OUTDOOR ALLIANCE

September 27, 2022

The Honorable Chuck Schumer
Majority Leader
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-232, U.S. Capitol
Washington, DC 20515

Re: Energy Independence and Security Act of 2022

Dear Majority Leader Schumer and Speaker Pelosi,

On behalf of the human-powered outdoor recreation community, we write to express our community's views on the Energy Independence and Security Act of 2022. Our organizations strongly support your recent work to pass the Inflation Reduction Act, and we are eager to see the IRA's transformative investments in clean energy, climate adaptation, and public lands and waters put into action.

The version of the EISA made public by Senator Manchin on September 21st seeks to expedite the permitting process for energy development and other projects such as those funded through the IRA, primarily through changes to established policy under the National Environmental Policy Act. We understand that earlier proposed changes to the Clean Water Act have been removed from the bill, and we are grateful for these revisions.[1] While we recognize the importance of ensuring efficient permitting for infrastructure projects, particularly in service of meeting climate objectives through a clean energy transition, we believe Congress should take additional time to further refine its approach and ensure that permitting

[1] We include our critique on these provisions in an appendix in the event that they become relevant as the permitting reform process continues.

efficiency does not come at the expense of conservation and environmental values, particularly for frontline communities.

Outdoor Alliance is a coalition of ten member-based organizations representing the human powered outdoor recreation community. The coalition includes Access Fund, American Canoe Association, American Whitewater, International Mountain Bicycling Association, Winter Wildlands Alliance, The Mountaineers, the American Alpine Club, the Mazamas, Colorado Mountain Club, and Surfrider Foundation and represents the interests of the millions of Americans who climb, paddle, mountain bike, backcountry ski and snowshoe, and enjoy coastal recreation on our nation's public lands, waters, and snowscapes.

The outdoor recreation community is deeply familiar with both NEPA and the Clean Water Act. Both of these laws are critical for protecting the clean air, clean water, and healthy ecosystems that we experience and appreciate during our time in the outdoors. Outdoor recreationists participate regularly in the public processes afforded by both of these laws, both as interested stakeholders in projects that affect the recreation experience, and as proponents of recreation infrastructure, conservation, and restoration projects. Although review of projects under NEPA and the Clean Water Act require time and energy from stakeholders, project sponsors, and federal agencies, robust environmental analyses generally inform better outcomes for project implementation, and these laws are often the primary and most meaningful opportunities for recreationists and others to provide input on projects that may permanently affect lands and resources that we value.

In our experience, project delays are most often caused by issues with agency culture and capacity rather than by environmental laws themselves. This experience is confirmed by a recent analysis of 41,000 NEPA decisions at the US Forest Service, which found that project delays were most often caused by issues with agency budgets, staff turnover, lack of information from project applicants, and compliance with other laws. The authors also found that less rigorous levels of analysis, such as categorical exclusions, often failed to deliver faster decisions.[2]

[2] John C. Ruple, Jamie Pleune, & Erik Heiny, Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation, 46 Columbia J. Environ. Law 273 (2022). *Available at* https://journals.library.columbia.edu/index.php/cjel/article/view/9479/4840.

The IRA provides a significant infusion of funding to federal agencies specifically to facilitate environmental reviews, and we are eager to see this funding play out to support efficient and effective implementation of the IRA. We also support the current efforts by the Council on Environmental Quality to modernize NEPA implementation and to revise harmful regulations promulgated during the Trump administration. We hope that Congress will allow CEQ the opportunity to complete this process, as well as put the new resources provided by the IRA to work, before considering whether additional changes may be appropriate. Likewise, we support efforts by the Biden administration to promulgate new regulations that would restore the cooperative federalism at the core of the Section 401 of the Clean Water Act and reverse the 2020 rules adopted by the Trump administration that weakened state Section 401 authority. We believe that this proposed legislation could delay or result in challenges to the current rulemaking process.

Our specific concerns with the EISA are outlined in greater detail below.

National Environmental Policy Act

The NEPA process is a primary avenue by which recreation stakeholders provide input on projects and plans that affect outdoor recreation and public lands and waters. For our community, these federal actions range from National Forest land management plans that require years of collaborative effort to develop, to recreation infrastructure projects like trail networks, to mining projects that threaten important recreation resources, and beyond. Although the process necessarily requires time and energy, we consider NEPA's core values—informed, science-based decision-making, transparency, and robust public input—to be critical for sound federal decision-making, and we find that robust NEPA analysis tends to produce successful projects with higher levels of public support.

The EISA proposes a broad set of changes to established agency policy that would shortcut environmental reviews, limit public input, and lead to inadequate analysis of a project's environmental and social impact. Specifically, we are concerned with provisions of the EISA that:

