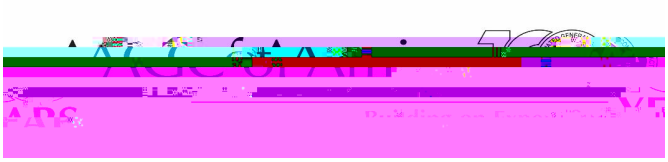


I. Executive Summary

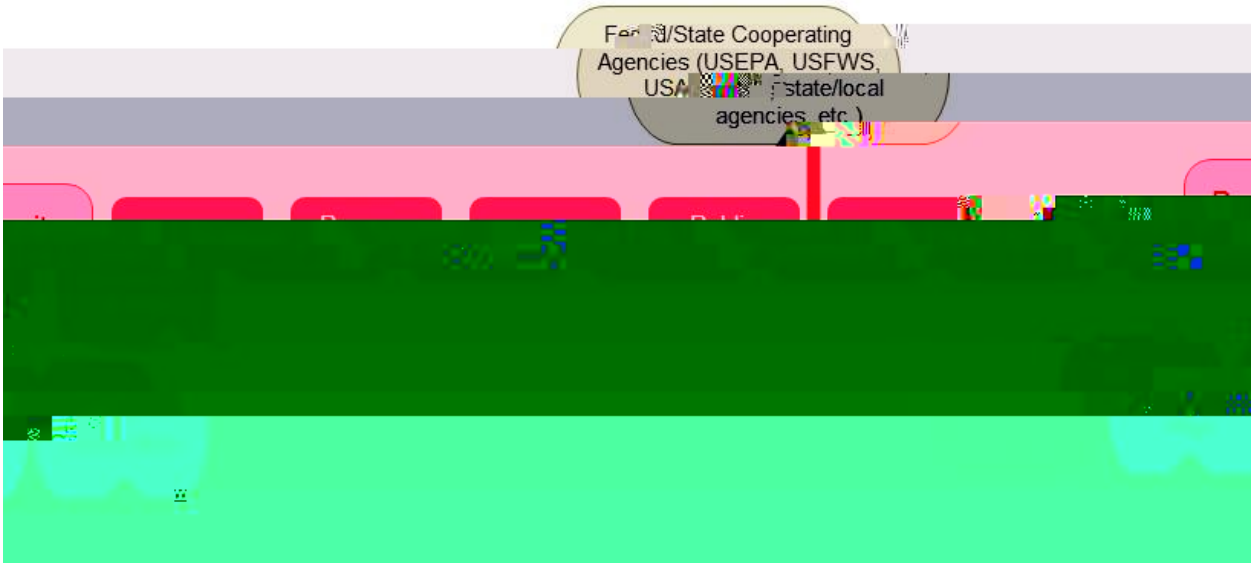
Most large infrastructure projects must receive environmental reviews and approvals that involve many federal agencies and multiple levels of government. What is more, these projects generally do not qualify for efficient general permitting procedures and must obtain extremely costly and time-consuming individual permits, on a project-by-project basis. AGC, in this document, is focused on reforming the National Environmental Policy Act (NEPA) and the federal environmental permitting process to eliminate delays, unnecessary duplication, and frivolous litigation, and give worthy projects a timely green light.

Specifically, Congress should strengthen and expand the time-limited schedules and other meaningful "streamlining" reforms in current law and impose action-forcing mechanisms as well as incentive programs to ensure agency-wide compliance. To avoid sequential and duplicative reviews that slow down many large infrastructure projects, Congress should require the issuance of Clean Water Act Section 404 permits in conjunction with the NEPA Record of Decision. To this end, it is critical that Congress require agencies to allow the monitoring, mitigation and other environmental planning work performed during the NEPA process, and included the final Environmental Impact Statement, to satisfy federal environmental permitting requirements.

AGC also points out why undisclosed environmental risk – as for managing and remediating unforeseen hazardous material – can unnecessarily drive up construction costs, particularly on public works projects, (due to added cost contingencies) and limit the universe of qualified, responsible construction firms (due to contractors dropping out of the procurement). Congress should require the government to bear such unquantifiable risk on public works projects and/or provide contractual relief through cost sharing mechanisms.

Importantly, the threat of endless litigation (with regard to environmental justice, climate impacts and other issues) is forcing agencies to try to make their NEPA analyses litigation-proof so they survive judicial challenges under NEPA's well worn "hard look" standard. AGC herein makes the case for why Congress should work to remove the incentives for frivolous and obstructive litigation that are delaying, and sometimes defeating, proposed projects.

