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PERMITTING: FINDING A PATH FORWARD

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON
INTERGOVERNMENTAL AFFAIRS

AND THE

SUBCOMMITTEE ON
THE INTERIOR, ENERGY, AND ENVIRONMENT

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 6, 2018

Serial No. 115–102

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.govinfo.gov
http://oversight.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE

32–511 PDF WASHINGTON : 2018

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CONTENTS

	Page
Hearing held on September 6, 2018	1

WITNESSES

Mr. Frank Rusco, Director, Natural Resources and Environment Issues, U.S. Government Accountability Office	
Oral Statement	7
Written Statement	10
Mr. Philip K. Howard, Founder and Chair, Common Good	
Oral Statement	24
Written Statement	26
Ms. Christy Goldfuss, Senior Vice President, Energy and Environment Policy, Center for American Progress	
Oral Statement	35
Written Statement	37
Mr. Daren Bakst, Senior Research Fellow, The Heritage Foundation	
Oral Statement	42
Written Statement	44

APPENDIX

Letter for the Record from Ms. Plaskett regarding Limetree Bay Terminals, submitted by Ms. Plaskett	78
Letter for the Record from Earthjustice, submitted by Mr. Raskin	80

PERMITTING: FINDING A PATH FORWARD

Thursday, September 6, 2018

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERGOVERNMENTAL AFFAIRS, JOINT
WITH THE SUBCOMMITTEE ON THE INTERIOR, ENERGY,
AND ENVIRONMENT
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittees met, pursuant to call, at 10:02 a.m., in Room 2154, Rayburn House Office Building, Hon. Greg Gianforte [chairman of the subcommittee on Interior, Energy, and Environment] presiding.

Present: Representatives Gianforte, Palmer, Grothman, Duncan, Comer, Plaskett, and Raskin.

Mr. GIANFORTE. The Subcommittee on Intergovernmental Affairs and the Committee on the Interior, Energy and Environment will come to order. Without objection, the chair is authorized to declare a recess at any time.

Good morning. Today the committee on the Interior, Energy and the Environment and the Subcommittee on Intergovernmental Affairs will examine permitting and environmental review process for infrastructure projects.

This is the third permitting hearing this committee has held this Congress. Previously we have heard from many witnesses about the ways in which convoluted requirements and lengthy application periods for Federal environmental permits negatively affect infrastructure projects.

Today we will continue to explore this important topic and discuss how delaying infrastructure projects hurts the economy and communities in need of modernize improved infrastructure.

Environmental protection statutes like the Clean Air Act, the Clean Water Act, and the National Environmental Protection Act were passed with noble intentions years ago. And no one disputes the need for a healthy environment. In recent years, however, Federal agencies have taken it upon themselves to broaden their interpretations of these statutes and made too many rules and regulations that stretch the bounds of the authority that Congress has provided. As a result, permitting workloads and associated delays have increased. For example, the EPA lowered the national ambient air quality standards for ozone in 2015. Under the new lower standard, 209 counties in 22 States are designated as nonattainment areas subjecting all projects in those counties that could produce emissions to more rigorous permitting requirements.

Similarly, the Obama administration's EPA, along with the U.S. Army Corps of Engineers finalized the Waters of the United States Rule which vastly expanded their jurisdiction to issue permits under the Clean Water Act. These Federal power grabs have increased the number of project applicants, lengthened wait times, and caused the cost of projects to balloon.

Under President Trump, the administration has prioritized infrastructure modernization and Federal permitting reform. The President's management agenda and the one Federal decision policy implemented by executive order direct Federal agencies with permitting responsibilities to reduce permit application processing times by instituting a number of best practices.

Some of our witnesses today will discuss how these proposals can move the ball forward to address well-known problems with the Federal permitting and environmental review status quo. We will also hear from the Government Accountability Office. GAO has done extensive research into Federal agencies' management of their permitting responsibilities and, in the process, has observed both common problems and best practices.

One major issue GAO has identified across Federal agencies is the lack of quality data on permitting milestones. Many agencies with permitting responsibilities are simply not tracking when applications are submitted or approved. While the administration's proposals are a step in the right direction, their success relies heavily upon the ability to hold agencies accountable. GAO's work suggests the data necessary to do so may not be readily available.

To that end, my subcommittee has initiated conversations with GAO about creating a permitting scorecard that can be used as a tool to measure agencies' progress as they begin to implement these necessary reforms. The scorecard would determine a letter grade, A through F, for each agency based on their adoption of agreed-to permitting best practices.

Last month I sent a letter to GAO requesting a review of efforts to streamline the Federal permitting process including an assessment of key permitting related indicators from monitoring agency progress.

As we discuss permitting reforms and recommendations today, I hope the conversation will contribute to developing a scorecard that can be used now and in the future to promote best practices and incentivize agencies to improve their permitting processes.

Today's hearing will provide an opportunity to discuss how we can ensure our future where Federal permitting functions are more efficiently achieved and better serves the American people. I look forward to hearing, our witnesses' recommendations.

And I now recognize the ranking member of Interior, Energy and Environment subcommittee, Ms. Plaskett, for her opening statement.

Ms. PLASKETT. Thank you very much, Mr. Chairman. And thank our witnesses for being here, and my colleagues for coming to this important hearing.

Mr. Chairman, thank you for calling today's hearing concerning the Federal permitting process and how it relates to infrastructure development. The idea that environmental protection, not just of the natural environment but also the human environment, goes

hand-in-hand with infrastructure development is now an old one. It goes back nearly 50 years to the passage of the National Environmental Protection Act, commonly known as NEPA. And the call that the environmental review and permitting process become more efficient and streamlined is nearly as old. The Virgin Islands sees both sides of this coin. With tourism and travel accounting for nearly 30 percent of the island's GDP right now, we are highly aware of the need for environmental protection. But because of our higher cost of living, anything that potentially slows our economy, including unnecessary delays to infrastructure and responsible development, must be addressed.

Delays to some projects are ongoing, and that is an impediment to our economic health. The need to fast track projects in the Virgin Islands is especially urgent as the economy recovers from the 2017 hurricane season. Today marks 1 year that Hurricane Irma hit the Islands of St. John and St. Thomas.

My office has provided assistance with numerous projects that have been delayed in the permitting progress. In some instances, these delays go back as far as 12 years or more. That is outrageous.

Mr. Chairman, I would like to have included in the record a letter I recently wrote to Rear Admiral Tim Gallaudet, assistant secretary of commerce for Oceans and Atmosphere, and Mr. Chris Oliver, assistant administrator for Fisheries for assistance with the Federal permitting of an energy infrastructure on St. Croix.

The permit application to install a single——

Mr. GIANFORTE. Without objection.

Ms. PLASKETT. Thank you.

The permit application to install a single point mooring buoy system to allow the Limetree Bay terminal facility to receive shipments from very large bulk fuel carriers has now been pending for a year. This is just one example of the list of projects that I have been asked to assist with the permitting application. Applicants incur extraordinary costs as a result of the delays in the process, and developers are thwarted and sometimes discouraged from bringing projects out because of this.

In 2017, President Trump issued two executive orders with the aim of streamlining the environmental review and permitting process. But it turns out that these executive orders are mostly redundant, a superfluous to bipartisan laws already on the books.

Since 2012, Congress has passed three major laws designed to streamlined NEPA. Each one refined some permitting requirements and provided the Federal Government with new tools to speed up environmental reviews. The FAST Act in particular created the Federal permitting improvement steering council which answers to the President. Compromising members from 13 agencies, it is designed to coordinate and expedite the permitting process. But President Trump has yet to appoint a permanent executive director of the council. And a fee structure to collect money from project sponsors so the council can facilitate faster reviews has yet to be established.

So we have all the tools we need to expedite the permitting process if we fully fund them. But this is where President Trump's proposed budget for fiscal year 2019 fell short, a call for a staggering

one-third cut in the budget of the Environmental Protection Agency and a 16 percent cut from the Department of the Interior. It's hard to see how we can speed up the permitting process when the President is calling for drastic cuts to the agencies that oversee much of that process. We know what the answers are. We just need to—find to fund them.

I thank the witnesses for their appearance today and look forward to their testimony.

Mr. GIANFORTE. Thank you.

I now recognize the ranking member of the Intergovernmental Affairs Committee, Mr. Raskin, for his opening comments.

Mr. RASKIN. Mr. Chairman, thank you very much. And thanks for calling this hearing on how we can develop our infrastructure without sacrificing the environment and the rules that protect it. Welcome to our witnesses today.

I wanted to start, Mr. Chairman, by introducing a very thoughtful letter that we received from Earth Justice to the committee, if that is——

Mr. GIANFORTE. Without objection.

Mr. RASKIN. Great. Thanks so much.

Mr. Chairman, NEPA was signed into law nearly a half century ago when experience showed the dangers of not examining the environmental implications of development before building took place. And those dangers involved the creation of perilous environmental harms and also dealing with environmental problems that came up through the litigation process which was obviously divisive and polarizing and took years to get through.

And so NEPA was established so that the environmental questions could be considered first before the building process took place. Leap before you look was the old way of doing things, and this was look before you leap so we wouldn't destroy neighborhoods and environments unnecessarily before projects took place.

So the rules arising out of NEPA and other environmental statutes like the Clean Air Act and the Clean Water Act were designed to enable planners to build environmental planning into the development process.

Now, President Trump, of course, is in the real estate development business, and declared himself the number one champion of the eminent domain process which has trampled so many Americans' property rights and environmental quality of life, has been, you know, full-blown offensive against the permitting process under NEPA. And the suggestion, of course, from the very beginning of this administration has been, as Steve Band put it, to dismantle the regulatory state, and obviously the permitting process is an important part of the regulatory process that has grown up under our environmental laws.

As I noted in July, the Office of Management and Budget every year issues a congressionally mandated report that identifies the cost of government rules on the private sector and then the estimated financial benefits of the rules for the American public. The most recent report found that Federal rules imposed just under $5 billion in costs on business but resulted in more than $27 billion in benefits to the American public. That is a benefit-to-cost ratio of more than 5 to 1. So instead of permitting rules being some kind

of staggering burden on the American people, they actually help everyone across the board.

Now, blaming environmental permitting rules is a way to flatten out and demolish the regulatory process to benefit specific corporations and developers. The BP oil spill is a good example of why environmental enforcement and permits are so essential. In the wake of the oil spill, which created 11 human deaths and the deaths of a million sea birds and contamination of an entire ecosystem, the Bureau of Safety and Environmental Enforcement was established to oversee offshore oil drilling. But President Trump's proposed 2019 budget called for slashing, by 43 percent, environmental enforcement by this bureau. This is obviously the wrong way to go. Permitting is not the problem. It should be seen as part of the solution.

Studies have shown that project funding, developing a local community census, and dealing with residences and businesses in the path of a proposed development are far greater sources of delay than the permitting process.

So let's focus on what the real problems might be. Everybody is for simplifying government and reducing red tape where we can do it, but certainly not at the expense of maintaining the environmental safeguards that the American people have established.

I thank all of the witnesses in advance for sharing their insights today. I look forward to continuing this important discussion.

Mr. Chairman, I yield back to you.

Mr. GIANFORTE. Okay. Thank you.

I now recognize chairman of the Intergovernmental Affairs Subcommittee, Mr. Palmer, for his opening statement.

Mr. PALMER. Thank you, Mr. Chairman. I thank the witnesses for being here.

I think it goes without saying that infrastructure is a critical issue that directly affects the quality of our life and our communities, and I think we can have good infrastructure without compromising environmental quality. The issue is have we gone overboard to the degree that we now have infrastructure that basically gets a D grade. We have got a deteriorating infrastructure that is having a significant impact on the economy. We have got congestion on the highways that cost us $160 million a year in lost time and wasted fuel, which, by the way, when you have that kind of congestion, increases some of the air quality issues that we are all trying to deal with. We have got power outages that have an additional impact of $150 million a year. All these costs, by the way, get passed on to the consumer in one form or another.

In 2017, the American Society of Civil Engineers analyzed the state of the Nation's infrastructure and estimated that American families lose upwards to $3,400 each year because of it. And they further scored our country's infrastructure, as I said before, and gave it a grade of D.

Fixing failing infrastructure should be a top priority. It is certainly a top priority with me. And not only just fixing the failing infrastructure but improving the quality of what we have and expanding it as our economy grows, and it's growing as the Atlanta Fed announced just last week, that they expect GDP to be 4.6 per-

cent for this quarter, which is a huge improvement over the economic conditions of the country over the last few years.

We are going to need higher quality, better infrastructure, but only if the permitting process and multiagency approvals and the tens of thousands of pages of environmental impact assessments are causing all kind of delays, and they have been for decades. The cost to rebuild infrastructure will dramatically increase due to inflation and prolonged construction cost.

Having worked for two engineering construction companies, I know the time and money it takes to get a project off the ground. And I've used this example in a couple other hearings of what happened down in Texas where you had a State road, a U.S. highway, and an infrastructure. The State road was delayed 33 1/2 months. It added over $5 million to the cost of the project.

The State road was the delayed 5 years. That added almost $18 million to the cost of the project. And the interstate, it's a mile and a half adding an interchange, was delayed for 11 months. And it cost about $447,000 a month in delay costs. That added almost $4 million to the project, which all of that is infrastructure money.

Contractors and project developers are forced to comply with dozens of permitting requirements spread across multiple agencies. They're subject to reviews and often duplicative and redundant, and then they wait. They wait for responses and approvals from Federal agencies. Waiting cost money. Delays cost money.

We see it—as I just gave those examples from Texas, when a project started and then they have to delay, these contractors are forced—you have to pay the contractors for their people being on-site and their equipment on-site. And if you shut it down, a 5-year delay, they got to move off-site and then restage. People are hired, and they're ready to work, and they expect to get paid regardless of whether or not the Federal Government is meeting the deadlines. As I said, moving equipment around, compliance, administrative tasks, updating contracts, they're grown out-of-date, delays, these are all delays that cost money. And it adds up over years.

These delay costs take away the resources that could be put to other critical projects. And my home State of Alabama has experienced infrastructure projects delay firsthand. We've been trying to get the Northern Beltline, I–459, built. And the funding for that was first approved in 1989. We've built 2 miles of road.

The project would create a six-lane beltway around the City of Birmingham. We're the largest city in the country without a complete belt line. So 30 years later, 2 miles of road. The Federal Highway Administration recently predicted that construction of the remaining 50 miles will take another 35 years. I'll be 100 years old. And, Mr. Chairman, I promise, if they take that long, I'm going to drive on it, so—we're literally throwing our infrastructure dollars down the drain with these delays.

The current administration is working to modernize the Nation's infrastructure and cure the permitting inefficiencies. In August of last year, the President issued Executive Order 13807 to streamline the environmental review and permitting process. The executive order established a one Federal decision when it comes to major infrastructure projects. This gives a single agency the authority to navigate the project through the permit authorization

process as well as the Federal environmental review. The President also encouraged cooperation between the executive branch and Congress to shorten the time consuming environmental review process to 2 years.

I look forward to hearing from today's witnesses about the Federal permitting process including how it contributes to a backlog of needed improvements and how reform proposals can address these problems.

I thank the witnesses for being here, and I yield back.

Mr. GIANFORTE. Okay. Thank you.

And I'm pleased to introduce our witnesses at this time. Mr. Frank Rusco, director of natural resources and environmental issues at the U.S. Government Accountability Office. Thank you for being here.

Mr. Philip K. Howard, founder and chair of Common Good. Ms. Christy Goldfuss, senior vice president of energy and environmental policy at the Center for American Progress. And last, but not least, Mr. Daren Bakst, senior research fellow at the Heritage Foundation.

Welcome to all of you. Thank you for being here.

Pursuant to committee rules, all witnesses will be sworn in before they testify.

Please stand and raise your right hand.

Do you solemnly swear or affirm the testimony you're about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Please be seated.

The record will reflect the witnesses have answered in the affirmative.

In order to allow time for discussion, I would ask the witnesses to please limit your testimony to 5 minutes. Your entire written statement will be made part of the record. As a reminder, the clock in front of you shows your remaining time. The light will turn yellow when you have 30 seconds left and red when your time is up. Please also remember to press the button to turn your microphone on before speaking.

And at this time I recognize Mr. Rusco from GAO for 5 minutes.

WITNESS STATEMENTS

STATEMENT OF FRANK RUSCO

Mr. RUSCO. Thank you.

Chairman Gianforte and Palmer, Ranking Members Plaskett and Raskin, and members of the subcommittees, I'm pleased to be here today to discuss GAO's work evaluating Federal agencies' permitting processes for energy infrastructure. While my testimony focuses on energy infrastructure permitting, GAO has done work looking at many other infrastructure projects, and many of the issues around permitting are broadly applicable.

It is essential to understand that permitting large infrastructure projects is a complex process involving adherence to Federal, State, and local laws and regulations. As such, it is often the case that multiple Federal, State agencies as well as other stakeholders will be involved.

Our work on energy infrastructure permitting has identified five broad categories of factors that can affect the timeliness of the permitting progress. First, coordination and communication are essential. In particular, having a lead Federal agency to coordinate the efforts of other Federal, State, and local stakeholders can be beneficial to expedite permitting processes. For example, the Federal Energy Regulatory Commission takes a lead role in coordinating environmental reviews with other Federal agencies and stakeholders in pipeline permitting.

As such, FERC and nine other agencies have signed interagency agreements for early coordination of environmental and historic preservation reviews in order to encourage timely development of pipeline projects. Both industry representatives and public interest groups have told us that having FERC as a lead agency has made the process for permitting interstate pipelines more efficient than that of intrastate pipelines where FERC is not involved.

A second factor involves human capital, or more simply, having the right Federal employees with the right skills in the right places to perform environmental reviews and other required actions for permit approval. For example, in 2016, we reported that the bureau of Indian Affairs longstanding workforce challenges had contributed to lengthy and unpredictable permit reviews, that it hindered Indian energy projects and, therefore, cost tribes and their members significant time and money in lost or delayed opportunities.

We recommended that BIA assess critical skills and competencies needed to effectively perform permit reviews. And BIA has begun developing a workforce plan to address these skill and competency gaps.

Federal agencies must also set reasonable timeframes for completing permit reviews and measure their performance using reliable data. Only then can agencies identify and address inefficiencies in their processes. We have often found that while agencies may have guidelines for how long permit reviews should take, they often do not record key dates such as when a permit application was first received, when it was deemed to be complete, and when the agency began conducting its review. Without such simple measures, we have sometimes found it impossible to know whether or not the agency is meeting its timelines.

Another recurring issue in our work has been the agency's report that applications are sometimes incomplete when submitted and cannot be reviewed until applicants provide additional information. Sometimes this appears to be the result of a lack of experience of some applicants, but other times it seems that the requirements for having a complete application may be unclear or that different agency offices have different standards for completeness or for when to start the review.

Lastly, changes to laws, regulations, or policies can cause longer permitting times. For example, after the 2010 Deepwater Horizon oil spill in the Gulf of Mexico, Interior reviewed and revised decades-old safety requirements for offshore drilling. We found that permit review times increased after these new requirements were adopted as applicants and agency officials became familiar with the new process.

To help make permitting processes more efficient, we have made numerous recommendations over the years, and agencies have generally been in agreement and taken steps to improve their performance. As always, more can be done. We look forward to taking a broad look at energy permitting processes for your subcommittees in the coming year and looking for additional ways to improve efficiency and performance.

This ends my oral remarks. I'll be happy to answer any questions you may have.

Thank you.

[Prepared statement of Mr. Rusco follows:]

United States Government Accountability Office

GAO

Testimony before the Subcommittees on Intergovernmental Affairs and the Interior, Energy, and Environment, Committee on Oversight and Government Reform, House of Representatives

For Release on Delivery
Expected at 10:00 a.m ET
Thursday, September, 6, 2018

ENERGY INFRASTRUCTURE PERMITTING

Factors Affecting Timeliness and Efficiency

Statement of Frank Rusco, Director,
Natural Resources and Environment

GAO-18-693T

GAO Highlights

Highlights of GAO-18-693T, a testimony before the Subcommittees on Intergovernmental Affairs and the Interior, Energy, and the Environment, Committee on Oversight and Government Reform, House of Representatives

Why GAO Did This Study

Congress recognizes the harmful effects of permitting delays on infrastructure projects and has passed legislation to streamline project reviews and hold agencies accountable. For example, in 2015 Congress passed the Fixing America's Surface Transportation Act, which included provisions streamlining the permitting process. Federal agencies, including the Department of the Interior and FERC, play a critical role by reviewing energy infrastructure projects to ensure they comply with federal statutes and regulations.

