117TH CONGRESS 1ST SESSION

S. 716

To amend the National Environmental Policy Act of 1969 to provide for legal reform, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 11, 2021

Mr. Lee introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the National Environmental Policy Act of 1969 to provide for legal reform, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “NEPA Legal Reform Act”.

SEC. 2. LEGAL REFORMS UNDER NEPA.

(a) In General.—Title I of the National Environmental Policy Act of 1969 is amended—

(1) by redesignating section 105 (42 U.S.C. 4335) as section 106; and
(2) by inserting after section 104 (42 U.S.C. 4334) the following:

"SEC. 105. LEGAL REFORM.

"(a) DEFINITIONS.—In this section:

"(1) FEDERAL AGENCY.—The term ‘Federal agency’ includes a State that has assumed responsibility under section 327 of title 23, United States Code.

"(2) HEAD OF A FEDERAL AGENCY.—The term ‘head of a Federal agency’ includes the governor or head of an applicable State agency of a State that has assumed responsibility under section 327 of title 23, United States Code.

"(3) NEPA PROCESS.—

"(A) IN GENERAL.—The term ‘NEPA process’ means the entirety of every process, analysis, or other measure, including an environmental impact statement, required to be carried out by a Federal agency under this title before the agency undertakes a proposed action.

"(B) PERIOD.—For purposes of subparagraph (A), the NEPA process—

"(i) begins on the date on which the head of a Federal agency receives an appli-
cation for a proposed action from a project sponsor; and

“(ii) ends on the date on which the Federal agency issues, with respect to the proposed action—

“(I) a record of decision, including, if necessary, a revised record of decision;

“(II) a finding of no significant impact; or

“(III) a categorical exclusion under this title.

“(4) Project Sponsor.—The term ‘project sponsor’ means a Federal agency or other entity, including a private or public-private entity, that seeks approval of a proposed action.

“(b) Judicial Review.—

“(1) Standing.—Notwithstanding any other provision of law, a plaintiff may only bring a claim arising under Federal law seeking judicial review of a portion of the NEPA process if the plaintiff pleads facts that allege that the plaintiff has personally suffered, or will likely personally suffer, a direct, tangible harm as a result of the portion of the NEPA process for which the plaintiff is seeking review.
“(2) Statute of Limitations.—

“(A) In general.—Notwithstanding any other provision of law and except as provided in subparagraph (B)(ii), a claim arising under Federal law seeking judicial review of any portion of the NEPA process shall be barred unless it is filed not later than the earlier of—

“(i) 150 days after the final agency action under the NEPA process has been taken; and

“(ii) if applicable, an earlier date after which judicial review is barred that is specified in the Federal law pursuant to which the judicial review is allowed.

“(B) New information.—

“(i) Consideration.—A Federal agency shall consider for the purpose of a supplemental environmental impact statement new information received after the close of a comment period if the information satisfies the requirements for a supplemental environmental impact statement under the regulations of the Federal agency.
“(ii) Statute of limitations

based on new information.—If a supplemen-4 tual environmental impact statement is required under the regulations of a Fed-3 eral agency, a claim for judicial review of the supplemental environmental impact statement shall be barred unless it is filed not later than the earlier of—

“(I) 150 days after the publica-10 tion of a notice in the Federal Reg-ister that the supplemental environ-12 mental impact statement is final; and

“(II) if applicable, an earlier date after which judicial review is barred that is specified in the Federal law pursuant to which the judicial review is allowed.

“(C) Savings clause.—Nothing in this paragraph creates a right to judicial review.

“(3) Remedies.—

“(A) Preliminary injunctions and temporary restraining orders.—

“(i) In general.—Subject to clause (ii), in a motion for a temporary restraining order or preliminary injunction against
a Federal agency or project sponsor in a claim arising under Federal law seeking judicial review of any portion of the NEPA process, the plaintiff shall establish by clear and convincing evidence that—

“(I) the plaintiff is likely to succeed on the merits;

“(II) the plaintiff is likely to suffer irreparable harm in the absence of the temporary restraining order or preliminary injunction, as applicable;

“(III) the balance of equities is tipped in the favor of the plaintiff; and

“(IV) the temporary restraining order or preliminary injunction is in the public interest.

“(ii) ADDITIONAL REQUIREMENTS.—A court may not grant a motion described in clause (i) unless the court—

“(I) makes a finding of extraordinary circumstances that warrant the granting of the motion;

“(II) considers the potential effects on public health, safety, and the
environment, and the potential for significant negative effects on jobs resulting from granting the motion; and

“(III) notwithstanding any other provision of law, applies the requirements of Rule 65(c) of the Federal Rules of Civil Procedure.

“(B) PERMANENT INJUNCTIONS.—

“(i) IN GENERAL.—Subject to clause (ii), in a motion for a permanent injunction against a Federal agency or project sponsor a claim arising under Federal law seeking judicial review of any portion of the NEPA process, the plaintiff shall establish by clear and convincing evidence that—

“(I) the plaintiff has suffered an irreparable injury;

“(II) remedies available at law, including monetary damages, are inadequate to compensate for the injury;

“(III) considering the balance of hardship between the plaintiff and de-
fendant, a remedy in equity is warranted;

“(IV) the public interest is not disserved by a permanent injunction; and

“(V) if the error or omission of a Federal agency in a statement required under this title is the grounds for which the plaintiff is seeking judicial review, the error or omission is likely to result in specific, irreparable damage to the environment.

“(ii) ADDITIONAL SHOWING.—A court may not grant a motion described in clause (i) unless—

“(I) the court makes a finding that extraordinary circumstances exist that warrant the granting of the motion; and

“(II) the permanent injunction is—

“(aa) as narrowly tailored as possible to correct the injury; and
“(bb) the least intrusive means necessary to correct the injury.”.

(b) ATTORNEY FEES IN ENVIRONMENTAL LITIGATION.—

(1) ADMINISTRATIVE PROCEDURE.—Section 504(b)(1) of title 5, United States Code, is amended—

(A) in subparagraph (E), by striking “and” at the end;

(B) in subparagraph (F), by striking the period at the end and inserting “; and”; and

(C) by adding at the end the following:

“(G) ‘special factor’ does not include knowledge, expertise, or skill in environmental litigation.”.

(2) UNITED STATES AS PARTY.—Section 2412(d)(2) of title 28, United States Code, is amended—

(A) in subparagraph (H), by striking “and” at the end;

(B) in subparagraph (I), by striking the period at the end and inserting “; and”; and

(C) by adding at the end the following:
“(J) ‘special factor’ does not include knowledge, expertise, or skill in environmental litigation.”