AGC also offers specific reforms to the NEPA process that would help to expedite project construction at a reduced price, while supporting the innovation needed to our nation's infrastructure, include prohibiting the initiation of procurement prior to the NEPA approval and exempting changes formal NEPA re-evaluation. Specific to the 404-permitting process, reforms are needed to encourage advance mitigation planning and investment.



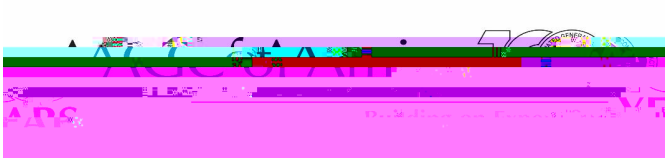
B. The Interplay between NEPA and other Federal Requirements

NEPA forms the framework to coordinate compliance with other environment-related statutes and regulations, many of which impose permit requirements. On the positive, the NEPA process serves to provide decision-makers with a more comprehensive view of the major environmental issues and potential conflicts among the environmental components of proposed projects. However, NEPA does not give the lead agency (or for that matter, the Council on Environmental Quality (CEQ)) regulatory authority and oversight of the agencies charged with implementing the regulations and permitting programs that are required to adequately ensure the federal activity is conducted to avoid and minimize potential impacts. In current practice, project proponents are generally proceeding with piecemeal permit applications after NEPA to advance the project to construction.

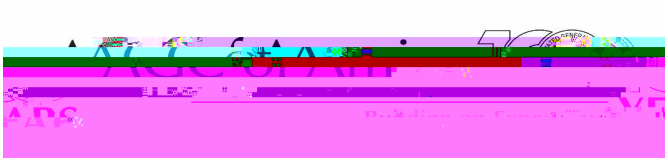
Construction projects, such as bridge and highway construction, pipelines, water resource projects, renewable or conventional energy production may require compliance with literally dozens of federal, state, tribal, and local laws.

Federal environmental legal requirements potentially applicable to federal actions include; but may not be limited to:

- Archaeological and Historical Preservation Act
- Clean Air Act
- Clean Water Act (CWA)
- Coastal Zone Management Act
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- Emergency Planning and Community Right to Know Act (EPCRA)
- Endangered Species Act (ESA)
- Executive Order 12898 (Environmental Justice)
- Farmland Protection Policy Act



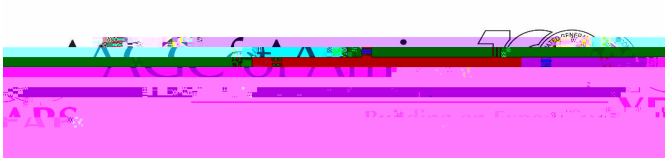
Fish and Wildlife Coordination Act
Historic Sites



C. Federal Review and Permitting in Action

There are a multitude of statutes, implementing regulations, agency policies, and court decisions that affect what permits are required on construction projects, what agencies look for during a permitting process, and what activities or discharges they can authorize. Duplicative environmental reviews and permits are often required on the same project by federal, state, and local governments. A builder of infrastructure must seek approval not from "the government," but from a dozen or more different arms of the government.

The process of issuing a federal environmental permit almost always involves a complex web of related permissions, approvals and certifications that are all interdependent. For example, if the USACE determines that a project requires federal authorization under a CWA Section 404 permit before it can proceed, the project sponsor/operator can expect a lengthy and costly process during which a host of separatspo4(n)3Asilder of



Between 2003 and 2012, the U.S. Department of Energy paid consultants an average fee of $6.6 million, and as much as $85 million, to prepare EISs.[14]

The opportunity cost also can be significant:

The 2015 report by Common Good, a non-profit government watchdog, finds that a six-year delay in starting construction on public projects costs the nation more than $3.7 trillion in lost employment and economic gain, inefficiency, and unnecessary pollution.[15]

Delay also dramatically increases the cost of construction.

That projected total is more than double the $1.7 trillion needed through the end of this decade to modernize and upgrade the crumbling U.S. infrastructure, according to projections of the American Society of Civil Engineers.

The procurement process for large projects is moving to design-build. These procurements expedite construction; however, these efficiencies may be offset by lengthy procurement processes.