This testimony discusses factors GAO found that can affect energy infrastructure permitting timeliness and efficiency. To do this work, GAO drew on reports issued from July 2012 to December 2017. GAO reviewed relevant federal laws, regulations, and policies; reviewed and analyzed federal data; and interviewed tribal, federal, state and industry officials, among others.

What GAO Recommends

GAO has made numerous recommendations about ways to improve energy infrastructure permitting processes. Federal agencies have implemented a number of GAO's recommendations and taken steps to implement more efficient permitting, but several of GAO's recommendations remain open, presenting opportunities to continue to improve permitting processes.

View GAO-18-693T. For more information, contact Frank Rusco at (202) 512-3841 or RuscoF@gao.gov.

September 6, 2018

ENERGY INFRASTRUCTURE PERMITTING

Factors Affecting Timeliness and Efficiency

What GAO Found

GAO's prior work has found that the timeliness and efficiency of permit reviews may be affected by a range of factors. For the purposes of this testimony, GAO categorized these factors into five categories.

- **Coordination and Communication.** GAO found that better coordination between agencies and applicants is a factor that could result in more efficient permitting. Coordination practices that agencies can use to streamline the permitting process include the following:
  - **Designating a Lead Coordinating Agency**. GAO found having a lead agency to coordinate the efforts of federal, state, and local stakeholders is beneficial to permitting processes. For example, in a February 2013 report on natural gas pipeline permitting, industry representatives and public interest groups told GAO that the interstate process was more efficient than the intrastate process because in the interstate process the Federal Energy Regulatory Commission (FERC) was lead agency for the environmental review.
  - **Establishing Coordinating Agreements among Agencies**. In the February 2013 report, GAO reported that FERC and nine other agencies signed an interagency agreement for early coordination of required environmental and historic preservation reviews to encourage the timely development of pipeline projects.
- **Human Capital.** Agency and industry representatives cited human capital factors as affecting the length of permitting reviews. Such factors include having a sufficient number of experts to review applications. GAO reported in November 2016 on long-standing workforce challenges at the Department of the Interior's Bureau of Indian Affairs (BIA), such as inadequate staff resources and staff at some offices without the skills to effectively conduct such reviews. GAO recommended that Interior incorporate effective workforce planning standards by assessing critical skills and competencies needed to fulfill its responsibilities related to energy development. Interior agreed with this recommendation, and BIA stated that its goal is to develop such standards by the end of fiscal year 2018.
- **Collecting and Analyzing Accurate Milestone Information.** GAO's work has shown that a factor that hinders efficiency and timeliness is that agencies often do not track when permitting milestones are achieved, such as the date a project application is submitted or receives final agency approval. Having quality information on permitting milestones can help agencies better analyze process deficiencies and implement improvements.
- **Incomplete Applications.** Agency officials and agency documents cited incomplete applications as affecting the duration of reviews. For example, in a 2014 budget document, BLM reported that—due to personnel turnover in the oil and gas industry—operators were submitting inconsistent and incomplete applications for drilling permits, delaying permit approvals.
- **Significant Policy Changes.** Policy changes unrelated to permitting can affect permitting time frames. For example, after the 2010 Deepwater Horizon incident and oil spill, Interior issued new safety requirements for offshore drilling. GAO found that review times for offshore oil and gas drilling permits increased after these safety requirements were implemented.

Chairmen Palmer and Gianforte, Ranking Members Raskin and Plaskett, and Members of the Subcommittees:

I am pleased to be here today to discuss our work on the role of federal agencies in the permitting processes for energy infrastructure projects.

Federal agencies, including the Department of the Interior and the Federal Energy Regulatory Commission (FERC), play a critical role in ensuring that energy infrastructure projects developed in the United States comply with a wide range of federal statutes and regulations. Perhaps the most notable is the National Environmental Policy Act (NEPA), which requires federal agencies to evaluate the potential environmental effects of actions they propose to carry out, fund, or approve, such as by permit.[1]

Over the years, we have issued numerous reports describing the role of federal agencies in permitting various types of energy infrastructure, including onshore and offshore oil and gas projects, natural gas pipelines, and liquefied natural gas (LNG) export facilities. Two common themes emerge from these reports. First, permitting processes are varied and complex, often requiring an applicant to comply with a range of federal, state, and local laws and regulations. Second, permitting processes can involve several federal and state agencies, as well as other stakeholders, many of whom have approval responsibilities. For example, to construct an LNG export facility, an applicant must coordinate with federal agencies such as FERC—the lead agency responsible for the environmental and safety review—as well as the U.S. Coast Guard—which assesses waterway suitability; the applicant may also need permits from, among others, the U.S. Army Corps of Engineers for dredging activities and the U.S. Environmental Protection Agency for permits under the Clean Air Act.[2] In addition to federal permits and consultations, applicants may also be required to obtain other permits under state and local law. Because of

[1]Enacted in 1970, NEPA has as its purpose, among others, to promote efforts to prevent or eliminate damage to the environment. NEPA requires an agency to prepare a detailed statement on the environmental effects of any "major federal action" significantly affecting the environment. Regulations promulgated by the Council on Environmental Quality implementing NEPA generally require an agency to prepare either an environmental assessment or an environmental impact statement, depending on whether a proposed federal action could significantly affect the environment.

[2]GAO, *Natural Gas: Federal Approval Process for Liquefied Natural Gas Exports,* GAO-14-762, (Washington, D.C.: Sept. 26, 2014)

the wide variety of projects, locations, and state and local laws, permitting requirements vary by project. Public interest groups and the public also contribute to the process.

We have found that inefficiencies in the permitting process can have real world effects. For example, in a June 2015 report on Indian energy development, we reported that a review by the Bureau of Indian Affairs (BIA) could be a lengthy process and increase development costs and project development times, resulting in missed development opportunities and lost revenue and jeopardizing the viability of projects.[3] As we reported then, the Acting Chairman for the Southern Ute Indian Tribe reported in 2014 that BIA's review of some of its energy-related documents took as long as 8 years, and during that time the tribe estimated it lost $95 million in revenues.

Congress has recognized the harmful effects of permitting delays and passed legislation to streamline permitting and to hold agencies accountable, including Fixing America's Surface Transportation Act.[4] When Congress passed this act in 2015, it included provisions for streamlining the infrastructure permitting process and codified into law the use of a permitting dashboard to track project timelines.

This testimony discusses factors that can affect permitting timeliness and efficiency. This statement draws on findings from our reports issued from July 2012 to December 2017. In conducting that work, we reviewed relevant federal laws, regulations, and policies; reviewed and analyzed federal data; and interviewed tribal, federal, state and industry officials,

[3]GAO, *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, GAO-15-502 (Washington, D.C.: June 8, 2015).

[4]Pub. L. No. 114-94, 129 Stat. 1312 (2015).

among others. More detailed information on our scope and methodology can be found in each of the cited reports.[5]

We conducted the work on which this testimony is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions.

Factors Affecting Federal Infrastructure Permitting

In our prior work, we identified a range of factors that can affect permitting timeliness and efficiency. For the purposes of this statement, we have categorized the factors into five broad categories: 1) coordination and communication, 2) human capital, 3) collecting and analyzing accurate milestone information, 4) incomplete applications, and 5) significant policy changes.

Coordination and Communication

Effective coordination and communication between agencies and applicants is a critical factor in an efficient and timely permitting process. Standards for internal control in the federal government call for management to externally communicate the necessary quality information to achieve the entity's objectives, including by communicating with and obtaining quality information from external parties.[6] We found that better coordination between agencies and applicants could result in more efficient permitting. For example, in our February 2013 review of natural gas pipeline permitting, we reported that virtually all applications for

[5]GAO, *Offshore Seismic Surveys: Additional Guidance Needed to Help Ensure Timely Reviews*, GAO-18-60, (Washington D.C.: Dec. 11, 2017).; *Indian Energy Development, Additional Actions by Federal Agencies Are Needed to Overcome Factors Hindering Development*, GAO-17-43, (Washington, D.C.: Nov. 10, 2016).; *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, GAO-15-502, (Washington, D.C.: June 8, 2015).; *Natural Gas: Federal Approval Process for Liquefied Natural Gas Exports*, GAO-14-762, (Washington, D.C.: Sept. 26, 2014); *Oil And Gas Development: BLM Needs Better Data to Track Permit Processing Times and Prioritize Inspections*, GAO-13-572, (Washington, D.C.: Aug. 23, 2013).; *Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary*, GAO-13-221, (Washington, D.C.: Feb. 15, 2013); *Oil And Gas Management: Interior's Reorganization Complete, but Challenges Remain in Implementing New Requirements*, GAO-12-423, (Washington, D.C.: July 30, 2012).

[6]GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington, D.C.: September 2014).

pipeline projects require some level of coordination with one or more federal agencies, as well as others, to satisfy requirements for environmental review.[7] For example, BIA is responsible for, among other things, approving rights of way across lands held in trust for an Indian or Indian tribe and must consult and coordinate with any affected tribe.

We have reported on coordination practices that agencies use to streamline the permitting process, including the following.

Designating a Lead Coordinating Agency

We have found that having a lead agency coordinate efforts of federal, state, and local stakeholders is beneficial to permitting processes. For example, in our February 2013 review on natural gas pipeline permitting, industry representatives and public interest groups told us that the interstate process was more efficient than the intrastate process because in the interstate process FERC was designated the lead agency for the environmental review.[8] Other agencies may also designate lead entities for coordination. For example, in a November 2016 report, we described how BIA had taken steps to form an Indian Energy Service Center that was intended to, among other things, help expedite the permitting process associated with Indian energy development.[9] We recommended that BIA involve other key regulatory agencies in the service center so that it could more effectively act as a lead agency.[10]

Establishing Coordinating Agreements among Agencies

Establishing coordinating agreements among agencies can streamline the permitting process and reduce time required by routine processes. For example, in our February 2013 review of natural gas pipeline permitting, we reported that FERC and nine other agencies signed an interagency agreement for early coordination of required environmental and historic preservation reviews to encourage the timely development of pipeline projects.[11]

Using Mechanisms to Expedite Routine or Less Risky Reviews

Agencies can also use mechanisms to streamline reviews of projects that are routine or less environmentally risky. For example, under NEPA,

[7]GAO-13-221.

[8]GAO-13-221.

[9]GAO-17-43.

[10]Interior agreed with this recommendation and, as of September 2017, BIA was in discussions with other agencies to establish formal agreements.

[11]GAO-13-221.

agencies may categorically exclude actions that an agency has found—in NEPA procedures adopted by the agency—do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.[12] Also under NEPA, agencies may rely on "tiering," in which broader, earlier NEPA reviews are incorporated into subsequent site-specific analyses. Tiering is used to avoid duplication of analysis as a proposed activity moves through the NEPA process, from a broad assessment to a site-specific analysis.[13] Such a mechanism can reduce the number of required agency reviews and shorten the permitting process.

Human Capital

Agency and industry representatives cited human capital factors as affecting the length of permitting reviews. Such factors include having a sufficient number of experts to review applications. Some examples include:

- In June 2015 and in November 2016, we reported concerns associated with BIA's long-standing workforce challenges, such as inadequate staff resources and staff at some offices without the skills needed to effectively review energy-related documents.[14] In November 2016 we recommended that Interior direct BIA to incorporate effective workforce planning standards by assessing critical skills and competencies needed to fulfill BIA's responsibilities related to energy development.[15]
- For a September 2014 report, representatives of companies applying for permits to construct LNG export facilities told us that staff shortages at the Pipeline and Hazardous Safety Materials

[12]40 C.F.R. § 1508.4. Any such procedures must provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Id.

[13]GAO-18-60.

[14]GAO-15-502; GAO-17-43.

[15]GAO-17-43. Interior agreed with this recommendation and stated the Indian Energy Service Center would identify and implement a workforce plan for the participating agencies regarding positions associated with the development of Indian energy and minerals on trust lands. According to June 2018 testimony by the Acting Director of BIA, BIA's goal is to develop workforce standards by the end of fiscal year 2018.

Administration delayed spill modeling necessary for LNG facility reviews.[16]

- In an August 2013 review of Interior's Bureau of Land Management (BLM) and oil and gas development, industry representatives told us that BLM offices process applications for permit to drill at different rates, and inadequate BLM staffing in offices with large application workloads are one of the reasons for these different rates.[17]

Agencies have taken some actions to mitigate human capital issues. For example, we reported in August 2013 that BLM had created special response teams of 10 to 12 oil and gas staff from across BLM field offices to help process applications for permits to drill in locations that were experiencing dramatic increases in submitted applications.[18] In July 2012, we recommended that Interior instruct two of its bureaus to develop human capital plans to help manage and prepare for human capital issues, such as gaps in critical skills and competencies.[19]

Collecting and Analyzing Accurate Milestone Information

Our work has shown that a factor that hinders efficiency and timeliness is that agencies often do not track when permitting milestones are achieved, such as the date a project application is submitted or receives final agency approval to determine if they are achieving planned or expected results. In addition, our work has shown that agencies often do not collect accurate information, which prevents them from analyzing their processes in order to improve and streamline them. The following are examples of reports in which we discussed the importance of collecting accurate milestone information:

- In December 2017, we found that the National Marine Fisheries Service and the U.S. Fish and Wildlife Service were not recording accurate permit milestone dates, so it was not possible to

[16]GAO-14-762.

[17]GAO-13-572.

[18]GAO-13-572.

[19]GAO-12-423. Interior neither agreed nor disagreed with our recommendation. According to Interior, the Bureau of Safety and Environmental Enforcement and the Bureau of Ocean Energy Management completed human capital plans in 2013 and 2016, respectively.

determine whether agencies met statutory review time frames.[20] We recommended that these agencies clarify how and when staff should record review dates so that the agencies could assess the timeliness of reviews.[21]

- We found in June 2015 that BIA did not have a documented process or the data needed to track its review and response times; to improve the efficiency and transparency of BIA's review process, we recommended that the agency develop a process to track its review and response times and improve efforts to collect accurate review and response time information.[22]
- We found in an August 2013 report that BLM did not have complete data on applications for permits to drill, and without accurate data on the time it took to process applications, BLM did not have the information it needed to improve its operations. We recommended that BLM ensure that all key dates associated with the processing of applications for permits to drill are completely and accurately entered into its system to improve the efficiency of the review process.[23]

Standards for internal control in the federal government call for management to design control activities to achieve objectives and respond to risks, including by comparing actual performance with planned or expected results and analyzing significant differences. Without tracking performance over time, agencies cannot do so. The standards also call for agency management to use quality information to achieve agency objectives; such information is appropriate, current, complete, accurate, accessible, and provided on a timely basis. As we have found, having

[20]GAO-18-60.

[21]The National Marine Fisheries Service agreed with the recommendation and said it planned to implement the recommendation. The U.S. Fish and Wildlife Service partially agreed with the recommendation but did not indicate whether it planned to implement the recommendation.

[22]GAO-15-502. Interior did not agree with the recommendation, but in May 2017 Interior stated that BIA subject matter experts were working to improve data fields necessary to track and monitor review and response times for oil and gas leases and agreements.

[23]GAO-13-572. Interior generally agreed with this and other recommendations in this report. According to BLM, it redesigned its system to improve the accuracy and completeness of applications in the system, and in February 2017 began requiring operators to use the system, which BLM believes will help reduce application processing times.

quality information on permitting milestones can help agencies identify the duration of the permitting process, analyze process deficiencies, and implement improvements.

Incomplete Applications

According to agency officials we spoke with and agency documents we reviewed, incomplete applications are a factor that can affect the duration of reviews. For example, in a 2014 BLM budget document, BLM reported that—due to personnel turnover in the oil and gas industry—operators were submitting inconsistent and incomplete applications for permits to drill, which was delaying the approval of permits.[24] In a February 2013 report, officials we spoke with from Army Corps of Engineers district offices said that incomplete applications may delay their review because applicants are given time to revise their application information.[25] Deficiencies within agency IT systems may also result in incomplete applications. As we noted in a July 2012 report, Interior officials told us that their review of oil and gas exploration and development plans was hindered by limitations in its IT system that allowed operators to submit inaccurate or incomplete plans, after which plans were returned to operators for revision or completion.[26]

Agencies can reduce the possibility of incomplete applications by encouraging early coordination between the prospective applicant and the permitting agency. According to agency and industry officials we spoke with, early coordination can make the permitting process more efficient. One example of early coordination is FERC's pre-filing process, in which an applicant may communicate with FERC staff to ensure an application is complete before formally submitting it to the commission.[27]

[24]GAO-13-572.

[25]GAO-13-221.

[26]GAO-12-423.

[27]This process may be mandatory—such as for liquefied natural gas export facilities—or voluntary—such as for pipelines. For example, liquefied natural gas export facility applicants are required to spend at least 6 months in the pre-filing process before formally submitting an application. According to FERC officials we spoke with, the pre-filing process is intended to allow applicants to communicate freely with FERC staff and stakeholders to identify and resolve issues before the applicant formally files an application with FERC.

Significant Policy Changes

Changes in U.S. policy unrelated to permitting are a factor that can also affect the duration of federal permitting reviews. For example, in September 2014, we reported that the Department of Energy did not approve liquefied natural gas exports to countries without free-trade agreements with the United States for a period of 16 months.[28] We found that the Department stopped approving applications while it conducted a study of the effect of liquefied natural gas exports on the U.S. economy and the national interest. Exporting liquefied natural gas was an economic reversal from the previous decade in which the United States was expected to become an importer of liquefied natural gas.

Policy changes can result from unforeseen events. After the Deepwater Horizon incident and oil spill in 2010, Interior strengthened many of its safety requirements and policies to prevent another offshore incident. For example, Interior put new safety requirements in place related to well control, well casing and cementing, and blowout preventers, among other things. In a July 2012 report, we found that after the new safety requirements went into effect, review times for offshore oil and gas drilling permits increased, as did the number of times that Interior returned a permit to an operator.[29]

In conclusion, our past reports have identified varied factors that affect the timeliness and efficiencies of federal energy infrastructure permitting reviews. Federal agencies have implemented a number of our recommendations and taken steps to implement more efficient permitting, but several of our recommendations remain open, presenting opportunities to continue to improve permitting processes.

Chairmen Palmer and Gianforte, Ranking Members Raskin and Plaskett, and Members of the Subcommittees, this concludes my prepared statement. I would be pleased to answer any questions that you may have at this time.

[28]GAO-14-762.

[29]GAO-12-423.

GAO Contacts and Staff Acknowledgments

If you or your staff members have any questions concerning this testimony, please contact Frank Rusco, Director, Natural Resources and Environment, who may be reached at (202) 512-3841 or RuscoF@gao.gov. Contact points for our Office of Congressional Relations and Public Affairs may be found on the last page of this statement. Key contributors to this testimony include Christine Kehr (Assistant Director), Dave Messman (Analyst-in-Charge), Patrick Bernard, Marissa Dondoe, Quindi Franco, William Gerard, Rich Johnson, Gwen Kirby, Rebecca Makar, Tahra Nichols, Holly Sasso, and Kiki Theodoropoulos.

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Mr. GIANFORTE. Okay. Thank you.

We now recognize Mr. Howard for his opening—his statement.

STATEMENT OF PHILIP K. HOWARD

Mr. HOWARD. Thank you, Chairman Gianfonte, Palmer, Ranking Members Plaskett and Raskin, members of the subcommittee.

The problem that we're faced with is that—is that the goals of environmental review are indisputably valid. It's very important to look at a project and its effects before sometimes billions of dollars are spent on the project. So that the public knows what they're in for. And the regulatory complexity that causes delay is also, to an extent, unavoidable. There are fire code requirements as well as environmental requirements. But most of these requirements are legitimate.

The problem is that there's no mechanism in the government and among the different levels of government to make the value judgements that prioritize these concerns and then make a judgment to move forward.

So in an effort to achieve a perfect compliance with often hundreds, sometimes thousands, of regulatory requirements, it can take years, sometimes more than a decade. And that's the problem we're confronted with here, which is the absence of decisionmaking authority to make practical judgments.

America is a country of practicality. The environmental and permitting process in this country is a process of dysfunction and paralysis is the opposite the practicality.

In 2015, Common Good, which I chair, released a research paper 2 years, not 10 years, which tried to, on order of magnitude, evaluate the cost and the harm caused by permitting delays. And while there's no comprehensive data on large projects, it was common that projects would be delayed by years, sometimes more than a decade.

We also found that in countries such as Germany and Canada, with which our economy competes, typically projects like this were approved within 1 or 2 years at most.

In calculating the harm, we—assuming a 6-year delay in a large project, found that the delay more than doubled the cost of infrastructure. That's wasted money for the American economy. Thirty percent of the increase is in direct cost, inflation and an extra overhead, and the indirect cost of sustained inefficiencies and loss of benefits, being stuck in traffic jams or waiting for, as inefficient century-old locks on rivers finally open up, lost electricity and inefficient power lines more than doubles the cost of the infrastructure.

