**Via Email**

September 10, 2024

The Honorable Bruce Westerman
Chairman
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

The Honorable Raul Grijalva
Ranking Member
House Committee on Natural Resources
1322 Longworth House Office Building
Washington, D.C. 20515

**Re: AXPC Support for Legislation to Amend the National Environmental Policy Act**

Dear Chairman Westerman and Ranking Member Grijalva:

To meet America's growing energy demand, it is imperative that our country develop the necessary infrastructure to produce and move energy. Our country's permitting processes and environmental laws are crucial to ensure the balance between responsible energy development and the protection of ecological resources and public health. But increased litigation under the National Environmental Policy Act ("NEPA") has resulted in the unnecessary delay of all infrastructure projects. According to the Department of Justice, NEPA is the most frequently litigated federal environmental statute. Despite the frequency of challenges, courts often rule in favor of defending the agency's action. The American Exploration & Production Council ("AXPC") applauds the Committee's efforts to improve the NEPA process and include much-needed judicial reforms to ensure durability, predictability, and transparency in NEPA decision-making.

AXPC is a national trade association representing 31 leading independent oil and natural gas exploration and production companies in the United States. Collectively, our member companies produce more than half of U.S. onshore oil and natural gas and support millions of Americans in high-paying jobs. Dedicated to safety, stewardship, and technological advancement, we strive to deliver energy to consumers while positively impacting the economy and the communities in which we live and operate. As part of this mission, we understand and promote the importance of providing affordable, reliable, and sustainable American-made energy to consumers every day. And we work hard to fulfill our obligation to develop those resources responsibly.

For traditional energy, renewable energy, and the energy systems of the future, a critical piece of the puzzle will be building the infrastructure needed to keep up with today and tomorrow's growing demand in an ever-cleaner way. Policymakers on both sides of the aisle have recognized the need to foster responsible American energy production and expand new resilient American infrastructure to deliver it. While comprehensive permitting reform is needed, the notable abuse of the NEPA process by third-party litigants seeking to challenge federal agency decisions that, after years of deliberations are infrequently overturned, indicates that NEPA reforms are essential now.

According to a recent study, "[b]etween 2013 and 2022, circuit courts heard approximately 39 NEPA appeals cases per year, a 56% increase over the rate from 2001 to 2015. Agencies won about 80% of the 2013–2022 appeals cases, 11% more per year than from 2001 to 2004, 8% more than from 2001 to 2008, and 4% less than from 2009 to 2015. The rate at which agencies' reviews are upheld is high, meaning these environmental reviews are seldom changed as a result of litigation."[1] The study also found that, on average, 4.2 years elapsed between the publication of an environmental impact statement or environmental assessment and the conclusion of a corresponding legal challenge. For energy projects specifically, NEPA litigation resulted in an average delay of about 3.9 years for project implementation (including both fossil fuel and clean energy projects), with many taking more than twice that amount of time.[2]

The current litigation-exposed NEPA process provides few, if any, additional public benefits given the success rate of federal agencies to defend their underlying environmental decisions. Instead, it only increases the time and cost to develop infrastructure projects in our country. The Committee's proposed legislation would place a common-sense legal standard of review on NEPA to ensure the most substantiated challenges are proceeding through the courts.

This is an even more troubling trend because NEPA litigation primarily impacts energy development — including significant impacts on fossil fuel, renewable, pipeline, and transmission projects. In a study looking at projects requiring a NEPA analysis between 2010–2018, it was reported that: "64% of solar projects were challenged; 38% of wind projects were challenged; 56% of pipeline projects were challenged; and 31% of transmission projects were challenged."[3] Moreover, as the Committee knows, nearly all federal oil and gas drilling permits that were issued in New Mexico and Wyoming under the Biden Administration have been challenged under NEPA; just like the vast majority of oil and gas leases issued between 2016–2021.[4] NEPA litigation, more than any other factor, is restraining the development of domestic energy projects that are central to meet our looming energy demand and dual-goal of energy reliability with environmental progress.

Central to this reform is a NEPA-specific standard of review. Unlike other hallmark environmental statutes, like the Clean Air Act and the Clean Water Act, NEPA currently does not specify a fit-for-purpose standard of judicial review for litigation challenges. In its absence, the Administrative Procedures Act ("APA") provides a basic framework for courts. These courts, however, have varied their interpretations when applying an amorphous APA standard to project-

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[1] Nikki Chiappa, et. al., Understanding NEPA Litigation: A Systemic Review of Recent NEPA-Related Appellate Court Decisions," Breakthrough Institute (June 2024), available at https://thebreakthrough.org/issues/energy/understanding-nepa-litigation.

[2] *See id.*

[3] Michael Bennon and Devon Wilson, NEPA Litigation over Large Energy and Transport Infrastructure Projects, Environmental Law Reporter (Oct. 2023), available at https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-09/nepa_litigation_over_large_energy_and_transport_infrastructure_projects.pdf.

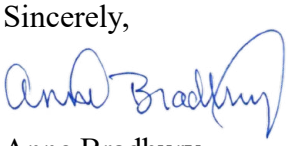
[4] *See* U.S. Department of Interior, Bureau of Land Management, APDs under Litigation – APD Notifications, available at https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/operations-and-production/permitting/apds-under-litigation.

specific agency decisions under NEPA. As a result, unpredictable decisions have invited frivolous lawsuits and leave agencies guessing on what constitutes a sufficient review. This trend, in turn, leads federal agencies to spend an exorbitant amount of time and resources to litigation-proof their reviews with bloated documents full of extraneous information that do not inform their actual decision.

Among other constructive provisions, this legislation would establish a clear standard of review for NEPA challenges which courts would be required to use in evaluating such cases, leading to more consistent outcomes. Greater consistency among NEPA rulings will drive greater clarity and predictability in the NEPA process and invite greater investment and development for all sources of energy.

For these reasons, AXPC is pleased to support the Committee's efforts to impose a much-needed, common-sense set of NEPA process improvements and judicial-reform measures. We remain committed to working on these efforts to find solutions and pass meaningful and durable legislation that helps secure affordable, reliable, and sustainable energy for all Americans.

Sincerely,



Anne Bradbury
President & CEO
American Exploration & Production Council