A $1.3 billion procurement of a 60-mile segment of high speed rail took 15 months from RFQ (request for qualifications) to award.

A $860 million procurement of a 30-mile tollway took 21 months from RFQ to award.

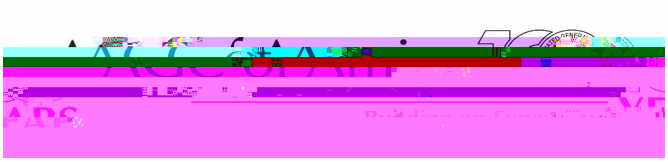
An RFQ for a $1.3 billion procurement for a reconstruction of a highway in a major city has spanned over two years and has yet to award.

III. General Recommendations to Improve Federal Review and Permitting Efficiency

A. Streamlining Reforms in Current Law Have Limited Applicability; Fail to Mandate Schedules

Currently the environmental streamlining reforms in current law have limited application and, in some cases, miss the mark. MAP-21 (The Moving Ahead for Progress in the 21st Century Act),[16] the Water Resources Reform and Development Act (WRRDA) of 2014,[17] and the FAST Act (Fixing America's Surface Transportation Act) included a great deal of new authority designed to streamline project review and approval. See Appendix 1: Expedited Environmental Review of Infrastructure Projects – FAST-41 Highlights. See also the Energy Policy Act of 2005 (EPAct 2005),[18] a law intended to streamline and expedite federal authorizations for interstate natural gas pipeline projects and electric transmission infrastructure projects. Still, more reforms are needed, and on a more comprehensive basis, to improve our delivery of important infrastructure projects across the nation.

REFORM: Rather than creating brand new processes, Congress should expand the meaningful reforms included in Title 41[19] of the FAST Act (FAST-41) (coordinated and time-limited environmental review and permitting schedule and enhanced procedural transparency) more broadly so that they cover more projects (i.e., projects with total investment of LESS than $200 million). FAST-41's definition of "covered project" leaves room for confusion and does not include most federal transportation projects or federal water resource development projects – see Appendix 1. What is more, the language appears to give developers the option not to participate in the new process: Infrastructure projects may be become "covered projects" under FAST-41 only after the project sponsor submits "an initiation notice for inclusion" under the Act.[20] To expedite the delivery of projects, Congress should ensure that the



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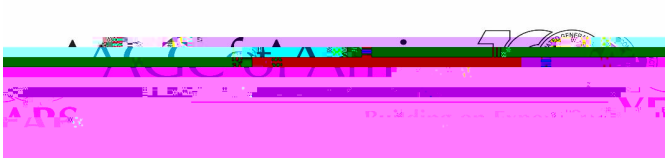
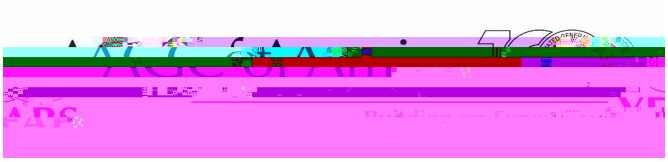


FAST-41 requires that state and federal permitting reviews run concurrently for a "covered project" so long as doing so does not impair a federal agency's ability to review the project.[32] The law does not specify the permits and approvals required to be included in the schedule. Again, as stated above, there is no penalty or regulatory consequence for missed deadlines. MAP-21 directs cooperating agencies to coordinate and carry out activities concurrently, instead of sequentially, and in conjunction with the NEPA review, and expanded the use of categorical exclusions.[33] (Notably, the "concurrent review" requirement under MAP-21 is waived if it "would impair the ability" of any agency to conduct any analysis or meet any obligation.) WRRDA similarly requires agency coordination and concurrent action on environmental reviews to accelerate project delivery.[34]

REFORM: For federal transportation projects, several states have merged their NEPA and CWA Section 404 permitting processes; this should be the national standard and USACE's current regulations already point in this direction but do not go far enough.[35] (Across the nation there is considerable variation in



Rodenticide Act, allow "any citizen" to bring a "civil action on his own behalf" against "any person" (including the government) who is alleged "to be in violation" of a standard or order issued under the statute. While NEPA does not have a citizen suit provision per se, an agency's failure to follow NEPA's required procedures can be challenged under the Administrative Procedures Act.