We also found that lengthy environmental review is typically harmful to the environment because it delays—when you have half-century or century-old infrastructure, it delays the improvements to infrastructure that get rid of the traffic jams or the waste of electricity.

The cause of delay is not the fact that we do environmental review. It's that there are no clear lines of authority to make the needed practical choices. So, for example, environmental review statements on large projects now are typically characterized by a flood of detail that can be characterized as no pebble left unturned. A project of a pipeline in Wyoming, for example, had detail about

the possibility of gates being left open when the power line was built so that cows might wander off.

It had a point about the trucks using construction-emitted fumes and, therefore, that caused pollution. These are completely self-evident points that are not at all important to the decision whether to build this power line. There were big issues and material issues involved with the power line and shouldn't have thousands of pages of detail like this.

And the Bayonne Bridge, a project to raise the roadway of a bridge using its existing foundations to permit more efficient ships into New York harbor, the environmental assessment ended up being 10,000 pages plus another 10,000 pages of exhibits and took 5 years, including studies of historic buildings within a 2-mile radius of either end of the bridge even though the project was not touching any buildings, and traffic studies even though the project was not changing the flow of traffic over that bridge.

That's the kind of detail that ends up adding cost and time to these projects, because no one has authority to actually make a choice about what's important on a particular project. It doesn't help public policy, and it doesn't help public debate to get it lost in detail.

But environmental review is not the only problem. There's also permitting. For example, the Bayonne Bridge, 47 permits from 19 different agencies. The effect of all this in our view is that the White House cannot solve the problem. Its goals, we think, are all valid. As Ranking Member Plaskett said, many of these goals have been set forth in prior statutes. But what's needed is congressional help in clarifying lines of authority so that the chair CEQ can decide what's important in a project. Someone in the White House, to resolve disagreements among different agencies and so forth.

And if Congress would do that, we propose legislative language, I think it would go a long ways be towards getting the decrepit infrastructure rebuilt in this country.

Thank you.

[Prepared statement of Mr. Howard follows:]

Statement of Philip K. Howard
Chair of Common Good

"Permitting: Finding a Path Forward"
September 6, 2018

U.S. House of Representatives
Subcommittee on Intergovernmental Affairs and
Subcommittee on the Interior, Energy, and Environment
Committee on Oversight and Government Reform
Washington, DC

Chairman Palmer, Ranking Member Raskin, Chairman Gianforte, Ranking Member Plaskett, and Members of the Subcommittees:

Thank you for inviting me to testify before the subcommittees today about the issue of infrastructure permitting.

In September 2015, the organization I chair, Common Good, released a white paper arguing that two things are needed to rebuild America's infrastructure: money and permits. The paper's key finding was that delays associated with the current infrastructure approval process more than double the effective cost of infrastructure.[1] A six-year delay in permitting raises direct costs of infrastructure construction by 30 percent. Opportunity and environmental costs associated with this delay, depending on the sector, can exceed total construction costs. All told, we estimate that the cost of delay from permitting and review is nearly $3.7 trillion, compared to an overall cost to rebuild of $1.7 trillion.

Our paper found that delays associated with environmental review and permitting actually harm the environment by prolonging bottlenecks that produce congestion and pollution, and preventing replacement of outdated systems with new technologies. For example, a six-year delay in rebuilding our nation's crumbling highway infrastructure would release an extra 51 million tons of $C0_2$ emissions. America's antiquated power grid wastes an amount of electricity equivalent to the output of 200 coal-burning power plants.

The upside of modernizing America's decrepit infrastructure is as rosy as the current situation is dire. An infrastructure initiative will provide upwards of two million high-paying construction-related jobs, and provide a 21st century platform to enhance America's competitiveness. Not rebuilding infrastructure runs irresponsible risks.

[1] In May of this year we updated our calculations using 2017 data (the 2015 paper was based off 2012 numbers). We now estimate that approval delays add nearly $3.9 trillion to the cost of fixing American infrastructure, an increase of nearly $200 billion from our previous figure. At this rate, every year in which we neglect to address the process failures inherent in our current system of infrastructure approval adds around $40 billion to the pricetag.

The core flaw in America's review and permitting process is that there are no clear lines of authority to make needed decisions to adhere to timetables, including to resolve disputes among bickering agencies or project opponents. At any step along the way, a project can get bogged down in the balkanized bureaucracy. The project to raise the roadway of the Bayonne Bridge required 47 permits from 19 different federal, state, and local agencies. Despite creating virtually no environmental impact, as it used the same rights of way and foundations as the old bridge, approval of the Bayonne Bridge project took five years and created 20,000 pages of documentation.

The Bayonne Bridge is no outlier; complex or controversial projects regularly generate thousands, and even tens of thousands, of pages of review documents. The environmental impact statement for the new Mario Cuomo Bridge (replacing the aging Tappan Zee Bridge over the Hudson River) spent over 300 pages *describing the methodology used in the rest of the statement*. It also included detailed traffic studies despite the fact that the new bridge would not meaningfully alter traffic patterns relative to the old bridge.

The Complexification of NEPA

No one deliberately designed this permitting process. Environmental review in particular has strayed from its original intention. The 1970 National Environmental Policy Act (NEPA) was designed to provide the public with disclosure of major impacts, not dense academic analyses. One historian reports that "[t]he earliest [environmental impact statements (EISs)] were less than ten typewritten pages in length." The current regulations of the Council of Environmental Quality (CEQ), created to oversee NEPA, say that an EIS should generally be no more than 150 pages, and no more than 300 pages for complex projects.

What happened in America is that NEPA diverged from its original goal of public transparency to being an implied mandate for perfect projects. But every infrastructure project has an environmental cost—a desalination plant has a briny byproduct, a new power line or wind farm mars natural views, a new highway exit or intermodal facility will disrupt a neighborhood. Wringing our hands for years over these effects does not make these effects disappear; it just postpones the benefits of the projects while making them more expensive.

NEPA provided no private right of action. But activist courts in the 1970s implied a right of action, and lawsuits over environmental review statements became surrogates for questioning the wisdom and design of projects.

In effect, NEPA litigation transferred power from democratically-elected officials to project opponents and courts. For example, the environmentally-beneficial, but now defunct, Cape Wind offshore wind farm project faced numerous NIMBY lawsuits since its NEPA process began in 2001 as wealthy beachfront property owners used lawsuits to kill the project and protect their ocean views.

Over time, lawsuits over environmental disclosures triggered a downward spiral of ever-denser detail—a process of no pebble left unturned. Former EPA general counsel E. Donald Elliott estimates that 90 percent of detail in federal impact statements is there not because it's actually useful to the public or decision-makers, but because it might help in the inevitable litigation—a form of environmental "defensive medicine."

At this point, environmental review has taken on a life of its own, often unrelated to any meaningful public purpose. Striving for consensus means that delays can go on for years, often decades. A plan to plug a quarter-mile gap in a Missouri levee has been studied seven times since it was originally proposed, with no resolution in site.

Environmental review is often a weapon for opponents to demand changes or other concessions that undermine the common good. Fear of litigation skews decision-making towards mollifying the squeaky wheel. The public harm includes dramatically higher costs and delayed environmental benefits.

Another harm from delay is that the uncertainty over timing keeps many projects on the drawing board, and has been a kind of poison pill deterring private capital from committing to infrastructure investment.

Efforts to Fix the Current Approval Process

In recent years, Congress has improved the approval process, but only marginally, by creating committees to resolve disputes, shortening the statute of limitations, allowing some state-level processes to fulfill federal requirements, and improving transparency via the Permitting Dashboard. For example, the creation of a 16-agency Permitting Council to resolve inter-agency disputes—mandated in the FAST Act—may be better than no mechanism, but few wise public managers would ever recommend a 16-agency committee as a way to expedite decision-making.

The Trump Administration—in Executive Order 13807, its accompanying MOU, and its February 2018 legislative outline—also deserves credit for highlighting the issue of permitting in its infrastructure agenda. But it can't work to meet its goals without clear lines of authority to override the current bureaucratic tangle. For instance, while the executive order's "One Federal Decision" framework seems to recognize that the vacuum of authority that defines the current system is a major contributor to delay and buck-passing during the environmental review and permitting process, it does not actually create a single federal decision-maker who is empowered to set limits on review. Instead, it mostly reiterates existing legal requirements, such as that a project have a designated "lead agency." Similarly, the executive order attempts to address the issue of agency disagreement, which can drag projects off course and add months or even years to permitting timelines. But here too, the order falls short, by seemingly assigning responsibility to facilitate resolutions to two separate entities simultaneously, and in terms too weak to allow either to decisively resolve significant conflicts. The MOU's language on dispute resolution is similarly vague on actual decision-making authority, insisting that disputes be resolved "at the earliest possible time" or else elevated "to

senior agency leadership for resolution." Because it lacks any action-forcing mechanism, this agreement is unlikely to have any actual effect on inter-agency disputes.

Implementing the Administration's goals requires new regulations and help from Congress, in each of following ways:

A crucial component of the Administration agenda is for firm deadlines, no longer than two years, to complete environmental reviews and permits. Enforcing deadlines, however, requires clear lines of authority. Common Good proposes a statutory amendment giving CEQ responsibility over the scope and adequacy of environmental review.

The Administration is correct in directing CEQ to issue new regulations to streamline NEPA processes, which take many years longer than ever intended. The environment will be helped, not harmed, by returning to the shorter process originally created by landmark environmental protections.

The Administration agenda would also make needed changes to judicial review, such as a shorter statute of limitations and a higher bar for injunctive relief. This is important to avoid a kind of "defensive medicine" which, because of fear of legal claims over inadequate review, transforms environmental impact statements into multi-thousand-page documents. We propose a statutory clarification that, among other things, requires the plaintiff to demonstrate material deficiencies of environmental significance.

The Administration does not adequately address the delay caused by review and permitting by multiple levels of government. If state and local processes extend beyond the federal timetable for projects of interstate significance, we propose preemption of state and local review (similar to the Federal Energy Regulatory Commission's authority over new gas pipelines).

We support the Administration agenda to create pilot programs to explore accelerating projects that have net environmental benefits.

The Administration's funding proposals are not adequate. A federal contribution of $200 billion over ten years will not stimulate $1.5 trillion of infrastructure investment. Most transportation infrastructure projects have little or no revenue streams, and require public investment that cannot be directly repaid. It is not realistic to expect state and local governments to fund 80-90 percent of the cost of projects where the federal government currently provides half or more of the funding.

Legitimate concerns over increasing the federal deficit lead to one obvious conclusion: an increase in the gas tax or a "vehicle miles travelled" tax. The return on the investment will greatly outweigh the costs, as well as improve America's environmental footprint.

Congress Needs to Act

Funding is another area where Congress needs to act—and the deal to be made is right in front of us: Republicans agree to provide funding, and Democrats agree to streamline permitting.

In summary, what's needed to achieve the Administration's goals is to create a straightforward hierarchy, where designated officials have statutory authority to make needed decisions at each step without months of delay, accountable to officials up the hierarchy, and also to courts if they shirk their responsibilities under NEPA and other statutes. I attach here three pages of amendments that create clear lines of authority to make decisions needed to adhere to reasonable schedules. The effect will be to reduce the effective cost of infrastructure by half and to create a greener footprint.

Attachment to Statement of Philip K. Howard for "Permitting: Finding a Path Forward"

Accelerate Infrastructure Permitting
March 2017

Permitting for infrastructure projects can take a decade or more. Multiple agencies oversee the process, with no clear lines of authority. Once permits are granted, lawsuits can last years more. These delays are costly and, often, environmentally destructive.

To eliminate unnecessary delays, we must give officials authority to enforce deadlines and resolve lawsuits in expedited proceedings. To accomplish these goals, we recommend amending the FAST Act with the following provisions:

1. Except in unusual circumstances, decisions to approve infrastructure projects are made in *less than two years*.

2. The Chairman of the Council on Environmental Quality (CEQ) has authority to resolve all disputes regarding the scope and adequacy of environmental review pursuant to NEPA.

3. CEQ has the authority to grant a *fast track one-year review* for those projects that were developed with significant consultation with stakeholders and that demonstrate net environmental benefits.

4. The Director of the Office of Management and Budget has authority to resolve inter-agency disputes.

5. If state and local permits are delayed past issuance of federal permits, the Chief Permitting Officer is authorized to grant final permits for projects of interstate or national significance.

6. Judicial review is limited to the question of whether the initial review failed to disclose material impacts and practical alternatives.

These changes will substantially improve review timetables and reduce construction costs while maintaining strong environmental protections for federal infrastructure projects. Here is the text of the bill to accomplish these amendments, which we call the Get America Building Act of 2017.

FAST Act (PL 114-94) as Amended by the Get America Building Act of 2017

1. Approval in Less Than 2 Years (§41002)

(aa) IN GENERAL.—The final completion dates in any performance schedule for the completion of an environmental review or authorization under clause (i) shall not exceed **2 years, unless there is a determination under Section 41003(c)(2)(B) that the project presents unusual and extraordinary circumstances.** ~~the average time to complete an environmental review or authorization for a project within that category~~.

~~(bb) CALCULATION OF AVERAGE TIME.—The average time referred to in item (aa) shall be calculated on the basis of data from the preceding 2 calendar years and shall run from the period beginning on the date on which the Executive Director must make a specific entry for the project on the Dashboard under section 41003(b)(2) (except that, for projects initiated before that duty takes effect, the period beginning on the date of filing of a completed application), and ending on the date of the issuance of a record of decision or other final agency action on the review or authorization.~~

2. The Chairman of the Council on Environmental Quality Resolves Disputes Regarding the Scope and Adequacy of Environmental Review (§41003)

(ii) DISPUTES.~~—If a dispute remains unresolved 30 days after the date on which the dispute was submitted to the Executive Director, the Director of the Office of Management and Budget, in consultation with the Chairman of the Council on Environmental Quality, shall facilitate a resolution of the dispute and direct the agencies party to the dispute to resolve the dispute by the end of the 60-day period beginning on the date of submission of the dispute to the Executive Director.~~ **The Chairman of the Council on Environmental Quality may resolve all disputes regarding environmental review pursuant to NEPA, including scope, adequacy, timetable, and incorporation of prior environmental review statements.**

(iii) FINAL RESOLUTION.—Any action taken by the ~~Director of the Office of Management and Budget~~ **Chairman of the Council on Environmental Quality** in the resolution of a dispute under clause (ii) shall: (I) be final and conclusive; and (II) not be subject to judicial review.

3. Unusual and Extraordinary Circumstances and Fast Track Review (§41003)

(B) FACTORS FOR CONSIDERATION.— (i) In establishing the permitting timetable under sub-paragraph (A), the facilitating or lead agency shall follow the performance schedules established under section 41002(c)(1)(C), but may vary the timetable **if a determination is made that the project presents unusual and extraordinary circumstances** based on relevant factors, including—

~~(i)~~ (I) the size and complexity of the covered project;
~~(ii)~~ (II) the resources available to each participating agency;
~~(iii)~~ (III) the regional or national economic significance of the project;
~~(iv)~~ (IV) the sensitivity of the natural or historic resources that may be affected by the project;
~~(v)~~ (V) the financing plan for the project; and
~~(vi)~~ (VI) the extent to which similar projects in geographic proximity to the project were recently subject to environmental review or similar procedures under State law.

(ii) If the Chairman of the Council on Environmental Quality determines that a project demonstrates significant net environmental benefits and was developed with significant consultation with affected stakeholders, the timetable may be set at one year or less.

4. The Director of the Office of Management and Budget Resolves Inter-Agency Disputes (§41005)

(e) Issue Identification and Resolution.—

(4) DISPUTE RESOLUTION —

(i) IN GENERAL. —The Executive Director, in consultation with appropriate agency CERPOs and the project sponsor, shall, as necessary, mediate any inter-agency disputes regarding a project.

(ii) DISPUTES.—If a dispute remains unresolved 30 days after the date on which the dispute was submitted to the Executive Director, the Director of the Office of Management and Budget, in consultation with the Chairman of the Council on Environmental Quality, shall resolve the dispute.

(iii) FINAL RESOLUTION.—Any action taken by the Director of the Office of Management Budget in the resolution of a dispute under clause (ii) shall: (I) be final and conclusive; and (II) not be subject to judicial review.

5. Coordination with State and Local Governments (§41003(c)(3))

(E) For interstate projects, in the event that the coordination specified in (B) does not achieve a final determination on review and permitting under any applicable state, local, or tribal law by the respective state, local, or tribal agency by the time of issuance of a final Federal permit, the lead agency CERPO, in consultation with the Chairman of the Council on Environmental Quality and the Director of the Office

of Management and Budget, shall be authorized to make a determination regarding any outstanding environmental review, authorizations, and permits.

6. Judicial Review (§41007)

(1) IN GENERAL.—Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of any authorization issued by a Federal agency for a covered project shall be barred unless—

(A) the action is filed not later than 60 days after the date of publication in the Federal Register of the final record of decision or approval or denial of a permit, unless a shorter time is specified in the Federal law under which judicial review is allowed; and

(B) in the case of an action pertaining to an environmental review conducted under NEPA—

- **(i)** the action is filed by a party that submitted a comment during the environmental review; ~~and~~
- **(ii)** any commenter filed a sufficiently detailed comment so as to put the lead agency on notice of the issue on which the party seeks judicial review, or the lead agency did not provide a reasonable opportunity for such a comment on that issue; **and**
- **(iii)** **the action is limited to claims that the lead agency failed to consider or disclose material impacts of the proposed project or practical alternatives to the project.**

This proposed bill was developed with the assistance of Covington & Burling LLP, pro bono counsel to Common Good's infrastructure red tape project.

Mr. GIANFORTE. Thank you.
Ms. Goldfuss.

STATEMENT OF CHRISTY GOLDFUSS

Ms. GOLDFUSS. Good morning, everyone.

Thank you, Chairman Palmer and Gianforte, and Ranking Members Raskin and Plaskett, for inviting me to participate in this important discussion about Federal permitting process and finding a path forward.

Both Republicans and Democrats have sought to improve the process by which we permit major infrastructure projects while also ensuring community input and clean air, clean water, and wildlife are protected. The U.S. Congress has acted to address this issue three times in the past 6 years. Passing MAP–21 in 2012, WRRDA in 2014, and most importantly, the FAST Act in 2015.

The three laws included bipartisan provisions to clarify several permitting requirements and provide the Federal Government with many new tools to expedite the review process without sacrificing environmental considerations and community input. The Trump administration has not used these tools to maximize permitting efficiencies. Instead of recognizing its own failures and addressing them, the administration has asked Congress to cut corners and gut cornerstone environmental laws.

My experience in the U.S. Federal Government both as deputy director of the National Park Service and leading the Council on Environmental Quality gave me a front row seat to the inner agency difficulties that can slow this permitting process. This confirmed for me that the permitting reforms are necessary. But those calling for gutting the environmental laws were using the reform process as a trojan horse.

Give my experience, I recommend five steps for consideration by the committee when reviewing the path forward. First, hold the administration to account for implementing the recent permitting reforms and authorities that Congress enacted. For example, recognizing the need for further study of the cause of project delays, the Congress directed DOT To establish a public facing online tracking system for projects. This is called the Federal Infrastructure Permitting Dashboard, and it can help to expedite projects and understand the true cause of the delays. The permitting dashboard is still very much a work in progress with incomplete data and limited mapping capabilities. But it really does have significant untapped potential.

Next, appoint people with collaborative project implementation and permitting expertise. The Federal Highway Administration, which processes approximately 10 percent of the Federal Government's environmental impact statements in any given year, still does not have an administrator. Also, key positions in the EOP are left vacant. In 2015, the Federal permitting improvement steering council whose core function is to coordinate these agencies was established with an executive director appointed by the President. The connection to the EOP is integral to the success of the executive director who needs to build relationships with deputy secretaries and staff across these agencies. Incredibly important posi-

tion. President Trump still has not appointed anyone to this position.

Third, both Congress and the administration should fund environmental review through implementing existing fee authority for cost recovery and the regular appropriations process. The FAST Act gave TIFIA fee authority, and the notice to implement that fee authority was put out this week. That's great news but still way too slow for an administration that places priority on permitting.

Fourth, a lot can be learned from studying and collecting data on environmental review about contracting practices. Congress could work with GAO to make sure that incentives for Federal contractors are appropriately structured to achieve efficient and quality environmental analysis and not extraordinarily long documents.

