on Endangered Species Act Deadline Suits*, GAO-17-304: Published: Feb 28, 2017.



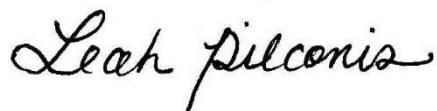
environmental approvals and the financing of the project, but – in far too many cases – impedes projects that are vital to the renovation and improvement of our nation’s municipal water supplies, wastewater treatment facilities, highway and transit systems, bridges and dams.

**Citizen suit reforms are necessary to prevent their abuse.<sup>19</sup> AGC recommends the following reforms:**

- **Further shorten and standardize the time limit on challenges to final NEPA RODs or claims seeking judicial review of an environmental permit, license or approval issued by a Federal agency for an infrastructure project;**
- **Require interested parties to get involved early in a project’s review process to maintain standing to sue later;**
- **Require bonds be posted by plaintiffs seeking to block activities to reduce abuse and delay tactics that harm private parties and taxpayers; and**
- **Require that the enforcement of federal environmental rules on a construction site be enforced only by trained staff of government agencies -or-**
  - **Limit citizen suit penalties to violations of objective, numeric limitations rather than subjective, narrative standards;**
  - **Extend “notice period” beyond the current 60 days (giving regulatory agencies more time to review notice of intent letters and initiate formal actions);**
  - **Clarify definition of “diligent prosecution” of alleged violations, thereby allowing federal/state authorities to exercise their primacy in enforcement and preventing unnecessary citizen suit intervention.**

Thank you for your consideration of AGC’s recommendations. AGC is available to meet and discuss any of the issues identified above at the committee’s convenience and to provide further perspective on environmental streamlining.

Respectfully,



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<sup>19</sup> MAP-21 reduced the time limit to 150 days after publication of a notice in the *Federal Register* announcing that a permit, license or approval is final, for parties to file lawsuits that challenge agency environmental decisions regarding surface transportation projects. However, the preparation and announcement of a “supplemental” EIS, when required, restarts to 150-day clock. As currently written, the FAST Act’s judicial review changes are limited and not likely to provide additional relief.