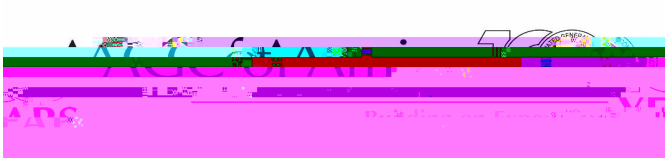
Even on projects where an EIS is not required, officials spend years "working through every detail" for fear of being sued sometime in the future.[45] There is a high rate of turnover among the government career staff carrying out the NEPA procedures, and it is not uncommon for the new person on the team to "waste" $50,000 in printing fees and many months redoing documents just to make minor edits (e.g., date changes). Still, private plaintiffs who seek to delay or halt a controversial construction project will file a lawsuit against the government alleging noncompliance with the NEPA procedures or against the project owner or operator for an alleged failure to comply with (or secure coverage under) and environmental permit. Many lawsuits begin with an injunction requiring immediate stoppage of work and may take considerable time, effort and cost in attorney fees and court costs to resolve.

> EXAMPLE: When Maryland, Virginia and the District of Columbia agreed that the Woodrow Wilson Bridge (I-95 between Oxon Hill, Maryland and Alexandria, Virginia) , a long and detailed EIS process had to be followed, even though the proposed new (and wider) bridge was replacing an old and inadequate crossing. Once the EIS was complete, the Sierra Club filed suit in federal court for the District of Columbia to remand the document for more work, and Sierra won at the district court (trial court) level, but the trial court's remand was reversed by the U.S. Court of Appeals for the District of Columbia. All of this litigation took several years to complete.

As currently written, the FAST Act's judicial review changes are limited and not likely to provide significant relief. FAST-41 reduced the statute of limitations for NEPA challenges from six to two years to provide more certainty for applicants; however, most NEPA lawsuits already are filed well within two years, because project challengers generally want to sue before the targeted project is constructed to avoid mootness arguments. FAST-41 also provides that in any action seeking a temporary restraining order or preliminary injunction of a covered project, the court shall "consider the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction" and shall not presume that such harms are reparable. However, most courts already consider an injunction's negative impact when balancing the harms and equities. Another FAST-41 provision dictates that NEPA challenges can only be brought by those who commented on an EIS and did so with sufficient detail to put the lead agency on notice of the claims. With regard to standing, many courts have limited NEPA challenges to comments raised within the public review period on the EIS (others allow plaintiffs to file suit as long as they can show "injury in fact").

MAP-21 reduced the time limit to 150 days after publication of a notice in the announcing that a permit, license or approval is final, for parties to file lawsuits that challenge agency environmental decisions regarding surface transportation projects.[46] However, the preparation and announcement of a "supplemental" EIS, when required, restarts to 150-day clock.

REFORM – Part 1: Further shorten and standardize the statute of limitations for challenges to final ROD or claims seeking judicial review of a permit, license or approval issued by a Federal agency for an infrastructure project (see Section III.A and III.B). The Portman-McCaskill Senate bill, Federal Permitting Improvement Act, that was reportedly supported by environmental and business groups would have



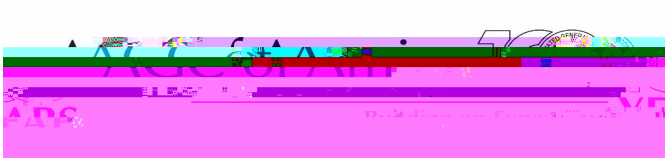
lowered the statute of limitations from six years to 150 days for all major projects across all sectors. In addition, interested parties should be forced to get involved early in a project's review process to maintain standing to sue later (RAPID Act proposed a "get-in or get-out" rule). Eliminate the risk of being sued when you reopen the ROD for minor changes to the construction contract. Another way to control the litigious environment that is delaying (and often stopping) critical infrastructure work may be to require any party who brings a challenge against a project's final EIS/ROD, and causes the work to stop, to put up a bond[47] that covers the cost of delay; legal fees also should be awarded if the project proponent prevails.