Lastly, the permitting review process must be objective and free from political interest and conflicts. The administration's handling of the Hudson Tunnel project, an infrastructure proposal to modernize bridges and tunnels that ferry commuters from New Jersey to Manhattan, lays bear the current level of political meddling.

Since a bipartisan meeting in September, the President has refused to fund the project unless the Senate agrees to fund the southern border wall. The Trump administration points to burdensome environmental reviews as the culprit, yet recently, a senior administration official was quoted as saying they are slow walking the review and the release of that document.

In conclusion, there is already evidence that the new administrative tools, when used, can ensure that environmental review of major infrastructure projects is efficient. Instead of rushing into future gutting of statutes that provide for public input on infrastructure and clean air and clean water, we need to make sure that we implement the existing tool kit that the administration already has.

Thank you for allowing me to testify, and I look forward to your questions.

[Prepared statement of Ms. Goldfuss follows:]

Testimony of Christy Goldfuss
Senior Vice President for Energy and Environment Policy,
Center for American Progress
Committee on Oversight and Government Reform
Joint Interior Environment and Energy and Intergovernmental Affairs Subcommittees
Hearing on Permitting: Finding a Path Forward
September 6, 2018

Introduction

Thank you, Chairmen Palmer and Gianforte and Ranking Members Raskin and Plaskett for inviting me to participate in this important discussion about the federal permitting process and finding a path forward. What we are talking about today should not be political or divisive. Both Republicans and Democrats have sought to improve the process by which the Federal Government works to permit major infrastructure projects while ensuring that community input is included, and clean air, clean water, and wildlife are protected.

The U.S. Congress acted to address permitting challenges three times over the past six years—passing the Fixing America's Surface Transportation (FAST) Act in 2015, the Water Resources Reform and Development Act (WRRDA) in 2014, and the Moving Ahead for Progress in the 21st Century Act (MAP-21) in 2012. The three laws included bipartisan provisions to clarify several permitting requirements and provide the federal government with many new tools to expedite review processes without sacrificing environmental considerations and community input.

In those recent pieces of legislation, Congress recognized the need for more transparency, funding, and agency coordination in the permitting process and gave the Federal Government the tools to modernize the way it does business. In corporations, it has been well documented that highlighting best practices, measuring progress, and tracking metrics leads to better outcomes. However, those tested measures only work if the government uses them and builds trust with industry to demonstrate that this model will work in the complex government structure. The Trump administration has not used the tools that it has to maximize permitting efficiencies. Instead of recognizing its own failures and addressing them, the administration has asked Congress to cut corners and gut cornerstone environmental laws.

My experience in the U.S. federal government, both as Deputy Director of the National Park Service (NPS) and as Managing Director of the Council on Environment Quality (CEQ), gave me a front row seat to the interagency difficulties that can slow permitting progress. This confirmed for me that permitting reforms were necessary, but that those calling for gutting environmental laws were using the reform process as a trojan horse.

While running CEQ under President Obama, I worked closely with my colleagues at the Office of Management and Budget (OMB) and the National Economic Council (NEC) to implement the Fixing America's Surface Transportation (FAST) Act by standing up the Federal Permitting Improvement Steering Council (FPISC), writing its inaugural guidance, and staffing it with talented people that knew

how to move the levers of government to overcome barriers and achieve greater efficiency in the environmental review process.

As you know, CEQ is responsible for administering the National Environmental Policy Act (NEPA), which allows federal decision-makers to understand the impacts of their actions ahead of time. The clear majority, upwards of 95 percent, of federal decisions are exempted from detailed analysis through categorical exclusions. Less than one percent of federal decisions, which are frequently related to large, multi-jurisdictional, and complex projects, are subject to detailed environmental impact statements (EIS) that provide information to federal decision makers about the potential impacts of a project and options for alternatives. This small percentage of reviews garners the greatest attention. The unique nature of each of these projects makes it impossible to apply a one size-fits all approach, but thanks to Congress, there are new tools and authorities that show promising signs of facilitating permitting for the most complex projects.

Given my experience, I recommend a few options for consideration when reviewing the path forward.

1. Hold the administration to account for implementing recent permitting reforms and authorities that were enacted in the FAST Act, WRRDA, and MAP-21
2. Appoint people with collaborative project implementation and permitting expertise across the government
3. Fund environmental review through implementing existing fee authority for cost recovery and regular appropriations
4. Study and collect data on environmental review contracting practices
5. Remove political influence from the environmental review process as is done with independent agency actions

Fully Implement Recent Permitting Reforms

Federal agencies often coordinate their review processes so that experts on a range of environmental impacts or infrastructure types can weigh in on projects' potential outcomes. The FAST Act provided project sponsors with a path to help them identify potential environmental impacts as well as agencies with jurisdiction over affected natural, cultural, and historic resources. Thanks to MAP-21 and the FAST Act together, agencies with jurisdiction now have improved early coordination procedures; clarified roles and responsibilities; and dispute resolution practices. Projects must follow a single government-wide project schedule and can carry planning-level decisions forward into the NEPA process. Progress has been made, but there is a lot more work to be done for these reforms to reach the scale and impact desired by Congress.

Instead, the Trump administration and others point to the permitting process as the main cause for project delays. The limited existing data show that delays are more often the result of a lack of funding, failure to govern, and even politics. Recognizing the need to further study the causes of project delays, the U.S. Congress directed DOT to establish a public-facing online tracking system of projects in the permitting process. Project sponsors and the public should be able to use the tracking system—known as the Federal Infrastructure Permitting Dashboard to expedite projects and understand the true causes of any delays. The Permitting Dashboard is still very much a work in progress, with incomplete data and limited mapping capabilities, but it has significant, untapped potential. Ideally, this tool would

be continually supported through investment to ensure that it is upgraded on a regular basis to meet the needs of project sponsors and federal agencies.

In 2015, the Infrastructure Permitting Improvement Center (IPIC) at the Department of Transportation (DOT) was established to help the agency that has many of the most complicated projects develop transparency for project sponsors. The IPIC, too, is only just getting started. In its Annual Report to Congress, the IPIC notes that its "accomplishments this past year have laid the foundation for the time and resource efficiencies that DOT expects will soon be realized in the environmental review and permitting of infrastructure projects." Like many of the other provisions Congress provided, the Permitting Dashboard and the IPIC have not had sufficient time to demonstrate success in expediting project delivery.

Lastly, as with all new authorities and tools, there needs to be extensive and rigorous training components for subject matter experts across the government on how the new authorities impact their work. The Annual Report to Congress for FY2017 from the FPISC shows that each agency has at least one updated online training tool, and while that is a start, it will hardly be enough to change behavior across the government. The leaders of permitting in the Executive Office of the President (EOP) should prioritize developing a strong community of practice across the government so that case studies, training tools, and data needs can be shared regularly by practitioners. By failing to utilize these existing tools, the Trump administration is not advancing the established goals within the agreed-upon frameworks of MAP-21, the FAST Act, and WRRDA.

The recent progress of the Mid-Barataria Sediment Diversion project along the Mississippi River shows that when all interested parties use these tools effectively, environmental review for large, complicated projects can move more efficiently. The project, which is being financed in part by settlement money from the BP Deepwater Horizon oil spill, will divert sediment, along with water and nutrients, into Barataria Bay to support existing wetlands and ensure the creation of new wetlands. This helps Louisiana to meet its goals in its 50-year coastal Master Plan.

In early 2018, Louisiana's Coastal Protection and Restoration Authority (CPRA) announced a Memorandum of Understanding between state and federal agencies committing to finish the complex permitting process' in two years. This timeline was confirmed by the Army Corps of Engineers in April 2018, and the change in the permitting timeline was then added to the permitting "dashboard" established by FAST-41. The expedited timeline was achieved in part thanks to CPRA agreeing to advance a portion of the permitting costs upfront, an action that was followed by the state's governor elevating the project to Executive Office attention. This complex project is a model for how stakeholders can successfully employ existing tools that encourage cooperation across state and federal agency actors.

Appoint Project Delivery and Permitting Expertise to Key Positions

President Trump has also failed to appoint people to key positions that could help accelerate project delivery. The Federal Highway Administration (FHWA), which processes approximately 10 percent of the federal government's environmental impact statements in any given year, is still without an administrator.

Similarly, key positions within the Executive Office of the President (EOP) have been left vacant. In 2015, the Infrastructure Permitting Federal Permitting Improvement Steering Council (FPISC) was established with an executive director appointed by the President. The FPISC was viewed as essential

to bringing agencies together to surface interagency disputes and share best practices. At the time it was established, the connection to the POTUS and the Executive Office of the President (EOP) was viewed as integral to the success of the executive director who would need to build relationships with deputy secretaries and staff across at least 13 departments and agencies, while also having credibility with project sponsors. The Trump administration has not appointed anyone to this important position. In coordination with CEQ, NEC, and OMB, this body has the most authority to move projects faster. It stands to reason that filling this position should be a priority for any administration committed to effective permitting reviews.

Fund Environmental Review

Through recent enacted reforms, Congress recognized the need to provide more funding to entities across the federal government responsible for conducting environmental review. The FAST Act allowed FPISC to establish a "fee structure for project proponents to reimburse the United States for reasonable costs incurred in conducting environmental reviews and authorizations" for certain projects. The Notice of Proposed Rulemaking (NOPR) was announced coincidentally this week, 20 months into the Trump administration. The FPISC has taken far too long to implement this provision given the relative priority the Trump administration claims to place on expedited permitting. This new source of funding could help substantially as it will be applied to the most complex projects.

Next, the Trump administration's own budget has repeatedly requested cuts or low appropriated levels for the very agencies and offices with the talent and tools necessary to reduce permitting times. For example, President Trump's FY18 and FY19 budget proposals requested a 30 percent and 25 percent cut respectively for EPA. EPA is the agency with the most tools and talent available to assist other agencies in conducting environmental reviews. In addition, President Trump's own initial budget did not request dedicated funding for the FPISC and just under $3 million for CEQ.

Study Environmental Review Contracting Practices

Federal contracting is big business in Washington DC, and it is well known that federal agencies turn to outside firms to conduct environmental reviews, especially for some of the most complex analysis. The Bureau of Land Management (BLM) has contracted with Environmental Management and Planning, Inc. to write the EIS for oil and gas development in the Arctic National Wildlife Refuge in Alaska. The contract award is for $1,667,550.44, and information from GSA shows that the federal contractor bills $214 per hour for a senior scientist's time. While this may be a bargain for taxpayers, it is difficult to say for certain given the lack of data and other information on the frequency, cost, or efficacy of outsourcing essential environmental analysis.

Congress should work with the U.S. Government Accountability Office (GAO) to study and gather information about federal contracting practices for environmental review across the federal government. Through the Federal Permitting dashboard, Congress will have more transparency into the federal agency review process. The next area of inquiry should be to ensure that incentives for federal contractors are appropriately structured to achieve efficient and quality environmental analysis. What are the best federal contracting practices for environmental review, and how do agencies ensure that their contracts are not inadvertently incentivizing longer review times or documents? The goal of this study would be to ensure quality environmental analysis at the lowest cost to the taxpayer.

Remove Political Influence from Environmental Review

Lastly, the most clear and simple recommendation is to ensure that the permitting review process is objective and free from the political interests and conflicts that can so easily stall, delay, or even derail infrastructure projects. Two recent examples demonstrate that the Trump Administration has chosen the opposite approach by more closely aligning politics with permitting decisions.

With the President's issuance of Executive Order 13807 in August 2017, agencies responded with attempts to modernize the NEPA process. The Environmental Protection Agency (EPA) moved the Office of Federal Activities, charged with reviewing environmental impact statements under NEPA, away from the Office of Enforcement and Compliance Assurance and into the Office of the Administrator. While done under the guise of prioritizing NEPA review, this move is clearly political in nature. It means that long-term career staff with institutional knowledge will be sidelined from this process, instead putting political appointees in charge of decision-making and review throughout the Agency's NEPA process. Political leadership can and should be responsible for driving review times and coordination, but they should not be engaged in the substance of the reviews. This threatens the quality of the environmental analysis and could make the reviews more vulnerable to litigation.

Another example of politics influencing the environmental review process and timeline is the current gridlock around the Hudson Gateway Tunnel, a project whose planning process started over a decade ago. The tunnel is intended to connect New Jersey and Manhattan to replace the crumbling tunnels that currently ferry more than 200,000 commuters daily and are in desperate need of repair. President Trump convened an initial bipartisan meeting in September 2017 to specifically address this project with lawmakers from both New York and New Jersey, including former Governor Christie and Senate Minority Leader Schumer, in which there was general agreement around the need for this massive infrastructure modernization project.

After the meeting, however, the President reportedly said he would only support funding the tunnel project if the Senate authorized funds for a border wall. Records indicate that the environmental review for this project was actually fast-tracked and sent to the Department of Transportation (DOT) for approval within two years. The Final EIS was due on March 30, 2018 and yet it is September 6, 2018 and it has still yet to be made public. An administration source is quoted as saying that they are slow-walking the review's release as they wait for the political battle to play itself out, as the environmental review makes an easy scapegoat for delay.

Conclusion

In conclusion, the U.S. Congress has acted repeatedly in the last six years to improve permitting efficiency. It is now up to the Trump administration to govern effectively so that project proponents and the American public can reap the benefits of well-constructed and planned infrastructure projects that include community input and protect clean water, clean air, and wildlife. Congress can help achieve this outcome by holding the administration to account for implementing recent reforms, including pressuring the administration to appoint people with the necessary expertise. Then, both Congress and the administration need to fund environmental review through appropriations and existing fee authority. Congress should study environmental review contracting practices and help to remove political influence from the environmental review process. Any assessment that assumes a one-size fits all approach to deadlines will cut costs and review times misunderstands the complexity of government incentives and the nexus of local, state, and federal decision-making. This is important work that should focus on giving agencies and their experts the tools necessary to be successful.

Mr. GIANFORTE. Thank you.

Mr. Bakst, you are recognized for 5 minutes.

STATEMENT OF DAREN BAKST

Mr. BAKST. Thank you.

Chairman Gianforte and Palmer, Ranking Members Plaskett and Raskin, and distinguished members of the subcommittees, thank you for this opportunity to discuss the Federal regulatory obstacles facing infrastructure development.

My name is Daren Bakst. I am a senior research fellow at the Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation.

Protecting the environment and building critical infrastructure are not mutually exclusive goals, yet Federal environmental regulations are creating unnecessary obstacles to effectively and efficiently build critical infrastructure projects.

There are three Federal regulatory obstacles that I'd like to discuss today. First, let's took at the National Environmental Policy Act, or NEPA. There's a bipartisan recognition that there are problems with the NEPA process. For example, to facilitate projects that were funded by the American Recovery and Reinvestment Act, better known as the stimulus package, the Obama administration recognized that NEPA reviews can be expedited to speed up project investment without sacrificing the environment by effectively relinquishing NEPA requirements for projects. Trying to expedite the development of projects by cutting the red tape should not be the exception but the rule.

In the NEPA conference report nearly 50 years ago, legislators made it clear that they did not want undue delay in the processing of Federal proposals. Yet a recent National Association of Environmental Professionals report found that the average preparation time of 177 final EIS' was 5.1 years in 2016.

Second, let's look the Endangered Species Act. The ESA was created and enacted into law in 1973 to promote the conservation of species. Unfortunately, the laws failed to achieve its mission. For example, only about 3 percent of species listed have been recovered and delisted as a result. But making matters worse, the law has created obstacles for major infrastructure projects. For example, according to a 2014 New York Times article, quote, already Federal officials had delayed, altered, or denied permits for more than two dozen energy projects in the west because of the bird. And the bird they're referring to is a sage-grouse.

There are very important reasons to protect endangered species, but that's not the same thing as protecting the Endangered Species Act. After 45 years, valuable lessons have been learned regarding the law and specifically whether or not it achieves its purpose. Those lessons need to be applied and not ignored.

And then, third, let's look at the Clean Water Act. I'd like to highlight two issues with the Clean Water Act—with the implementation of the Clean Water Act, not the statute itself but the implementation. And these two issues will also demonstrate some issues common across many environmental statutes.

One, there's an agency disrespect for States. The Clean Water Act expressly indicates right at the outset of the statute that the primary role of States in addressing water pollution, yet the EPA and Corps, even before the 2015 Clean Water Rule, had been trying to have—there has been Federal overreach, and they try to regulate in waters and intrude on traditional State and local powers.

The second issue is unclear and subjective Federal regulations. Objectivity and clarity of regulations is certainly important to regulated parties. For a law like the Clean Water Act that has civil and criminal penalties, it's really important.

Clear regulations, though, are also very beneficial to those officials enforcing the law. It allows agencies such as the EPA and the Corps to have consistency across districts or regions and to focus resources on the primary problems, not on waters that may not even be covered under the law. As it connects to permitting, these two issues lead to overbroad definitions of what waters are covered under the Clean Water Act.

The EPA and Corps are requiring more permits for more people and for more activities than is consistent with the text and intent of the underlying law.

In conclusion, protecting the environment does not have to mean blocking infrastructure projects, trampling on property rights, or ignoring principles of Federalism.

Thank you. I look forward to your questions.

[Prepared statement of Mr. Bakst follows:]

CONGRESSIONAL TESTIMONY

Permitting: Finding a Path Forward

Testimony before
Subcommittee on Intergovernmental Affairs and the Subcommittee on the Interior, Energy, and Environment

House Committee on Oversight and Government Reform

United States House of Representatives

September 6, 2018

Daren Bakst
Senior Research Fellow in Agricultural Policy
The Heritage Foundation

My name is Daren Bakst. I am the Senior Research Fellow in Agricultural Policy at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

I want to thank the Members of the House of Representatives Committee on Oversight and Government Reform, Subcommittee on Intergovernmental Affairs and Subcommittee on the Interior, Energy and Environment for this opportunity to examine the federal regulatory barriers to infrastructure development. My testimony will discuss some general principles and then go through several major federal regulatory obstacles, their impact, and recommendations on how to address them.

A Brief Overview

Infrastructure development and environmental protection are not mutually exclusive. Yet, federal regulations, particularly environmental regulations, seemingly exist to ensure that critical infrastructure projects never see the light of day. Of course, many critical infrastructure projects do come to fruition, but often not without significant cost and delay.

Environmental reviews and the federal permitting process for infrastructure projects are a major part of the reason many infrastructure projects are delayed or never come to fruition. Fortunately, there is a bipartisan recognition that improvements need to be made to help expedite the development of infrastructure projects.

For example, on August 15, 2017, President Donald Trump issued Executive Order 13807 that addresses National Environmental Policy Act (NEPA) reforms.[1] In 2015, President Barack Obama signed the *Fixing America's Surface Transportation Act* (FAST Act) into law. This legislation provided some changes to the NEPA permitting process.[2]

Even more instructive is what happened to facilitate projects that were funded by the American Recovery and Reinvestment Act, better known as the stimulus package. The Obama Administration recognized that NEPA reviews can be expedited to speed up project investment without sacrificing the environment by effectively relinquishing NEPA requirements for projects. The Administration granted more than 179,000 categorical exclusions for stimulus projects because, as then–Energy Secretary Steven Chu said, it was necessary to "get the money out and spent as quickly as possible" and "[i]t's about putting our citizens back to work."[3] Some of these projects included an electric grid update project in Kansas and a wind farm project in Texas.[4]

Trying to expedite the development of projects by cutting the red tape should not be the exception, but the rule. Providing clean drinking water or reliable electricity to citizens, for example, is important all the time, not just when the government seeks to spend taxpayer dollars to stimulate the economy.

Improving the environmental review and permitting process though is an after-the-fact solution in the sense that the underlying problem is the sheer number of permitting requirements in the first place.

As a result, there also needs to be a major focus on ensuring that when there are regulatory obstacles such as the need to secure permits, these obstacles are in fact justified. After all, even an efficient permitting process will eventually crumble under the weight of a high volume of permits and an overly complex web of permitting requirements.

This major focus would include examining federal environmental statutes in an in-depth manner, which is beyond the scope of this testimony. However, in general, simply improving upon agency implementation of these statutes will make a major difference, including addressing common problems that exist across the implementation of these statutes.

Principles to Address Regulatory Obstacles in Infrastructure Development

There are important principles, which if applied, could help to address the common problems in the implementation of federal environmental statutes. These principles would help to reduce regulatory

[1] Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, August 15, 2017 https://www.energy.gov/sites/prod/files/2017/09/f36/EO-13807.pdf (accessed September 3, 2018).
[2] "The FAST Lane: How the FAST Act Provisions Could Expedite Your Federal Permitting," Hunton & Williams, January 2016, https://www.hunton.com/images/content/2/0/v2/2021/fast-act-could-expedite-federal-permitting-jan2016.pdf (accessed September 3, 2018).
[3] Kristen Lombardi and John Solomon, "Obama administration gives billions in stimulus money without environmental safeguards," The Washington Post, November 28, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/28/AR2010112804379.html?sid=ST2010112903774 (accessed September 3, 2018).
[4] Ibid.

obstacles while simultaneously helping to achieve environment objectives, such as conserving species.