- Discourage public participation by limiting public comment periods for environmental reviews. The EISA limits public comment periods to no more than 60 days for a draft EIS and 45 days for all other projects and comment opportunities. The legislation also allows project sponsors the ability to veto any extension of public comment periods on NEPA documents for their projects. These time limits undercut the ability of stakeholders and communities—especially disadvantaged communities that may not have resources to review and respond to a complex proposal in a short time frame—to provide adequate input on projects that may permanently affect their communities and their environment.
- Require the President to prioritize and expedite fossil fuel development and mining projects without regard to climate and environmental justice goals. The EISA requires the President to develop a list of 25 energy projects of "strategic national importance" and to take actions to expedite environmental review for these projects. This process seems to weigh permitting reform away from holistic, process based improvements and towards the type of mega projects most likely to deserve close scrutiny and public input. Many of these projects are likely also to be harmful to frontline communities, climate goals, outdoor recreation, and conservation values.
- Set time limits for agencies preparing environmental impact statements and environmental analyses. We are concerned that these time limits are not responsive to the most common causes of delay and do not recognize the specific circumstances of individual projects.
- Allow for agencies to evaluate the preferred alternative for a project at a higher level of detail than other alternatives. The EISA would apply provisions of the FAST Act[3] that allow agencies to analyze the preferred alternative for a project at a higher level of detail than other alternatives to complex energy development projects. This provision may bias agency decisions towards a preferred alternative—often a decision to approve a proposed project—based on a lack of adequate information about other options. Additional alternatives are often designed to address stakeholder concerns, such as recreation issues. Limiting the level of analysis for these alternatives will potentially leave these concerns unaddressed.

[3] 42 U.S.C. § 4370m–4 (2022).

- Dramatically limit the statute of limitations for lawsuits from six years to just 150 days. Shortening the timeline by this magnitude may have the consequence of pushing some groups to sue preemptively, which will burden agencies unnecessarily. It will likely also prevent some affected individuals or communities from challenging projects, in particular entities particularly affected but unaccustomed to participating in these sorts of processes.
- Pressure agencies to develop new categorical exclusions (CEs), including by seeking ideas from project sponsors.

* * *

Thank you for your relentless work to pass the IRA and to support bold climate action in the 117th Congress. We request that any adjustments to bedrock environmental laws proposed to accelerate clean energy and other projects be developed via a public process that includes input from frontline communities, Tribes, and stakeholders and ask you to separate consideration of the EISA from a forthcoming continuing resolution or any other must-pass legislation. The outdoor recreation community would gladly participate in such a process.

Best regards,

Louis Geltman
Policy Director
Outdoor Alliance

cc: Adam Cramer, Chief Executive Officer, Outdoor Alliance
Chris Winter, Executive Director, Access Fund
Beth Spilman, Executive Director, American Canoe Association
Clinton Begley, Executive Director, American Whitewater
Kent McNeill, CEO, International Mountain Bicycling Association
David Page, Executive Director, Winter Wildlands Alliance
Tom Vogl, Chief Executive Officer, The Mountaineers

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Jamie Logan, Interim Director, American Alpine Club
Kaleen Deatherage, Interim Executive Director, the Mazamas
Keegan Young, Executive Director, Colorado Mountain Club
Chad Nelsen, Chief Executive Officer, Surfrider Foundation

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Appendix: Section 401 of the Clean Water Act

Subtitle B of the version of the EISA made public on September 26th proposed a set of changes to Section 401 of the Clean Water Act that ran counter to the Act's core objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." We are grateful for the decision to remove this section and believe it exemplifies the potential to improve permitting reform efforts with additional time for stakeholder engagement.

Section 401 requires that federal agencies receive a water quality certification from an applicable state or Tribe before providing a permit or license for activities that may result in a discharge of pollutants into navigable waters. In providing a water quality certification, states must ensure that a proposed activity meets state water quality standards, including the protection of designated and existing uses of a waterway, such as recreational uses like whitewater boating. States currently have one year to act on an application for certification—a relatively short timeline for environmental review—and may condition certification on compliance with certain conditions that become a part of a federal license.

Initially proposed changes to Section 401 had the potential to perpetuate harms to aquatic ecosystems and river-based recreation by hydropower dams. These changes would weaken the cooperative federalism at the core of the Clean Water Act that delegates to the states primary responsibility for ensuring that federally-permitted activities meet state water quality standards. Section 401 water quality certification is required for Federal Energy Regulatory Commission licenses for hydropower facilities, and states have used their Section 401 authority to require important changes to projects in order to protect aquatic species, fish passage, Tribal-treaty rights, and recreational uses. The changes initially proposed by the EISA would dramatically limit states' ability to make these changes by constraining the scope of impacts that could be considered, limiting access to critical information for informed decision making, and allowing federal agencies to shorten the deadline for states to make permitting decisions. These provisions would:

- Limit the scope of Section 401(d) to "any other appropriate *water quality* requirement of State law." This would prevent the agency from considering issues like climate change, Tribal access to fishing rights, social justice, and river access for boating and fishing;
- Limit the ability of states to deny an application or impose conditions based on the full range of project impacts on the environment. This change would limit states and Tribes' ability to protect water quality standards—including designated and existing uses like recreation access—from degradation by a project;
- Narrowly define an "act" under Section 401 as, "grant, grant with conditions, deny, or waive," rather than using a broader definition of "act" recognized by the Fourth Circuit. This change would likely result in an increase of denials of water quality certification because state agencies and Tribes would be unable to take actions like requesting new or additional information for review;
- Define "application materials" and narrow the information required from project sponsors to that related to water quality requirements. This would constrain the ability of the state agency to request information on greenhouse gas emissions, social justice impacts, recreation impacts, or other information that would be essential for a comprehensive review of project impacts of an action;
- Undermine the established 1-year review period for water quality certification prescribed by the Clean Water Act by creating a default 180-day deadline for states to make permitting decisions. This change would allow federal agencies to override state determinations of the reasonable period of time to make permitting decisions.

Together, these changes would greatly limit states' ability to address adverse impacts from federally permitted activities, and would circumscribe states' longstanding ability to deny or condition permits.

We are pleased to see these provisions removed from the EISA and note our concerns should they arise through this process in the future.