REFORM – Part 2: Federal environmental rules and regulations that apply to construction site owners and operators are complex and cumbersome and should be enforced only by trained staff of government agencies. Alternative potential reforms include: limiting 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.[48]

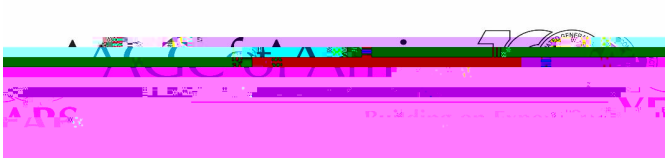
F. Permitting Risk Remains Key Barrier to Infrastructure Investment

Over the past 15 years, the growth in the use and performance of alternative contracting methods procurement of large projects has brought to light some specific environmental risks that need to be addressed when design-build is used as the project delivery system. Regarding risk, it is customary for the contractor to take on additional reasonable cost and schedule risk related to design, utility relocation and environmental compliance. (Reasonable risks are those that can be quantified for cost and time, where contractual compensation is provided to contain risk or for which insurance coverage can be obtained.) However, recently design-build agreements have included unquantifiable contractor risk, such as for managing and remediating pre-existing third-party site contamination.[49] This has resulted in the contractor assuming unreasonable cost and schedule risk, and in the case of site contamination, potential CERCLA liability. Since this risk is unquantified, insurance coverage is difficult if not impossible to obtain.[50]

Owners and contractors respond to this risk through the contract vetting process during the procurement stage where the contractor attempts to clarify through

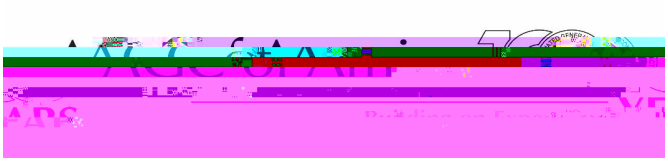


REFORM: Where the public owner is unwilling to compensate the designer/builder for unforeseen



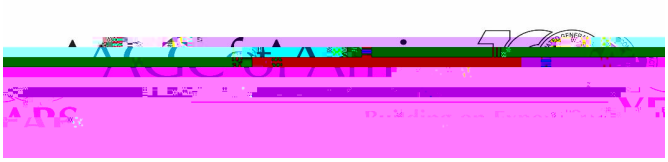
then the costs associated with that delay should be equally shared by the owner and the general contractor.

To cite a program worthy of replication: Once a natural gas infrastructure project under the Federal Energy Regulatory Commission



D. USEPA Plays Commanding Role in NEPA Review Process

Section 309 of the Clean Air Act empowers USEPA to review other federal agencies' EISs and to make those reviews public.[57] USEPA's reviews generally focus on identifying and recommending appropriate mitigation measures for the project, which can lead to lengthy back-and-forth negotiations between USEPA and the responsible federal agency(ies). If USEPA finds the draft EIS "inadequate," USEPA will recommend the draft EIS be formally revised and made available for a second period of public comment. USEPA also reviews final EISs to ensure that the lead agency has taken USEPA's comments into account. If the "lead agency" does not make sufficient



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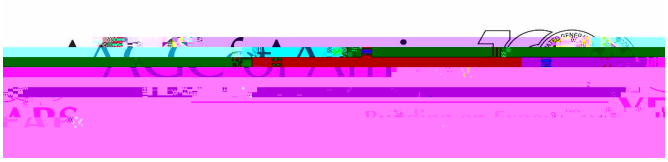

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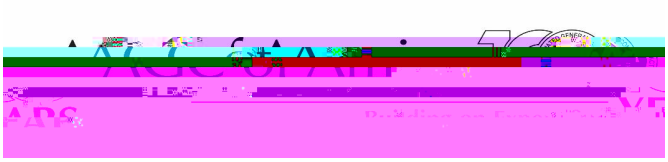
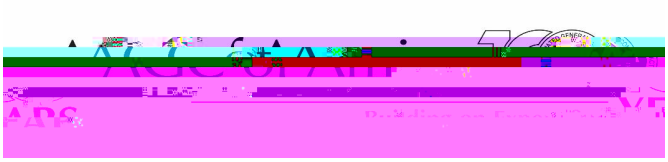


2. Permitting Authorities Are Thwarting Advanced Mitigation, Mitigation Banking, and Future Mitigation Investments

Permitting Authorities Are Thwarting Advanced Mitigation, Mitigation Banking, and Future Mitigation Investments. Complex procurement strategies, construction schedule risks, habitat alteration, and



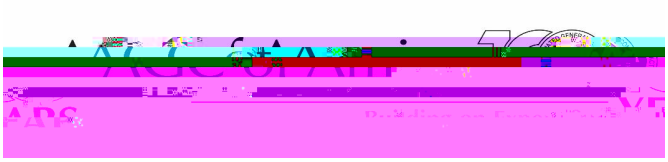
3. Delay on the RHA Section 408 Side Puts Off the CWA Section 404 Review Process and Further Delays Construction

Construction projects are being delayed because of Section 408 burdens.[68] USACE will to process many CWA Section 404 Nationwide and individual permits until the 408 permission is granted. This means that delay on the River and Harbors Act (RHA) Section 408 side puts off the CWA Section 404 review process and further delays construction. And, many of the reviews required under RHA Section 408 may be reviewed, yet again, under the CWA Section 404 process.