In general, these principles would not require changes to underlying federal statutes. They are merely ways for agencies to implement the statutes in a manner that will better achieve statutory objectives and reflect the will of Congress. The federal government should:

Improve its management of the permitting process. Without amending substantive environmental requirements, Congress and the Administration should be looking at ways to streamline permitting processes and reduce inefficiencies and miscommunication. The environment will not improve because permit applicants have duplicative requirements or receive conflicting information from multiple agencies.

Create clear and objective regulations. While objectivity and clarity are certainly important to permit applicants, it is also extremely beneficial to federal agencies. Too often, agencies such as the EPA will develop ambiguous regulatory requirements. This creates inconsistent and unpredictable enforcement across regional offices. However, it allows agency officials wide latitude to enforce the law in their preferred manner. Objective and clear definitions though help those enforcing the law and allow them to spend less time guessing and more time on focusing their attention and agency resources on the most important issues.

Respect the role of states in the environmental process. Congress has recognized the important role that states play in addressing environmental quality issues. States often have the most expertise to address environmental problems because they are more familiar than federal bureaucrats with the unique nature of state environmental challenges. They also have the most interest as well, because they live in the communities that are directly impacted by any environmental problems.

Respect property rights. There are many interests and concerns with infrastructure development, but fundamental rights, such as property rights, should always be respected and take precedent. In the environmental context, property rights are often trampled on in the name of protecting the environment. This disrespect for property owners ignores a critical point in environmental protection: private property owners can often be a powerful ally in achieving federal environmental objectives.

Recognize that environmental protection should just be one objective when evaluating projects. When evaluating infrastructure projects, the federal government should not place environment objectives ahead of many other important objectives. It certainly appears that this is what is happening. As explained by the U.S. Chamber of Commerce regarding the original Council on Environmental Quality (CEQ) National Environmental Policy Act (NEPA) regulations:

> In the wake of the prescriptive NEPA rule, federal agencies erred on the side of over-inclusive environmental reviews, and began the trend of giving environmental objectives **greater** weight than any other agency policy or mission.[5]

[5] Testimony of William L. Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs U.S. Chamber of Commerce before the House Committee on the Judiciary Subcommittee on Courts, Commercial & Administrative Law, "H.R. 4377, The 'Responsibly and Professionally Invigorating Development (RAPID) Act," April

Environmental concerns should be just one of many interests. What about the benefits that a proposed project will provide? What about human well-being, including human health and safety? What is the harm on human health if a project is delayed or eventually cancelled? Not to mention, what are the economic impacts, such as on jobs and economic growth?

Respect the plain language of statutes and legislative intent. Agencies too often take very expansive interpretations of statutory language, imposing regulation not authorized by the plain language of the statutory text and inconsistent with Congressional intent. This problem is exacerbated by the excessive judicial deference that courts afford agency interpretation of statutes. When agencies do impose permitting requirements, these requirements should clearly be within their statutory authority; in other words, Congress, not unelected and unaccountable government officials, should create any permitting requirements.

These principles can inform how to consider the numerous federal laws that impact infrastructure projects, including NEPA.

National Environmental Policy Act

On January 1, 1970, President Richard Nixon signed the National Environmental Policy Act (NEPA) into law.[6] As explained by CEQ, "NEPA was the first major environmental law in the United States and is often called the 'Magna Carta' of Federal environmental laws."[7] This law that was intended to merely create a process in which federal agencies consider the environmental impacts of their actions has morphed into a massive roadblock for federal projects.

Under NEPA, federal agencies are required to evaluate the impacts on the human environment of proposed federal actions, including infrastructure projects. There are two types of analyses that agencies could be required to perform. An environmental impact statement (EIS) is a detailed analysis that must be performed if the project is deemed to significantly affect the human environment. For an EIS, the agency "shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."[8] The other type of analyses is an environmental assessment (EA), which is less rigorous than an EIS.

An agency does not have to produce either of these analyses if a categorical exclusion (CE) applies; a CE is "a category of actions which do not individually or cumulatively have a significant effect on the human environment."[9]

25, 2012, https://www.uschamber.com/sites/default/files/documents/files/120425-re-TESTIMONY-HouseJudiciaryCommitteepermitstreamliningtestimony.pdf (accessed September 3, 2018).

[6] Council on Environmental Quality webpage on The National Environmental Policy Act, https://ceq.doe.gov/ (accessed September 3, 2018).

[7] Ibid.

[8] "The National Environmental Policy Act of 1969, as amended," https://www.whitehouse.gov/sites/whitehouse.gov/files/ceq/NEPA_full_text.pdf (accessed September 3, 2018).

[9] U.S. Environmental Protection Agency web page on the National Environmental Policy Act Review Process, https://www.epa.gov/nepa/national-environmental-policy-act-review-process (accessed September 3, 2018).

Congress did not envision that NEPA was going to create undue delays as it does today. The NEPA conference report explained:

> The conferees do not intend that the requirements for comment by other agencies should unreasonably delay the processing of Federal proposals and anticipate that the President will promptly prepare and establish by Executive order a list of those agencies which have "jurisdiction by law" or "special expertise" in various environmental matters…
>
> To prevent undue delay in the processing of Federal proposals, the conferees recommend that the President establish a time limitation for the receipt of comments from Federal, State, and local agencies similar to the 90-day review period presently established for comment upon certain Federal proposals.[10]

Congress also could not have expected that it would lead to so much litigation. There was no express private right of action in the statute and at the time of passage, environmental groups had difficulty getting standing in court to challenge such projects.[11]

Costs and Delays

A Government Accountability Office (GAO) report indicated that federal agencies had little cost information regarding the completion of NEPA analyses. However, researchers did include some data from the U.S. Department of Energy in the report including "According to DOE data, the average payment to a contractor to prepare an EIS from calendar year 2003 through calendar year 2012 was $6.6 million, with the range being a low of $60,000 and a high of $85 million."[12] For 2013, four EISs in which the DOE had data showed a median preparation cost of $1.7 million and an average cost of $2.9 million. To provide a government-wide perspective, the GAO explained, "a 2003 task force report to CEQ—the only available source of governmentwide cost estimates—estimated that an EIS typically cost from $250,000 to $2 million."[13]

Preparers of EISs may seek to complete analyses that are "litigation-proof." This, as is typical with NEPA, likely means increased costs without any benefits. As explained by GAO, "CEQ has observed that such an effort [creating "litigation-proof" documents] may lead to an increase in the cost and time needed to complete NEPA analyses but not necessarily to an improvement in the quality of the documents ultimately produced."[14]

Regarding the long review process, GAO cited data from the National Association of Environmental

[10] National Environmental Policy Act of 1969, Conference Report, No 91-765, December 17, 1969, https://ceq.doe.gov/laws-regulations/nepa_legislative_history.html (accessed September 3, 2018).
[11] For a good discussion regarding the private right of action and standing issues, please see Testimony of William L. Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs U.S. Chamber of Commerce before the House Committee on the Judiciary Subcommittee on Courts, Commercial & Administrative Law, "H.R. 4377, The 'Responsibly and Professionally Invigorating Development (RAPID) Act," April 25, 2012, https://www.uschamber.com/sites/default/files/documents/files/120425-re-TESTIMONY-HouseJudiciaryCommitteepermitstreamliningtestimony.pdf (accessed September 3, 2018).
[12] "National Environmental Policy Act: Little Information Exists on NEPA Analyses," Government Accountability Office, April 2014, https://www.gao.gov/assets/670/662543.pdf (accessed September 3, 2018).
[13] Ibid.
[14] Ibid.

Professionals that found 197 final EISs in 2012 had an average preparation time of 4.6 years.[15] A newer NAEP report found that the average preparation time of 177 final EISs was 5.1 years in 2016.[16]

The following are just two examples of the impact of NEPA on critical infrastructure projects:

- **Northwest Area Supply Project.** North Dakota and the Bureau of Reclamation have been trying to develop a water project to provide much-needed drinking water to the state's residents. The province of Manitoba, Canada and subsequently the state of Missouri filed lawsuits against the project (the Northwest Area Supply Project).[17] The project has been held up in the courts for about 15 years over the Bureau of Reclamation's compliance with NEPA. In August, 2017, a federal judge finally cleared the way for the project.[18]

- **Halligan Reservoir.** The city of Fort Collins, Colorado sought to expand the Halligan Reservoir to help with its water supply and protect against drought. The notice of intent to prepare an EIS was published in the Federal Register in 2006.[19] This project, being overseen by the U.S. Army Corps of Engineers, has already taken more than 10 years and has still not been finalized.[20]

Endangered Species Act

In 1973, the Endangered Species Act (ESA)[21] was enacted into law to promote the conservation of species. Unfortunately, the law has failed and, in so doing, has created numerous problems, including imposing major obstacles for infrastructure projects.

As of August 31, 2018, based on the U.S. Fish and Wildlife Service's Environmental Conservation Online System, there are 1,661 domestic species and 683 foreign species on the endangered species list (including both threatened and endangered species).[22] Only 54 species have been "recovered"

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[15] Ibid.
[16] "NAEP Annual National Environmental Policy Act (NEPA) Report for 2016," The National Association of Environmental Professionals, http://www.naep.org/nepa-2016-annual-report (accessed September 3, 2018).
[17] The Associated Press, "Federal judge clears way for completion of water project," U.S. News & World Report, August 11, 2017, https://www.usnews.com/news/best-states/north-dakota/articles/2017-08-11/federal-judge-clears-way-for-completion-of-water-project/ (accessed September 3, 2018) and *Government of The Province of Manitoba et al. v. Zinke*, No. 16-5203 (D.C. Cir. 2017) https://envirostructure.lexblogplatformthree.com/wp-content/uploads/sites/386/2017/03/1511109R2-v1-DC-Circuit-NAWS-Opinion.pdf (accessed September 3, 2018).
[18] Ibid.
[19] "Intent to Prepare an Environmental Impact Statement for the Proposed Halligan-Seaman Water Management Project in Northeastern Colorado," 71 Fed. Reg. 5250 (February 1, 2006), https://www.federalregister.gov/documents/2006/02/01/06-933/intent-to-prepare-an-environmental-impact-statement-for-the-proposed-halligan-seaman-water (accessed September 3, 2018).
[20] US Army Corps of Engineers web page "Environmental Impact Statement—Halligan Water Supply Project," http://www.nwo.usace.army.mil/Missions/Regulatory-Program/Colorado/EIS-Halligan/ (accessed September 3, 2018) and City of Fort Collins webpage on the Halligan Water Supply Project, https://www.fcgov.com/utilities/what-we-do/water/halligan-water-supply-project/fa (accessed September 3, 2018).
[21] Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq., https://www.law.cornell.edu/uscode/text/16/chapter-35 (accessed September 3, 2018).
[22] U.S. Department of the Interior, Fish and Wildlife Service, "Environmental Conservation Online System: Listed Species Summary (Boxscore)," August 31, 2018, https://ecos.fws.gov/ecp0/reports/box-score-report (accessed August 31, 2018)

and delisted from the endangered species list in the 45 years of the ESA.[23] That is only about one per year. To provide some context, the number of species that became extinct or never should have been on the list in the first place due to technical errors is not that much lower (31 species).[24]

In February, 2017 Senator John Barrasso (R-WY) provided an excellent summary of the law's failure, "As a doctor, if I admit 100 patients to the hospital and only 3 recover enough under my treatment to be discharged, I would deserve to lose my medical license.[25]

The following are just a few examples of the ESA's harmful impact on infrastructure development:

- **California water cutbacks.** In Congressional testimony, the Family Farm Alliance explained:

  > In 2009 (and in 2014, 2015 and 2016), irrigation delivery restrictions – based in large part on ESA biological opinions for fishery species managed by either FWS or NMFS in the Delta – were a primary cause for the water cutbacks and rationing afflicting a multitude of communities throughout the state and the resulting economic devastation in the San Joaquin Valley. In California in 2016 alone, 21,000 jobs were lost, equating to a $2.7 billion hit to economic activity. Over 540,000 acres of farmland were fallowed, and $2 billion in direct farm losses were realized.[26]

- **Richland County, Montana water project.** In recent testimony before the Senate Committee on the Environment and Public Works, the National Association of Counties highlighted an almost decade-long ESA delay of a major water project:

  > In Richland County, Montana, with a population of 11,960, agriculture is the county's economic backbone, contributing $926.5 million to the economy in 2016. The county's irrigation district, which provides water to agricultural users in the county, partnered with the Corps and the Bureau of Reclamation (Reclamation) on the Lower Yellowstone Project, which was authorized in WRDA 2007 for ecosystem restoration. Due to concerns over the pallid sturgeon's habitat, a species of fish protected under the ESA, several environmental groups sued. Though it took almost ten years, this case was recently resolved and the project will move forward this spring.[27]

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[23] U.S. Department of the Interior, Fish and Wildlife Service, "Environmental Conservation Online System: Delisted Species," August 31, 2018, https://ecos.fws.gov/ecp0/reports/delisting-report (accessed August 31, 2018).
[24] Ibid.
[25] Press release, "Chairman Barrasso: The Endangered Species Act Needs to be Modernized," Senate Committee on Environment and Public Works, February 15, 2017, https://www.epw.senate.gov/public/index.cfm/2017/2/chairman-barrasso-the-endangered-species-act (accessed September 3, 2018).
[26] Testimony of Dan Keppen, Executive Director, The Family Farm Alliance before the House Committee on Natural Resources Subcommittee on Water, Power and Oceans, Hearing on H.R. 3916, "The Federally Integrated Species (FISH) Act," October 12, 2017, https://naturalresources.house.gov/uploadedfiles/testimony_keppen2.pdf (accessed September 3, 2018).
[27] Testimony of Julie A. Ufner, Associate Legislative Director, National Association of Counties before the Senate Committee on Environment and Public Works, "America's Water Infrastructure Needs and Challenges," January 10, 2018, https://www.epw.senate.gov/public/_cache/files/2/c/2ccaea3c-97b9-4dad-81f5-

- **China Mountain wind farm.** To help meet the energy needs of Idaho and Nevada, RES America, a multinational renewable energy company, sought to build a 175 turbine wind farm. In 2008, the Bureau of Land Management (BLM)—who handled the permitting process of the wind farm—submitted its notice of intent to prepare an EIS.[28] In 2011, the BLM released their draft EIS.[29] In 2012, they placed a two-year delay on the completion of the final EIS report because of the potential impact on the sage grouse.[30] In 2014, the BLM suspended the permitting process due to the U.S. Fish and Wildlife Service considering the listing of the sage grouse as endangered under the Endangered Species Act. As a result of the process being suspended, RES decided to no longer pursue the project.[31]

The sage grouse example is very illuminating. Through the ESA, there have been efforts to restrict the use of land for infrastructure projects. According to a 2014 New York Times article, "Already, federal officials have delayed, altered or denied permits for more than two dozen energy projects in the West because of the bird [sage grouse].[32]

There are important reasons to protect endangered species, but this should not be confused with feeling compelled to protect the Endangered Species Act. After 40 years, it should not be surprising that lessons have been learned regarding how to modernize and improve the statute. Those lessons should be applied, not rejected in order to save every word of a flawed statute.

One of the central lessons: the law imposes severe restrictions on those who wish to develop their property, including those who want to develop infrastructure projects. These restrictions are not merely an attack on property rights but can also make it difficult for important projects to get developed.

Unless stopping development for the sake of stopping development is the goal, which it might be for some, the ESA is failing at its fundamental purpose to protect endangered or threatened species, and making matters worse, this failure is exacerbated by blocking important projects and trampling on property rights.

2fd3de1841c3/E00EF20BC1503ED107B7533A83AAD4AC.ufner-naco-testimony-01.10.2018.pdf (accessed September 3, 2018).

[28] "Notice of Intent to Prepare an Environmental Impact Statement for the Proposed China Mountain Wind Project," 73 Fed. Reg. 21362 (April 21, 2008) https://www.federalregister.gov/documents/2008/04/21/E8-8511/notice-of-intent-to-prepare-an-environmental-impact-statement-for-the-proposed-china-mountain-wind (accessed September 3, 2018).

[29] "Draft Environmental Impact Statement for the Proposed China Mountain Wind Project and Resource Management Plan Amendment," Bureau of Land Management, March 2011, https://archive.org/details/draftenvironmenti02unit (accessed September 3, 2018).

[30] Adella Harding, "BLM defers China Mountain decision for two years," Elko Daily Free Press, March 8, 2012, http://elkodaily.com/news/local/blm-defers-china-mountain-decision-for-two-years/article_5753798a-693c-11e1-8ab3-001871e3ce6c.html#.Wn3E6Ojwa9J (accessed September 3, 2018).

[31] Adam Cotterell, "At Least One Idaho Wind Farm Has Been Scrapped Because Of Sage Grouse," Boise State Public Radio, July 24, 2014, http://boisestatepublicradio.org/post/least-one-idaho-wind-farm-has-been-scrapped-because-sage-grouse#stream/0 (accessed September 3, 2018).

[32] Diane Cardwell and Clifford Krauss, "Frack quietly, please: Sage grouse is nesting," The New York Times, July 19, 2014, https://www.nytimes.com/2014/07/20/business/energy-environment/disparate-interests-unite-to-protect-greater-sage-grouse.html (accessed September 3, 2018)

Clean Water Act

There are two specific issues that are of particular concern regarding the Clean Water Act (CWA):[33] the definition of "navigable waters" and EPA's retroactive vetoes of Section 404 permits.

Navigable Waters and "Waters of the United States"

Under the CWA, the federal government has jurisdiction over "navigable waters," which the CWA further defines as "the waters of the United States, including the territorial seas."[34] This definition is critical because it defines what waters are regulated and subject to permitting requirements under the CWA.

For decades, the EPA and Corps have sought to expand their power by developing a broad definition of "waters of the United States" (WOTUS) and ignoring the primary role states are supposed to play in addressing water pollution.[35] The Obama Administrations 2015 Clean Water Rule[36] took the overreach to a new level. Fortunately, both the EPA and Corps are in the process of withdrawing the rule and are expected to issue a new rule.[37]

However, this process will involve significant litigation and a new Administration could always seek to get rid of any new rule; this is why it is so imperative that Congress itself more clearly define "navigable waters" or at a minimum clarify that the EPA and Corps should withdraw the rule and develop a new rule.

On August 16, 2018, a federal district court in South Carolina issued a nationwide injunction that blocks a Trump Administration rule that would delay enforcement of the Clean Water Rule.[38] This injunction, due to other existing injunctions in place, applies in 26 states, meaning the rule now applies in those states but not in other states.[39]

Even before the Clean Water Rule, CWA permitting requirements have made it difficult for property owners to engage in even ordinary activities such as farming or building a home, much less major infrastructure projects.[40] Cities and counties have expressed concerns that even public safety ditches

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[33] Clean Water Act, 33 U.S.C. §1251 et seq, https://www.law.cornell.edu/uscode/text/33/chapter-26 (accessed September 3, 2018).
[34] 33 U.S. Code §1362, https://www.law.cornell.edu/uscode/text/33/1362 (accessed September 3, 2018).
[35] See e.g. 33 U.S. Code § 1251(b), https://www.law.cornell.edu/uscode/text/33/1251 (accessed September 3, 2018).
[36] U.S. Army Corps of Engineers, Department of the Army, Department of Defense; and U.S. Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37053 (June 29, 2015), https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states (accessed September 3, 2018).
[37] U.S. Environmental Protection Agency web page on the WOTUS rulemaking, https://www.epa.gov/wotus-rule (accessed September 3, 2018).
[38] See e.g. *South Carolina Coastal Conservation League v. Pruitt*, No. 2-18-cv-330-DCN, (D.S.C. August 16, 2018). https://www.eenews.net/assets/2018/08/16/document_gw_05.pdf (accessed September 3, 2018)
[39] U.S. Environmental Protection Agency web page entitled "About Waters of the United States," https://www.epa.gov/wotus-rule/about-waters-united-states (accessed September 3, 2018) and see also Amanda Reilly and Ariel Wittenberg, "Judge shifts legal brawl, revives WOTUS in 26 states," E & E News, August 16, 2018, https://www.eenews.net/stories/1060094329 (accessed September 3, 2018).
[40] Daren Bakst, Mark C. Rutzick, and Adam J. White, "Restoring Meaningful Limits to 'Waters of the United States,'" Regulatory Transparency Project: Energy & Environment Working Group, September 26, 2017,

to help protect prevent flooding may be subject to permitting requirements.[41]

Cost and Delay. Securing permits can be costly and time-consuming. In *Rapanos v. United States*,[42] Justice Antonin Scalia cited a study from 2002 (admittedly a bit old) highlighting the following costs and delays for Section 404 dredge and fill permits: "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes."[43]

The CWA regulations have also been extremely vague, which makes it difficult for property owners to comply with permitting requirements and could deter them from pursuing a project in the first place.