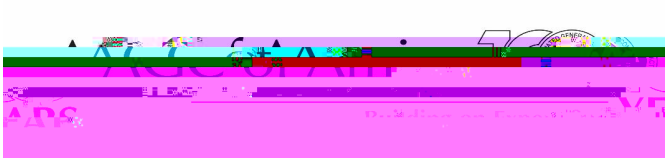
RHA Section 14[69] provides that the Secretary of the Army may grant permission for the alteration or use of works built by the United States when such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work. As a result, USACE requires that applicable construction projects are reviewed to determine if any of the proposed activities may affect a federal easement, right of way, property, levee, etc. Construction projects possibly subject to this process may include but are not limited to highways crossing Corps' property, bridges built over USACE flood control projects, and simply modification of existing Corps' projects—e.g., levees—by state and local entities.

USACE has recently undertaken action to more rigorously ensure compliance with Section 408, setting forth nine steps to obtain the 408 permission.[70] Those steps include pre-coordination, written request, required documentation (including environmental compliance, if applicable), district-led Agency Technical Review (ATR), Summary of Findings, division review, HQUSACE review, notification, and post-permission oversight.

Not all steps are applicable to every RHA Section 408 request, such as Division or Headquarters offices review. That stated, the Corps requires the RHA Section 408 requester to provide all information that the district identifies as necessary to satisfy all applicable federal laws, executive orders, regulations, policies, and ordinances. In



[54] Variances are not specifically mentioned in FERC's regulations but rather in its standard best management



[67] In 2008, USACE and USEPA published compensatory mitigation rules (2008 Mitigation Rule). 73 19,594 (Apr. 10, 2008). While USACE makes the final determination regarding the mitigation conditions included in the permit, USEPA retains the authority to veto the permit if it concludes that the mitigation is not adequate.

[68] http://www.nola.com/environment/index.ssf/2017/05/corps_attempting_to_speed_coas.html; http://www.journalscene.com/news/waiting-on-the-final-leg-of-berlin-g-myers-parkway/article_72b28f28-1309-11e7-a986-1f5ecfa794a9.html.

[69] 33 U.S.C. § 408.

[70] USACE Policy - Engineering Circular 1165-2-216.

[71] https://waterways.org/wordpress2/wp-content/uploads/2014/10/NWC-Comments-WRRDA-Webinar-III.pdf.

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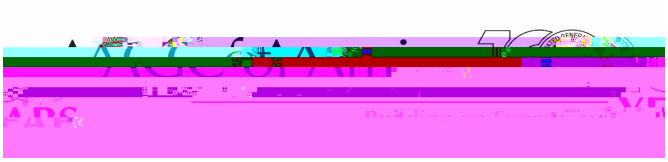
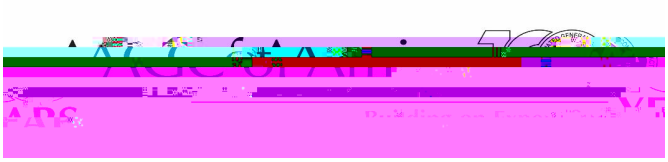


completion date and a proposal for an alternative completion date," and monthly updates thereafter. Pub. L. No. 114-94, § 41007(c)(2)(f). The Act also gives agencies discretion in determining when they have sufficient information to make a decision on a project, and issuance of a final decision must occur no later than 180 days thereafter. See Part 41002(c)(1)(A)(ii)(II)(cc). It appears that time limits may vary if an agency determines more information is needed or demonstrates a reason for missing the completion date (theoretically could just keep asking for more info and/or proposing alternative completion dates – which is what happens without expedited review). See also OMB & CEQ Guidance referenced below, Section 4.3 "What happens if an agency fails to conform to the permitting timetable?" on page 50.

REFORM: TIMELINE/SCHEDULE SHOULD BE MANDTORY, NONDISCRETIONARY DUTY. Any objections that



recommend that the agency