In 2004, the General Accounting Office (GAO)[44] highlighted the Corps' inconsistent enforcement across districts and even asserted that definitions were intentionally left vague.[45] The Clean Water Rule creates even more confusion and is filled with vague and subjective definitions, which gives agency officials even wider latitude in enforcing the law. If experts in districts would disagree over whether a water is covered by regulation, then it is clearly impossible for an average or even "expert" property owner to know how to comply with the law. This vagueness problem is particularly concerning since the CWA has both civil and *criminal* penalties.

While objectivity and clarity are certainly important to property owners, it is also extremely beneficial to the agencies. Objective and clear definitions help those enforcing the law and allow them to spend less time guessing and more time on focusing their attention and agency resources on those waters that do clearly fall within the regulatory definition of "waters of the United States." This approach is ultimately a win for the environment and for achieving the objectives of the CWA.

Respecting the State Role in Addressing Water Pollution. The CWA makes it clear at the outset of the statute that states are to play a primary role in addressing water pollution:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the

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https://regproject.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-WOTUS.pdf (accessed September 3, 2018)

[41] Comment to the EPA and Corps from the National Association of Counties, National Association of Regional Councils, National League of Cities, and The U.S. Conference of Mayors regarding "Definition of the 'Waters of the United States' - Recodification of Pre-Existing Rules rulemaking pursuant to the Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," September 27, 2017, http://www.naco.org/sites/default/files/documents/WOTUS%20Withdrawal%20Comments%2009%2027%2017.pdf (accessed September 3, 2018).

[42] *Rapanos v. U.S.*, 547 U.S. 715 (2006), https://www.law.cornell.edu/supct/html/04-1034.ZS.html (accessed September 3, 2018).

[43] *Rapanos* citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Res. J. 59, 74–76 (2002).

[44] The GAO is now known as the Government Accountability Office.

[45] *Rapanos* citing U. S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," GAO–04–297, pp. 20–22 (Feb. 2004), http://www.gao.gov/new.items/d04297.pdf (accessed September 3, 2018).

> development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.[46]

Too often, there is an assumption that to have clean water, the federal government must seek to regulate almost every water imaginable. Yet, Congress expressly disagreed with such a mindset. This respect for states is ignored when the federal government attempts to regulate almost any water, including those that have a tenuous connection at best to a water that legitimately should be covered under the "waters of the United States" definition.

Congress envisioned that federal power under the CWA has limits. One of the primary limits is a recognition that states have this primary role in protecting waters. The U.S. Supreme Court in cases such as *Solid Waste Agency of Northern Cook County.* v. *Army Corps of Engineers (SWANCC)*[47] and *Rapanos* expressed concern over CWA regulatory overreach that encroached on state and local power. In his plurality opinion in *Rapanos*,[48] Justice Antonin Scalia explained:

> The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. We ordinarily expect a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase "the waters of the United States" hardly qualifies.[49] [citations omitted]

The Clean Water Rule went even beyond the regulations that the Court was concerned about in *Rapanos*. The agencies are bound by express statutory language regarding the primary role of states within the CWA. In addition, even absent such language, it would be inappropriate and "unprecedented" for the agencies to intrude on traditional state and local powers without express Congressional approval to do so.

By ignoring this state role in addressing water pollution, the EPA and Corps have created federal permitting requirements for more individuals and for more activities than was envisioned. If the agencies would simply respect this state role, the number of CWA permitting requirements would decline and those remaining requirements would be focused on the concerns that Congress wanted to address when it passed the CWA.

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[46] 33 U.S. Code § 1251(b), https://www.law.cornell.edu/uscode/text/33/1251 (accessed September 3, 2018).

[47] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers et al.*, 531 U.S. 159 (2001). https://www.law.cornell.edu/supct/html/99-1178.ZO.html (accessed September 3, 2018).

[48] While there has been some disagreement as to whether Justice Kennedy's lone concurrence or Justice Scalia's plurality opinion should be the controlling opinion, the agencies should in fact look to the plurality. In addition to Justice Kennedy's concurrence providing a standard that is simply unworkable, it would certainly be difficult to argue that the agencies are acting unreasonably by looking to the views of four Justices of the Supreme Court from their plurality opinion. It is also the proper legal interpretation to look to the plurality instead of Justice Kennedy's concurrence based on Marks v. United States 430 U.S. 188 (1977) http://caselaw.findlaw.com/us-supreme-court/430/188.html (accessed September 3, 2018). See Hopper, M. Reed, "Running Down the Controlling Opinion in Rapanos v United States," (March 10, 2017). University of Denver Water Law Review, Forthcoming. Available at SSRN: https://ssrn.com/abstract=2983915 (accessed September 3, 2018). Further, it is not merely the plurality opinion but the CWA itself and other Supreme Court cases that should inform any new rule.

[49] *Rapanos v. U.S.*

Retroactive Vetoes of Section 404 Permits

Under the CWA, property owners sometimes have to secure dredge-and-fill permits under Section 404. The EPA has decided that it can retroactively revoke a Section 404 permit that the Corps has issued—regardless of whether the permit holder is in full compliance with permit conditions.

In a 2013 DC Circuit Court of Appeals case called *Mingo Logan Coal Co. v. EPA*,[50] the court held that the EPA could retroactively veto such permits; the EPA's veto was four years after the Corps issued the permit.

For anyone required to secure a permit, this retroactive power is chilling. If the EPA continues to retain such power, it will create uncertainly and undermine investment (including for infrastructure projects) and hamper property values. This unpredictability is both unfair to property owners and harmful to infrastructure development.

To its credit, on June 26, 2018, the EPA issued a memo directing its Office of Water to propose a rule that would get rid of these retroactive vetoes.[51]

National Ambient Air Quality Standards/Ozone Standard

Under the Clean Air Act, the EPA sets standards for six criteria pollutants: carbon monoxide, ground-level ozone (i.e. ozone), lead, nitrogen dioxide, particulate matter, and sulfur dioxide.[52] These standards are known as the National Ambient Air Quality Standards (NAAQS).

According to the EPA, the concentrations of these air pollutants has declined significantly since 1990 even as "the U.S. economy continued to grow, Americans drove more miles and population and energy use increased."[53]

Every five years though, the EPA is charged with reviewing and if appropriate revising the standards for criteria pollutants. The EPA is required to establish standards based on health considerations only, and not on costs.[54]

The latest ozone standard helps to shed light on why the National Ambient Air Quality Standards process has major implications for infrastructure development.

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[50] *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, (D.C. Cir. 2013), https://www.cadc.uscourts.gov/internet/opinions.nsf/DBEEA1719A916CDC85257B56005246C4/$file/12-5150-1432105.pdf (accessed September 3, 2018).

[51] U.S. Environmental Protection Agency web page entitled "Memo: Updating the EPA's Regulations Implementing Clean Water Act Section 404(c)," https://www.epa.gov/cwa-404/memo-updating-epas-regulations-implementing-clean-water-act-section-404c (accessed September 3, 2018).

[52] U.S. Environmental Protection Agency web page entitled "Criteria Web Pollutants," https://www.epa.gov/criteria-air-pollutants (accessed September 3, 2018).

[53] "Our Nation's Air," U.S. Environmental Protection Agency, https://gispub.epa.gov/air/trendsreport/2018/#home (accessed September 3, 2018).

[54] See e.g. "Implementing EPA's 2015 Ozone Air Quality Standards" James E. McCarthy and Kate C. Shouse, Congressional Research Service, August 16, 2018, https://fas.org/sgp/crs/misc/R43092.pdf (accessed September 3, 2018).

In 2008, the EPA issued an ozone standard of 75 parts per billion. Before the five years had even elapsed, the EPA was considering lowering the standards to as low as 60 parts per billion. In 2011, President Obama directed the agency to withdraw the proposed rule, citing the impact it would have on the recovering economy.[55]

This was just a temporary reprieve. The EPA finalized a more stringent ozone standard in 2015, setting the standard at 70 parts per billion.[56] This move was both premature and costly.

As of June, 2018, about a third of the U.S. population (107 million people) lived in nonattainment areas based on the previous 75 parts per billion standard.[57] Yet, the EPA is still prematurely moving forward with a more stringent standard even as many parts of the country are still trying to meet the old standard.

It may not be possible for many areas of the country to meet the ozone requirements, especially if the EPA continues to move the goalposts. The ozone concentration levels are so low that some areas of the country will soon be at or below background levels (i.e. ozone levels that would exist if there were no man-made emissions), if they are not already.

For example, Utah's Department of Environmental Quality director Amanda Smith testified in Congress last year that a monitor in Utah's Canyonlands National Park area regularly records ozone levels of 70 ppb despite the surrounding county being very rural.[58] A 2011 Harvard study found that background levels in the intermountain west regularly exceed 60 parts per billion.[59]

Making compliance even more difficult, by EPA's own admission, 23 percent of reductions must come from "unknown controls" that do not even exist.[60]

For infrastructure development, the impact of nonattainment could be devastating. There is a significant stick for not being in attainment, including losing federal highway funding.[61] In recent testimony, my Heritage colleague Nick Loris explained the costly steps that regions take to get into compliance:

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[55] President Barack Obama, "Statement by the President on the Ozone National Ambient Air Quality Standards," September 2, 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards (accessed September 3, 2018).
[56] U.S. Environmental Protection Agency, "National Ambient Air Quality Standards for Ozone," Final Rule, 80 Fed. Reg. 65292 (October 26, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-26594.pdf (accessed September 3, 2018).
[57] "Implementing EPA's 2015 Ozone Air Quality Standards" James E. McCarthy and Kate C. Shouse, Congressional Research Service, August 16, 2018, https://fas.org/sgp/crs/misc/R43092.pdf (accessed September 3, 2018).
[58] Matt Canham, "Utah leaders fear new EPA smog rules," The Salt Lake Tribune, http://archive.sltrib.com/article.php?id=56449444&itype=CMSID (accessed September 3, 2018).
[59] Testimony of Jeffrey R. Holmstead, Bracewell & Giuliani, LLP before the House Committee on Science, Space, and Technology, Subcommittee on Environment, "Background Check: Achievability of New Ozone Standards," June 12, 2013, https://docs.house.gov/meetings/SY/SY18/20130612/100968/HHRG-113-SY18-Wstate-Holmsteadl-20130612.pdf (accessed September 3, 2018).
[60] Global Energy Institute, U.S. Chamber of Commerce, web page entitled "Grinding to a Halt," https://www.globalenergyinstitute.org/grinding-to-a-halt (accessed September 3, 2018).
[61] "Implementing EPA's 2015 Ozone Air Quality Standards" James E. McCarthy and Kate C. Shouse, Congressional Research Service, August 16, 2018, https://fas.org/sgp/crs/misc/R43092.pdf (accessed September 3, 2018).

> Perhaps most oppressive are requirements for non-attaining regions to offset ozone-creating emissions from new or expanding industry with cuts in emissions elsewhere. Offsets turn economic growth into a zero-sum game and force investment away from non-attaining areas by making it harder to attract or expand new business.[62]

The U.S. Chamber of Commerce's Global Energy Institute has explained regarding counties that are not in attainment, "state officials and businesses have warned that the rule will force investment capital and the jobs that come with it elsewhere, effectively forming 'No Growth Zones' throughout the country."[63]

According to the EPA, the annual compliance cost in meeting the standard will be $1.4 billion (for areas outside of California).[64] The National Association of Manufacturers commissioned a study by NERA Economic Consulting that found a 65 parts per billion standard (not a 70 parts per billion standard) "could reduce GDP by $140 billion annually and eliminate 1.4 million job equivalents per year. In total, the costs of complying with the rule from 2017–2040 could top $1 trillion, making it the most expensive regulation ever issued by the U.S. government."[65]

The impact of a 70 parts per billion standard would not be as severe as a more stringent 65 parts per billion standard, but it is still an extremely costly rule that will impact investment, including the development of infrastructure projects Further, in a couple of years, the EPA will be reviewing the standard again and a 65 parts per billion standard or even lower could be looming.

Recommendations

Unfortunately, there are many more regulatory obstacles for infrastructure development beyond what has been discussed in this testimony. The following are just some recommendations regarding NEPA, the ESA, the CWA, and the NAAQS process as they relate to infrastructure projects. These recommendations are consistent with the principles outlined above.

NEPA Recommendations

NEPA had a reasonable objective of ensuring that federal agencies take into consideration the environmental impact of projects. However, the problem lies in how this statute has devolved into a

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[62] Testimony of Nick Loris, Herbert & Joyce Morgan Research Fellow, The Heritage Foundation before the House Committee on Oversight and Government Reform, Subcommittee on Intergovernmental Affairs and Subcommittee on the Interior, Energy, and Environment, "Examining Environmental Barriers to Infrastructure Development," March 1, 2017, https://oversight.house.gov/wp-content/uploads/2017/03/Loris_Testimony_infrastructure_FINAL.pdf (accessed September 3, 2018).
[63] Global Energy Institute, U.S. Chamber of Commerce, web page entitled "Grinding to a Halt," https://www.globalenergyinstitute.org/grinding-to-a-halt (accessed September 3, 2018).
[64] "Implementing EPA's 2015 Ozone Air Quality Standards" James E. McCarthy and Kate C. Shouse, Congressional Research Service, August 16, 2018, https://fas.org/sgp/crs/misc/R43092.pdf (accessed September 3, 2018).
[65] "New NAM Analysis Confirms: Federal Ozone Regulation Could be Costliest in U.S. History," National Association of Manufacturers, http://www.nam.org/Issues/Energy-and-Environment/Ozone/Economic-Impact-of-Proposed-EPA-Regulation.pdf (accessed September 3, 2018) and see also Implementing EPA's 2015 Ozone Air Quality Standards" James E. McCarthy and Kate C. Shouse, Congressional Research Service, August 16, 2018, at page 23, https://fas.org/sgp/crs/misc/R43092.pdf (accessed September 3, 2018).

judicial and executive branch-created regulatory monstrosity that imposes endless obstacles for little to no environmental benefit.

When NEPA was passed, it was the first major environmental law. Congress had not yet passed major laws such as the ESA or CWA. There were also no citizen suit provisions to enforce federal environmental laws. Bearing this in mind, if NEPA did not exist, would Congress feel the same need to pass such a law given that environmental issues are constantly being considered independent of NEPA through other federal, state and even local environmental laws? It is unlikely. Quite simply, Congress should repeal NEPA and ensure that this judicial and executive-created regulatory monstrosity never comes back to life.

I would stress that this does not mean environmental analyses do not matter, but Congress never intended for NEPA to become what it has become today.

ESA Recommendations

There are many reforms that need to be made to the ESA, from improving the scientific analysis of designations, compensating property owners for regulatory takings, to developing a better listing process. In addition, Congress should:

Make ESA an appropriated program, not a regulatory scheme. The law should be less of a regulatory scheme and more of a government program with clear appropriations for all of the government's actions, including covering any costs imposed on property owners. Regulation can hide the true costs of government action. The costs of all ESA-related efforts should be accounted for in a transparent manner.

Delegate power to the states. States should play a greater role in protecting species, in large part because they are closer than the federal government to any situation that needs to be addressed. Most states, if not all, already have conservation programs. By having states work in partnership with property owners, any threats to species can be addressed more effectively with fewer land use restrictions.

Ensure the federal government is working with property owners, not fighting with them. An approach that infringes on property rights fosters a confrontational relationship between the federal government and property owners. If the federal government is going to seek to conserve species, it should work with property owners instead of creating an adversarial relationship. Respecting property rights will go a long way in promoting this partnership.

CWA Recommendations

Congress should:

Define "navigable waters" in a similar fashion to Justice Scalia's *Rapanos* plurality opinion. As explained previously in this testimony, Congress needs to define "navigable waters" within the CWA statute and not defer this definition to the EPA and Corps. Justice Scalia's plurality opinion in *Rapanos* provides a useful framework for developing a definition.

Address the retroactive veto problem. Specifically, Congress should clarify that Section 404 does not give the EPA the power to retroactively revoke a lawfully issued permit.

NAAQS Recommendations

Congress, not agencies, should set any standards. New and stricter criteria pollutant standards, as seen with ozone, could have devastating effects on the economy and job creation, and compliance may not even be feasible for many areas of the country. Meeting these tighter standards are becoming far more expensive with smaller margins of tangible benefits. The impact of these tighter standards has created a situation where the EPA is in effect establishing economic policy as much as environmental policy.

If federal policy of the magnitude is going to be adopted, then Congress, not the EPA, should create any new standard. After all, legislators, who are elected and accountable to their constituency, should make such decisions, not unelected and unaccountable agency officials.

Factors other than health considerations, including economic factors, would influence the setting of standards. However, it is fallacy to think that the existing process is somehow independent of politics and policy. This can be seen when President Obama rightfully directed the EPA in 2011 to withdraw the proposed ozone standard due to economic considerations.[66] In fact, the setting of any standard is inherently a subjective decision because the level of risk one is willing to accept is a policy question, not a scientific question.

Conclusion

Americans want and expect basic services that are provided through infrastructure projects, such as safe drinking water and reliable electricity. When they turn on the tap, they want running water and when they flick the switch, they wants the lights to go on. Yet, federal environmental regulations are creating many obstacles to effectively and efficiently build the necessary infrastructure to meet these needs.

Unnecessary federal red tape does not protect species, eliminate water pollution, or provide cleaner air. It does however make it more difficult for basic services to be provided to Americans. By making the necessary reforms as outlined in this testimony, infrastructure development will get jumpstarted while improving, not hindering, environmental protection.

[66] President Barack Obama, "Statement by the President on the Ozone National Ambient Air Quality Standards," September 2, 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards (accessed September 3, 2018).

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Mr. GIANFORTE. Okay. Thank you to all the witnesses for your testimony today.

We'll move now to the period where we ask some questions and have some dialogue and dig a little deeper. And I'll recognize myself for 5 minutes to begin the questioning.

I'd like to start with you, Mr. Howard. You made an interesting comment. I'm a business guy. I'm always looking for best practices to adopt. And you made a comment about how other countries like Germany, Canada, and Australia have managed to reduce permit processing times while maintaining environmental quality.

Could you explain a little bit before what they've done achieve to that?

Mr. HOWARD. Yes. Quite interesting.

So, for example, with Germany, they divide projects into local or regional, national projects. And so with more local projects, the presumptive authority goes to a local body, the State, and it is in charge of doing all that's required, including complying with the Federal laws. It can't ignore the Federal laws, but it's in charge of making the decisions.

And if it acted in a way that was arbitrary, that is to say it ignored the Federal laws, it could—someone could go to court. So there are courts in Germany just as there here, and say they ignored the law.

But, in general, they have clear lines of authority. And so if it's a Federal—a big Federal project that's an offshore platform in the North Sea, or some other sort of large project, the Federal Government has presumptive authority.

And officials actually can make decisions. This is what we think is important to study when doing the tunnel under the City of Leipzig. And they will focus on the large environmental effects, and they won't talk about whether the construction trucks are emitting fumes. You know, they'll have a—they'll have a 50-page document that talks about what's important so the people can see it.

Mr. GIANFORTE. So making those observations, what lessons can we learn to apply here?

Mr. HOWARD. Very clear. I think that the head of CEQ, was appointed as part of NEPA, which I believe is quite a good statute and an important statute, should have authority to resolve all issues about scope and adequacy of environmental review, for example.

Mr. GIANFORTE. Do those other countries have the same level of litigation that the United States has?

Mr. HOWARD. Not the same level. They do have litigation. But, again, the difference is the courts in this country tend to focus on, well, did you leave the pebble unturned? And the process goes on for years. And it has all kinds of negative effects just in the way we write projects. That's why they're as thick as they are, because people are trying to avoid litigation.

The courts there focus on materiality. They look at the benefits of a project as well as the harms of a project and make a decision.

Mr. GIANFORTE. Okay. Mr. Bakst, while we're on this topic of litigation, what impact does litigation have on permit applicants' efforts to prepare environmental impact studies?

Mr. BAKST. So in 1970, when NEPA was enacted, there were none of these Federal environmental statutes. There were no citizen suit provisions that exist now. At the time, Congress didn't envision that plaintiffs would be able to get standing like they do now. And, unfortunately, what's happening is, even when you have a final EIS, there is—can be up to 6 years for a lawsuit to be brought. It just extended and delays the project.

And, quite simply, if you're an investor or somebody who's thinking about being a part of this infrastructure project, this delay may just be a reason not to even go forward in the first place. So we may focus on the delays of the projects that we know about. The problem is where the projects that we don't know about that never came to be. And I think a lot of that has to do with the litigation.

Mr. GIANFORTE. Okay. I'd like to follow on that with Mr. Howard.

What changes could Congress or the executive branch make that would respect the judicial process while reducing the incidence of frivolous lawsuits?

Mr. HOWARD. I think you have to change the standard of review and instruct the courts to try to abide by an expedited schedule. I'm sorry, and also shorten the statute of limitations dramatically to probably a matter of 60 or 90 days for most projects, because people know what the issues are by the time the environmental review statement is done.

And there should be a materiality standard that makes it clear that the court shouldn't intervene unless someone has really done the review in bad faith or made a conclusion that can't withstand any sort of reasonable standard. And the Congress can change that standard.

Mr. GIANFORTE. Okay. Mr. Bakst, would you like to add anything to that?

Mr. BAKST. Yeah. I would just say that I think one of the key issues is that the courts are in a position reviewing things that they shouldn't be reviewing. It shouldn't be a gotcha type of system where if you make one little mistake, then there goes the project. I think there needs to be some type of deference that exists. And certainly, for these projects, if there's some type material problem with an EIS, that's one thing. But if it's just a minor little defect, that shouldn't, you know, mean the end of the project. The courts shouldn't be trying to make those decisions. They're not in the right—they're not in a position to do so.

Mr. GIANFORTE. Okay. Thank you.

I'd now like to recognize the ranking member, Ms. Plaskett, for her questions.

Ms. PLASKETT. Thank you.

Ms. Goldfuss, thank you for your insights you are providing here into the Federal permitting process.

You mentioned that instead of issuing new executive orders, the administration should have its focus on what's already in place. The Federal permitting improvement steering council, which was created under what we all know as the FAST Act, Fixing American Surface Transportation.

As I understand it, the FAST Act and the council it created enabled agencies with jurisdiction over projects to have improved

early coordination, clarified roles and responsibilities, establishment of milestones and better transparency when it comes to environmental reviews; is that correct?

Ms. GOLDFUSS. That's correct.

Ms. PLASKETT. An that sounds like streamlining and efficiency to me. Can you elaborate on how the council was specifically designed to streamline projects and make environmental reviews or permitting more efficient?

Ms. GOLDFUSS. So just as Mr. Howard has been discussing, there is an issue with so many different statutes and decision-making deep within the agencies. So both when I was at the National Park Service and then moving to the White House, I saw how people could have disagreements, and there was no one that forced those disagreements to be resolved.

And what the permitting steering council allows is all those agencies and their deputy secretaries to sit at the table, see a dashboard of the major projects that they are facing and the timelines that they agreed to.

So what it was envisioned to do was look at the sticking points and the issues that needed to be resolved, bring them into the secretary's office early, and make sure that those difficulties were resolved so that the timeline would be adhered to.

What we haven't talked a bunch about is that there are many different factors around funding and design and local requirements and State requirements that also hold up this process. And because we have so little data on when the timeline starts and what agencies are doing, it's very easy to blame the statutes and blame these agencies. That's why the steering committee allows us to——

Ms. PLASKETT. And who would have that data? Where would that ideally be situated?

Ms. GOLDFUSS. Ideally, at this point, it would be on the dashboard. And the dashboard that was also created through the FAST Act is a public facing technological tool that would allow project sponsors and the agency to see what the timeline is and the progress that's being made.

Ms. PLASKETT. So can you give an example or two of projects that benefited from the council or in your past experience would have benefited from the council if the—it was working at the time that those projects were in place?

Ms. GOLDFUSS. Yes. I mean, the highest profile—obviously the council has only been around for 3 years. We had a transition in the middle and still no executive director. But the highest profile example that we have is the Mid Barataria wetlands sediment project in Louisiana. This was an enormous project that involved State agencies and U.S. Corps, EPA, and many other agency across the Federal Government.

And initially it was thought it was going to be a 10-year time frame to get through the permitting project. But through working with the council, working with the State, and then having funds from the BP oil spill settlement, they've been able to get to an agreed-upon timeline that is actually 2 years. And it will be on the dashboard so everybody can see the progress being made on that timeline.

Ms. PLASKETT. Okay. We were just talking about the two executive orders that the President has made. Executive Order 13766, which was intended to identify, quote, high priority infrastructure projects. And the other was Executive Order 13807, which created a, quote, one Federal decision mechanism to supposedly expedite major infrastructure projects.

So with, as you discussed, the Federal permitting improvement steering council already in place, were these executive orders necessary?

Ms. GOLDFUSS. The first executive order that you referenced, which——

Ms. PLASKETT. The high priority.

Ms. GOLDFUSS. —would identify high priority projects was within the first week of the administration. And it seemed as if they didn't know the Federal permitting council existed. The second one came along, put the one decision-maker policy in place, and corrected some of the high priority issues that were in the first executive order.

So although there has been a large priority on permitting and press releases, I would say, and executive orders, there's very little attention on the authority that the White House and these agencies already have to speed up the process.

Ms. PLASKETT. And you discussed needing an executive director. How would that facilitate the council being able to operate?

Ms. GOLDFUSS. This is a person that would have a connection to the EOP, connection to the President, and ideally a relationship with the project sponsors. So the executive director is that person that can unstick the problems and really make sure that we move these projects along. That is a key, key position that needs to be filled.

Ms. PLASKETT. Okay. Quickly, and Mr. Rusco, in your testimony, you cite different factors, and we've heard that there are other factors that are involved. You also note that the FAST Act include provisions for streamlining the infrastructure permitting process and codified into law permitting dashboard to track project timelines. Core coordination among agencies has been a problem. What do you think the solutions to that are?

Mr. RUSCO. Well, I think, you know, we have found that there have been some examples of attempts to improve coordination and communication. So one is obviously FERC, being a lead agency, has helped in permitting pipelines. Another example is the Indian Energy Service Center, which has been proposed to be a one-stop shop for information about permitting for energy projects on tribal and Indian lands.

Now, they have not set it up effectively to be a coordinating body, but they have the intent to do so. And if they do that and they get all of the resource agencies that are going to be involved, they will be able to improve the access for applicants to information they need to pursue applications, and they will also be able to help agency offices process those applications.

Ms. PLASKETT. Thank you.

I yield back.

Mr. GIANFORTE. Okay. At this time, I recognize Mr. Comer for his questions.

Mr. COMER. Thank you, Mr. Chairman.

And I appreciate this committee hearing, because this is one of the biggest complaints that I get. As I have traveled my district, a couple of projects I wanted to mention and then ask some questions.

First, in my district in Kentucky, southern Kentucky, we have eight lakes with marinas. Every lake—and that's from 6 hours from east to west in my southern Kentucky congressional district. Each lake is at maximum capacity with their current boat slips.

We've had permits, they've had permits, several of the lakes, to build new marinas, to even expand the number of slips they have to increase their capacity. This has to go through the Army Corps of Engineers. The permitting process is a nightmare. We recently announced a new marina opening on Lake Cumberland in eastern Kentucky. It took 12 years for that to get approved.

Is there anything that can be done with respect to the Corps of Engineers permitting for infrastructure projects? Can anyone answer that question?

Mr. HOWARD. I grew up in Whitesburg, Kentucky, and then moved to Mount Sterling, so I'm one of your——

Mr. COMER. Okay. Yeah, I know where Mount Sterling is.

Mr. HOWARD. Yeah, historically a constituent. So I know of many of the lakes in question. Ultimately, the choices should be politically accountable, including, in my view, choices by the Corps of Engineers. There are laws that they have to comply with that Congress passed. And there's a rule of reason typically that applies to things like docks and permits. And if there's too much delay, there ought to be political accountability to the people in the Corps.

And what's happened with all the bureaucracy that's grown up, really just over the last 50 years, is that there's no link between the White House, or virtually no link, and the Corps of Engineers. And one of the reasons to restore clear lines of authority is to actually reconnect us, not to let the White House make a decision about docks or lakes. But if some agency is dragging its feet, to make it make a decision and then call the question and get it resolved.

Mr. COMER. Another very important project that I'm working with Congressman Bucshon on is a new bridge, Interstate 69 between Evansville, Indiana, and Henderson Kentucky. We are—have been waiting for a long time on the environmental impact study. And I appreciate the question the chairman asked about litigation and things like that. This project is a number one priority for both Congressman Bucshon and myself. A very important link between an interstate that goes through Tennessee and basically from Canada to Mexico, really will open up a rural part of America. And the permit process, you know, every time that we check with the government agencies, they'll blame another agency. They'll say it's delayed.

What can—what can Congress do to try to streamline the process? Because if you meet with one of the bureaucrats, they will always say, well, we're doing better than we've ever done. They'll pat themselves on the back, but it's still—it's delayed and it's a frustration that's holding America back, not just my district. I don't think my district's unique to anything.

What, legislatively, or is there—are there any legislative solutions or is this all an executive branch function to try to streamline the process to get the permitting process? If we have an infrastructure bill next year, a major infrastructure bill like the President wants, I'm concerned that this won't go anywhere near the timeline that Congress hopes.

So I guess I'll let anyone answer any questions on advice on how we as Congress or as representatives can encourage the administration to try to streamline the process.

Mr. HOWARD. You know, the bureaucrats probably are doing a good job. The problem is there are 12 different agencies that have jurisdiction. And so if there's not a motivated political figure at a very high level forcing it to happen, as happened, I think, in Louisiana, it's happened with the Gateway Tunnel process that got expedited, it's happened with the Tappan Zee Bridge in New York, if you don't have that front page political willpower to make that bridge happen, it will get bogged down for—it could be decades.

And, again, I think there is a legislative solution. You need to reconnect the lines in the hierarchy. We'd be happy to work with your office and talk about what the really quite simple legislative reconnections are that don't involve changing the underlining substantive law.

Mr. COMER. Right.

Thank you, Mr. Chairman, I yield back.

Mr. GIANFORTE. Thank you.

At this time, I will recognize Mr. Duncan for his questions.

Mr. DUNCAN. Well, thank you very much, Mr. Chairman.

First of all, when I chaired the Aviation Subcommittee in another committee several years ago, we had a hearing one time with the head of the Atlanta airport and other witnesses, and he told—testified that the newest runway at the Atlanta airport took 14 years from conception to completion. It took—they were so happy to get all the final approvals, and all the problems were environmental rules and regulation. They did the—they built the runway in 33 days. They did—they were so excited, they worked around the clock. So I guess you could say it's 99 workdays.

Then when I chaired the Highways and Transit Subcommittee, there were two different Federal highway studies which said that the average highway project took—one study said 13 years from conception to completion, one said 15 years. This puts us at a disadvantage globally because most developed countries and even many developing countries are doing these major infrastructure projects in about a third of the time that we are and at about a third or less of the cost. In addition, it hurts—it's unfair to our taxpayers and it hurts our economy.

I want to mention another thing. These things kind of are all tied in together because—I really appreciate the work, Mr. Howard, that you've done through the years on legal reform, and you've been complimented by people on both sides of the political spectrum. And I understand now you're working with former Senator Bradley and Governor Kaine in your Common Good organization.

But you've written a book called Too Many Lawyers, and you're a lawyer yourself. I was a lawyer and a judge before I came to Congress. But this ties in together because I can tell you I've read that,

over the last 50 years, we've sent 50,000 or 60,000 factories to other countries and it's mostly because of environmental overregulation and rules, and red tape. And when I graduated, got my undergraduate degree, almost any young person with just a bachelor's degree could get a really good job, because we didn't just lose factory worker jobs when we sent all those factories away, we lost many white collar jobs. And so half the young people in the country started going to law school. And as you've noted in your book, Too Many Lawyers, it's—the number of lawyers has doubled in this country over the last 30 years or so.

And I want to read something from my last newsletter—or one of my last newsletters. There's so many rules, regulations, and laws on the books today that no human being could even come close to knowing about or understanding all of them. Harvey Silverglate, a Boston lawyer who studied in Princeton and Harvard, has written a new book. On the cover is the following, quote: "The average professional in this country wakes up in the morning, goes to work, comes home, eats dinner, and then goes to sleep, unaware that he or she has likely committed several Federal crimes that day. Why? The answer lies in the very nature of modern Federal criminal laws which have exploded in number, but also have become impossibly broad and vague," unquote.

The Code of Federal regulations is now 178,277 pages long; the Federal Register, 81,402 pages; and the U.S. Tax Code is 73,954 pages. This does not even count all the State and local laws. An innocent mistake is not supposed to be criminal, but a zealous, publicity-seeking prosecutor can make even the most innocent mistake look criminal.

And there's a retired law professor from Louisiana State University, John Baker, who told the Wall Street Journal recently that said there is no one in the United States over the age of 18 who cannot be indicted for some Federal crime. That is not an exaggeration.

What I'm getting at, we've got way too many laws, rules, and regulations on the books in this country. We have made some improvements in the last few years in this permitting process, but we still go ridiculously overboard and it takes far too long. The environmental impact statements now take, I think it says in our briefing material, 4.6 years, just that part of it.

What do you have to say about all that, Mr. Howard?

Mr. HOWARD. Most of the detail in modern regulation is not setting goals like clean air and clean water; it's telling people exactly how to meet those goals. And so we've got this—might call it a theory of correctness where you're not actually free, you're free to go and comply with thousands of pages of rules that you can't know. But in my view of the judgment, the problem here is not mainly in the goals, certainly not in having clean air and clean water; it's in the micromanagement.

Environmental impact statements were supposed to be, according to the CEQ regs, no more in the most complex project than 300 pages long, the most complex project. You can find them, they're 10,000 pages or 20,000 pages. That's all unnecessary detail. Most regulation, in my judgment, is unnecessarily detail telling people how to make a safe workplace, how to do everything, rather than

saying, we're going to hold you accountable for a safe workplace or for, you know, a reasonable environmental stewardship.

So I think the solution lies in restoring human responsibility in place of these dense, mindless bureaucratic structures that built up in the last 50 years.

Mr. DUNCAN. All right. Thank you very much.

Mr. GIANFORTE. At this time, I'd like to recognize the ranking member, Mr. Raskin, for his comment—for his questions.

Mr. RASKIN. Mr. Chair, thank you very much for your flexibility.

So, Ms. Goldfuss, let me ask you. The CRS has said that environmental review is typically not the greatest source of delay in surface transportation projects, and went on to say, quote: "Developing community consensus on what to do, securing the funding in dealing with effects of residents and businesses, including utilities and railroads, also contribute to the long timelines required to complete certain projects."

Do you agree with that general assessment?

Ms. GOLDFUSS. Completely agree.

Mr. RASKIN. A recent memo written by CRS in response to questions about Mr. Howard's 2-years now 10-years report found that in the reports he cited, quote:A common, if not the primary, issue identified in each report relates to funding. And then again, quote:No outside report or study cited in the Howard report identified permitting generally or compliance with specific local, State, or Federal requirements, in particular, as a primary barrier to completing various infrastructure projects.

Now, from 2015 to 2017, you were managing director of the White House Council on Environmental Quality. Is that right?

Ms. GOLDFUSS. Correct.

Mr. RASKIN. And in that time, you oversaw, as part of setting up the Federal Permitting Improvement Steering Council, the creation of an online Federal Infrastructure Permitting Dashboard to track the progress of different infrastructure projects. Is that right?

Ms. GOLDFUSS. Yes. We worked with National Economic Council and OMB to set that up, and all the agencies that participate.

Mr. RASKIN. Okay. So based on that experience and the data received on the Dashboard, would you agree that project delays are primarily caused by some factor other than the permitting process?

Ms. GOLDFUSS. The point of the Dashboard is to collect that information. GAO's report from 2014 showed that we have very little data. That data is just coming about. And so, anecdotally, we know that we can point to, all right, this project has its EIS, here's the timeframe, we met it or we missed it. So the Dashboard is designed to show us what the real delay is.

The reality is you can have your environmental impact statement. If you don't have funding to build the bridge, the bridge doesn't get built.

Mr. RASKIN. Gotcha. Okay. I want to go to the question of how agency budgeting cuts affect the permitting process. In its 2015 Red Book, the Federal Highway Administration said that limited budgets and staffers were to preclude agencies from assigning staff to work on reviews when staff may already be strained to process pending workload in a timely manner.

Do you agree with that assessment?

Ms. GOLDFUSS. Completely agree. We now have NEPA officials that are wearing multiple hats, and this is just a small part of their job, if they are overseeing large contracts for environmental impact statements or other environmental reviews, it's very difficult for them to keep on top of it.

Mr. RASKIN. Okay. I read an article that you wrote with Allen—Alison Cassady in which you said: "The best way for the Trump administration to speed up permitting without sacrificing environmental protection is to adequately fund the relevant Federal agencies involved in the permitting and environmental review process. Without funding, the Federal agencies cannot hire and train staff to complete environmental reviews or invest in technology that provides efficiencies."

Do you want to elaborate on that point?

Ms. GOLDFUSS. My point there, and I do think again, it's something similar to what Mr. Howard said. I mean, you'd be shocked at the antiquated tools that some of these agencies have with doing the review and the small number of human capital, the small number of people we have actually doing the reviews.

These are highly important projects. Industry would demand, corporations would demand using the best digital tools, the best information sharing so that we wouldn't have redundancies, so agencies could coordinate early on to make sure that we're expediting this process. Instead, we have limited talent, people who are doing multiple jobs, and as a result, potentially even misaligned incentives with our environmental review contracting process that pays for more pages rather than quality and efficiency.

Mr. RASKIN. The President has proposed a cut of $2.8 billion in the EPA. And I assume, based on what you just said, that what this would mean would be further delays and further postponement of the process. So why would we be actually defunding the agencies that could make the permitting process work?

Ms. GOLDFUSS. This is a fact of governing. I mean, the agencies have to be funded, the ones that have the talent. And EPA has the most talent and tools to share with the other agencies. They're also responsible for tracking and signing off on EISs. So if you're cutting the workforce that needs to do the work, it does not make sense that you're going to speed up the timeframes. So the rhetoric doesn't match the governing that's happening in the administration right now.

They need to fund EPA. They need to fully implement the fee authority they have through the Federal Permitting Council to put the money towards new tools, and really use the Dashboard and make sure that we take advantage of all that we can in modern tools of data sharing and data collection.

Mr. RASKIN. Thank you. I yield back, Mr. Chairman.

Mr. GIANFORTE. Okay. Thank you.

At this time, I'd like to recognize Mr. Palmer for his questions.

Mr. PALMER. Thank you, Mr. Chairman.

This question is for Mr. Howard and Mr. Bakst. Do we need all of the various agencies and subagencies and that linear structure of people out there that have to give approval to get a project done or can we do this in a more expedited manner with fewer people?

Mr. HOWARD. I believe in the one lead agency idea. So I think decisionmaking should be clarified, which isn't to say that you leave them out completely, but you don't necessarily give everybody an equal voice.

I would second what Ms. Goldfuss says about funding, particularly for CEQ. I would give CEQ more authority and three times as much money and put the spotlight on them and say, if this is not moving forward, it's your fault. I mean, just put—you know, that's the agency that's supposed to be in charge of environmental review. I wouldn't give undue power to the Corps of Engineers.

Mr. PALMER. Are you suggesting we should hold anybody in Federal Government accountable for something?

Mr. HOWARD. Yeah, I know it's a radical idea.

Mr. PALMER. Well, I think that we're at a point now, Mr. Chairman, where we need to consider some radical ideas.

Mr. Bakst, would you like to respond to that?

Mr. BAKST. I would just say that I think—I agree with the one agency idea, but I think there is kind of an underlying assumption with a lot of these projects that some type of precautionary principle have a concept that these projects are not going to go forward, unless you can pretty much prove in extreme detail that there's not going to be any environmental problem whatsoever. And the reality is there's many benefits to these projects, including being very critical infrastructure needs, which is water and transportation, and we tend to forget that.

And I think it's—regardless of how many people are working at the agencies doing NEPA, how much money is spent, if you have a lot of people doing a lot of inefficient and duplicative work, then you're just wasting their time and more money. The reality is that's the cart before the horse. What we need to do is have a more efficient process in the first place.

We need to have specific deadlines for projects. When developing these projects, you shouldn't have to look at every possible alternative that you have and examine that you're going to identify the alternative that definitely is going to have the least impact on the environment. The idea would be to identify those alternatives, they are actually feasible, not——

Mr. PALMER. Let me suggest something here. And I think it's easy to disparage Federal regulators and people that are trying to do their job. I don't think that's how you solve the problem. I think, having worked for a couple of international engineering construction companies, I have a pretty good idea of how you get things done. I can go back to Mr. Howard, I think you have to assign accountability. But there's also a quality of life issue here when it comes to infrastructure that impacts both the environment, public safety, and public health.

When you have, particularly cities in the South that are subject in the summertime to higher ozone levels, the more traffic congestion you have, the worse those levels become. Consequently, when you tie up projects that could reduce that amount of congestion and you have far more pollution produced by cars sitting on the highway than driving on the highway, that becomes a balancing act that the people in charge of permitting have to take into account. And then you have to take into account the economic benefits of it.

They get delayed because of this, and the city of Birmingham is a prime example of this by not completing that northern belt line. So I think that's all part of the issue here.

The other thing that I want to ask about is, and the ranking member, Ms. Plaskett, has lived through this, as have other Members of Congress, from natural disasters, and how we expedite the permitting process to rebuild infrastructure, and some of the very frustrating things we've gone through, like the Stafford Act and having to build things back.

I think that—we could take—we can learn some lessons from how we recovery from natural disasters for improving our overall infrastructure, because I think everybody in this room knows that we're in a real critical point in this country in regard to, first of all, rebuilding our infrastructure and getting it up to speed, whether it's highways or, as we've seeing in other parts of the country, our waterworks. And the longer we take to get this done, the worse it's going to get and the more it's going to cost and the more negative benefit it's going to have on public well-being.

With that, Mr. Chairman, I yield back.

Mr. GIANFORTE. Okay. Thank you.

I want to follow on with one additional question for you, Mr. Rusco. The GAO has shown that many agencies are not tracking permitting milestones, like the date a permit was submitted or the final date of approval and, therefore, have no data to determine if they're achieving expected results. Can you shine a little more light on that, what you found as you have done this research?

Mr. RUSCO. Sure. For example, I'll just take applications for permits to drill for onshore BLM. You go to different field offices, you get different approaches to documenting when applications come in, when they're complete, and when they start the review process. So that—you're going to get what you measure. And you can't go to a central database in BLM, although the databases exist, and track permitting times. And you should be able to, because sometimes—you know, sometimes they get an application, it's not complete. Well, they have to send it back. That's not their fault, that shouldn't count against them in the time. Sometimes they get an application, they get it all the way to the end, and they—and then the company just abandons it.

All that needs to be known, but there are other times when—when they're understaffed and they don't—they don't get to it and they're missing their timeframes. And we need to know what the difference is so that they can fix the ones they can fix. If they need more staff, they have to have the data to say, we're missing these deadlines because we don't have the staff to do the permit reviews.

Mr. GIANFORTE. So adoption of some standard practices and tracking methodologies would help us at least instrument the permitting process and have a basis then to improve?

Mr. RUSCO. Absolutely, and better IT tools.

Mr. GIANFORTE. Okay. In your written testimony, you identified incomplete applications as a contributing factor to delays. Could you talk a little bit about that in more detail?

Mr. RUSCO. Yes. So where we found that typically, you know—and, again, I'll refer to oil and gas development. So as you know, the oil and gas business is kind of boom and bust. And when it's

booming, all kinds of folks are coming in and they're filing applications for rights-of-ways and permits to drill, and they don't necessarily understand the process. So there's an opportunity for better communication and explanation about what the process is, that's something the agency could do, but sometimes it is just a learning curve for applicants.

The same thing happens when you have a change in regulations, as happened in the Gulf after the BP disaster, that they strengthened some safety requirements. It took people a lot to figure out how to do those, and then the permitting times settled down.

Mr. GIANFORTE. In your research, have you found agencies that do a good job of educating applicants on how to navigate the process?

Mr. RUSCO. Well, I've sort of repeatedly brought up FERC, that in some cases—so, for example, for permitting an LNG facility, you have an option of doing a pre-application process. And in that pre-application process, you basically get a primer on here's all the boxes you're going to have to tick, here's all the agencies you're going have to deal with. And that, according to a lot of the folks we've talked to, helps them understand, okay, we know what we have to do and we know the timeframes.

And by and large, the permitting process for LNG facilities has not been as slow as some things that you've seen. There was a large delay, while DOE made a determination, they basically stopped the process, and DOE made a determination that LNG exports was in the national interest. But in terms of the FERC process and all, you know, coordinating with Coast Guard and coordinating with resource agencies where necessary, that process went fairly smoothly.

Mr. GIANFORTE. So you believe there's a role for the agency in helping applicants navigate the permitting process instead of it being a black box where you don't know what you're going to get——

Mr. RUSCO. It's very important for there to be transparency in what is required and also the timing. When can you go to the next step? And there should be a place where you can go and track your progress online and see where it is, and that often doesn't exist.

Mr. GIANFORTE. Okay. I'd like to recognize Mr. Palmer for a follow-on question.

Mr. PALMER. Thank you, Mr. Chairman.

I had written myself a note and I overlooked it, and I apologize. I just want to know how much input do the State and local governments have in the permitting process and getting to a final approval?

Mr. Howard?

Mr. HOWARD. It depends on the project. A power line from the wind farm in Wyoming to the Pacific Northwest had to get the approval of every county in Idaho over which the line passed, which I find to be absurd. It's an interstate line. They shouldn't have to go to 100 hearings in Idaho for—you know, to get the approval. So it depends on the project.

As I suggested earlier—people—it shouldn't be a gauntlet. You know, people should honor the legitimate regulatory goals at each level of government, but it shouldn't be a gauntlet. If it's an inter-

state project, I think the Feds ought to be in charge. If it's local, I think the local ought to be in charge.

Mr. PALMER. All right. The reason I bring that up is we had a hearing with some county engineers, one of whom was from Alabama, and they had a culvert washed out of a county road, and that is a no-brainer. I mean, just—okay. Just replacing the culvert and putting the road back is the only—it gave access to residents, to the property. I want to say it took almost a year to get that put in. That should have been weeks, not months.

Mr. HOWARD. Right.

Mr. PALMER. And that should have been a local deal. Now, there was Federal intervention in that on permitting. It involved water that—you know, there needs to be a level at which, and I think it's been suggested in MAP–21, that there could be a level of costs under $2 million or under $5 million, I don't remember exactly which one it was, that is an expedited permitting process where you leave that to the county or to the municipalities.

Mr. HOWARD. Mr. Rusco made a good point. The OECD countries in Europe now have established some one-stop shops for everyone. So there were offices where the government was supposed to help you get the permit. If a culvert washes out and you need to get the road fixed, there ought to be some place you can go that will coordinate all of that and raise holy hell if somebody is holding it up for a year. And instead, you're going to literally 11 different agencies to try to get a permission.

Mr. PALMER. I thank the chairman for his indulgence. I yield back.

Mr. GIANFORTE. Okay. The chair recognizes Mr. Grothman for his questions.

Mr. GROTHMAN. Thank you.

First for Mr. Bakst. Do you feel the Federal environmental review and permitting system currently functions as Congress intended when it originally passed the legislation?

Mr. BAKST. No. In—when President Nixon signed NEPA into law on the first day in 1970, there was no other Federal environmental statutes. We don't have the Clean Air Act, Clean Water Act, et cetera. There was no citizen suit provisions. The idea was to take into account environmental considerations, which is very reasonable. Unfortunately, what's happened over time is that through the agencies and through the courts, NEPA has evolved into something that Congress never envisioned when they passed it in 1970—or they passed it in 1969, set into law in 1970.

I think if Congress—if NEPA didn't exist now and we looked at the existing Federal statutes that are on the books and the way citizen suit provisions exist now, and we wanted to create a procedural statute like NEPA is, we'd be trying to figure out ways to expedite the permitting process to help people to navigate through all these different Federal environmental laws and State and local laws. Unfortunately, NEPA has become a law that existed before these other statutes that's created kind of a—it's made things more difficult, and I think the reality is we need to make it simpler, not more difficult.

Mr. GROTHMAN. Okay. In general, the amount of things one requires permits for, the time it takes to get permitting done for

whatever, I don't know how long all of you've been involved in this game, but you use the general opinion of where the world stands today or the country stands today compared to, say, 25 years ago. It seems to me things only always get worse. And I'm old enough to remember the 1970s, and I thought the world was pretty idyllic then.

Could you comment on that? Have you ever, in all your experience, seen things ever go the other way, or do we always march steadily for more requirements, more paperwork, more time?

Mr. BAKST. Unfortunately—it's one of the points I made in my written testimony was I think looking at the permitting process on how to be more efficient in dealing with the permits that exist in some ways is an after the fact type of solution. And in reality, we need to look at the before the fact issue, which is looking at why permits require——

Mr. GROTHMAN. Can you give us any examples, any of the four of you, in which you can say, over the entire time

you've been following this, that, yeah, we've improved things since 20 years ago and it's less paperwork and less time? Can you think of any examples of that where you can really say, man, this used to be burdensome, but now we've sure straightened this out?

Mr. HOWARD. Yeah, there are a few things that have happened. People—on a local level, Mayor Bloomberg put in a 311 process. It's like a one-stop shop. You call in, you've got a——

Mr. GROTHMAN. Yeah. On a Federal level.

Mr. HOWARD. Yeah. On the Federal level, not too many. The—I worked with Clinton and Gore in the Reinventing Government Program, they dramatically simplified the way officials could buy small items. You know, get a credit card instead of going through a procurement process. So in some ways it got——

Mr. GROTHMAN. Well, that's kind of a Federal thing. How about the way you deal with not the Federal Government? How about how you deal with industry or business? Can you think of any examples in which it's now——

Mr. HOWARD. No. The regulations have only gotten thicker, and the solution, in my view, is not to reform it but to replace it. And that's the lesson of history. The Uniform Commercial Code replaced 50 complicated commercial codes, and it was great for the country. And most of these areas, including this one, permitting, in my view, we need to replace it with a simpler program that doesn't change the goals.

Mr. GROTHMAN. So there is no example right now, no good examples where any of the four of you can say, man, we're turning things around quicker than we used to, less paperwork, less cost?

Mr. BAKST. Let me reiterate that if you look at the Federal environmental statutes, the agencies are only expanding their power and they're taking very broad interpretations of statutes and not really meeting the will and intent of the statutes. And they're continuing to expand their power, not limit their power, which means more regulations and more permitting requirements.

Ms. GOLDFUSS. So I can say, from my time in the last administration, that tools like dashboards, tools like scorecards have done a lot to provide transparency into what the agencies are doing, and people do move faster when they're held to account. So from a very

macro level, I can't say whether or not it's worse than 20 years ago, but I saw change in a very short period of time.

Mr. GROTHMAN. I guess I'm out of time.

Mr. GIANFORTE. I want to thank the witnesses for appearing before us today.

The hearing record will remain open for 2 weeks for any member to submit a written opening statement or questions for the record.

If there's no further business, without objection, the subcommittee stands adjourned.

[Whereupon, at 11:32 a.m., the subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

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SUBCOMMITTEE ON HEALTH CARE, BENEFITS, AND ADMINISTRATIVE RULES
STEERING AND POLICY COMMITTEE
REGIONAL WHIP

August 17, 2018

RDML Tim Gallaudet, Ph.D., USN Ret.
Assistant Secretary of Commerce for Oceans and Atmosphere
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Mr. Chris Oliver
Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration
1315 East-West Highway
Silver Spring, MD 20910

Re: Limetree Bay Terminals, LLC, St. Croix, Virgin Islands USACE Permitting of Single Point Mooring

Dear RDML Gaulladet and Mr. Oliver:

I am writing to request your urgent assistance with the federal permitting of an energy infrastructure project that is a top priority for the economic recovery of the U.S. Virgin Islands, as described in the attached letter from Governor Mapp. The permit application to install a single point mooring buoy system to allow the Limetree Bay Terminals facility in St. Croix to receive shipments from very large bulk fuel carriers, has now been pending for one year. As a result of the delay in issuance of the permit, Limetree has incurred extraordinary costs and any further delay threatens to push the project timeline into the height of the 2018 hurricane season and further delays.

The project presents only minimal environmental impacts, but final authorization by the U.S. Army Corps of Engineers cannot be issued before consultations with the National Marine Fisheries Service under the Endangered Species Act are complete. Accordingly, I ask that the pending consultations be given a top priority within your agency and are concluded as expeditiously as possible. The project sponsor is working diligently with both the Corps and NMFS to complete the required consultations.

ST. CROIX DISTRICT OFFICE
60 KING STREET
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I would appreciate any assistance you can offer to expedite the issuance of the final permit and look forward to hearing back from you. I can be reached at (202) 225-1790 or a member of your staff can reach Angeline M. Jabbar in my office at (202) 226-7978.

Sincerely,

Stacey E. Plaskett
Member of Congress (D- VI)

cc:

Rickey Dale James
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James Cason
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Thomas Smith
Chief Environmental Review and Permitting Officer
U.S. Army Corps of Engineers

Earthjustice

September 5, 2018

The Honorable Greg Gianforte
Chairman, Subcommittee on Interior, Energy and Environment
Oversight and Government Reform Committee
United States House of Representatives
1419 Longworth House Office Building
Washington, DC 20515

The Honorable Stacey Plaskett
Ranking Member, Subcommittee on Interior, Energy and Environment
Oversight and Government Reform Committee
United States House of Representatives
331 Cannon House Office Building
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The Honorable Gary Palmer
Chairman, Subcommittee on Intergovernmental Affairs
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The Honorable Jamie Raskin
Ranking Member, Subcommittee on Intergovernmental Affairs
Oversight and Government Reform Committee
United States House of Representatives
431 Cannon House Office Building
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Re: "Permitting: Finding a Path Forward"

Dear Chairmen Gianforte and Palmer and Ranking Members Plaskett and Raskin,

Thank you for the opportunity to provide written testimony for the Joint Subcommittees' September 6, 2018 hearing titled "Permitting: Finding a Path Forward." Please accept these comments for the hearing's official record.

This testimony addresses the importance of the National Environmental Policy Act (NEPA) for infrastructure projects and refutes false narratives that cite it as the main source of delay in the permitting process.

I. Robust Environmental Reviews under NEPA Produce Better Projects and Save Taxpayer Dollars

There is no question that our nation needs transportation infrastructure. But our nation also needs this infrastructure to be safe, intelligently planned, and ultimately effective in responding to public necessities. Much time has been spent scapegoating the environmental review process and making false attributions as to the degree that NEPA contributes to project delays for important infrastructure projects, but very little time has comparably been spent highlighting how the permitting process under NEPA makes our infrastructure development smarter, safer, fairer, and more effective.

Careful compliance with NEPA is fundamental to making sound decisions on federal infrastructure projects. NEPA ensures that the public and agency decision-makers will have the information they need to understand the impacts of a proposed action and to know whether reasonable alternatives exist to achieve the project goals while incurring fewer environmental, social, cultural, public health, and economic costs.

Robust environmental review and meaningful public input under NEPA lead to better, more effective infrastructure projects. Indeed, as eight past chairs of the Council on Environmental Quality have concluded, NEPA review is a prerequisite for responsible agency action:

> [C]onsideration of the impacts of proposed government actions on the quality of the human environment is essential to responsible government decision-making. Government projects and programs have effects on the environment with important consequences for every American, and those impacts should be carefully weighed by public officials before taking action. Environmental impact analysis is thus not an impediment to responsible government action; it is a prerequisite for it.[1]

For example, the Los Angeles County Metropolitan Transportation Authority's (LACMTA) Crenshaw/LAX Transit Corridor project is an 8.5-mile light-rail metro extension under construction that will serve the cities of Los Angeles, Inglewood, Hawthorne, and El Segundo by offering an alternative transportation option to congested roadways. Through the NEPA process, the LACMTA determined that a five-mile stretch of the project could utilize a rarely-used existing freight rail line corridor instead to limit disruption to local neighborhoods and significantly reduce costs. One of the visionary elements NEPA is its creation of broad opportunities for public participation in government decisions that affect their environment and local communities. Throughout the environmental review and planning process, local residents were continuously

[1] September 19, 2005 Letter to the Honorable Cathy McMorris, Chair of the Task Force on Improving the National Environmental Policy Act from Russell E. Train (CEQ Chair 1970-1973), Russell W. Peterson (CEQ Chair 1973-1976), John Busterud (CEQ Chair 1976-1977), Charles W. Warren (CEQ Chair 1977-1979), J. Gustave Speth (CEQ Chair 1979-1981), Michael R. Deland (CEQ Chair 1989-1993), Kathleen A. McGinty (CEQ Chair 1995-1998), George T. Frampton Jr. (CEQ Chair 1998-2001), Gary Widman (CEQ General Counsel 1974-1976), Nick Yost (CEQ General Counsel 1977-1981) (emphasis added).

engaged in dialogue to ensure the project would be completed in an equitable, beneficial, and resourceful way that met the needs of local communities.[2]

NEPA also helps to ensure that the public and local decision-makers are fully engaged in the decision-making process so that the best, most cost-effective alternative can be pursued. The proposed "Garden Parkway" toll highway outside of Charlotte, North Carolina was once slated to cost close to $1 billion – a debt taxpayers would have been paying off for the next forty years. Questions raised during the NEPA process, however, led to the discovery that if the highway was built, North Carolina would actually see net job losses over time. Moreover, the careful review of traffic patterns during the NEPA process revealed that the highway would actually make congestion on other area highways *worse*. As a result, North Carolina has now abandoned the project and is pursuing more cost-effective upgrades to I-85.

Effective environmental reviews are critical for infrastructure projects that often have a profound effect on the environment and on public safety. NEPA reviews are typically the only opportunity for members of the public to provide input into these projects. Effective NEPA reviews expose the true cost of environmentally damaging and ill-conceived proposals, leading to improved and far less damaging projects and substantial savings for federal taxpayers. As the Crenshaw/LAX Transit Corridor project demonstrates, the public's local expertise often improves projects, lowering their cost and actually shortening the time they take to complete. Similarly, as illustrated by the Garden Parkway example, NEPA can empower local communities by giving them the information they need to make the best decisions for their communities.

In testimony before the House Armed Services Committee regarding plans to address problems with obsolete nuclear reactors at the Savannah River site, then Secretary of Energy Admiral James Watkins, testified:

> "Looking back on it, thank God for NEPA because there were so many pressures to make a selection for a technology that it might have been forced upon us and that would have been wrong for the country."[3]

When resource agency concerns are ignored or necessary studies are not done, the results can be devastating. Prior to construction of the Mississippi River Gulf Outlet (MRGO)— a channel that provided a shorter route between the Gulf of Mexico and New Orleans' inner harbor in Louisiana— the U.S. Fish and Wildlife Service raised serious concerns and recommended additional environmental and hydrologic modeling, but the Army Corps of Engineers ignored this advice. By 2000, the MRGO had impacted over 600,000 acres of coastal ecosystems surrounding the Greater New Orleans area and destroyed over 27,000 acres of wetlands that once served as an important buffer from storm surge. During Hurricane Katrina, the MRGO funneled Katrina's storm surge into New Orleans, resulting in devastating and deadly flooding in St. Bernard Parish and the lower Ninth Ward.

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[2] FEDERAL TRANSIT ADMINISTRATION, RECORD OF DECISION ON THE CRENSHAW/LAX TRANSIT CORRIDOR PROJECT (Dec. 30, 2011), http://media.metro.net/projects_studies/crenshaw/images/20111230_CrenshawLAX_Record_of_Decision.pdf.

[3] Hearings on National Defense Authorization Act for Fiscal Year 1993 - H.R. 5006, and Oversight of Previously Authorized Programs before the House Committee on Armed Services, 102nd Cong. 912 (1992).

Still, NEPA provides more than just a voice for the environment. State, local and tribal agencies, private property owners, labor unions, and business associations routinely rely on NEPA to express their views and impact agency decisions. It also gives a voice to the most impacted and underrepresented, especially to the most vulnerable communities who usually have to bear the greatest burden where federal projects are first proposed. Overall, it allows citizen oversight, ensuring public resources are used in a way that is responsive to what the public needs and wants.

II. All the evidence demonstrates that the NEPA review process is not the source of delay

Over the last few years, a number of Members of Congress and witnesses before this committee have commented that NEPA and other regulations were a major cause of delay in infrastructure projects. This theory has been comprehensively examined and rebuffed by numerous studies, including studies conducted by the Congressional Research Service (CRS) and the U.S. Department of the Treasury.

The most recent report was released by the Treasury Department in December 2016. This report, like the others, found that "a lack of funds is by far the most common challenge to completing" major infrastructure projects.[4] The report listed three additional challenges to large-scale infrastructure projects in order of their impact on the project development process. The second largest challenge was lack of consensus when multiple public and private entities and jurisdictions are involved. The third largest challenge was capital costs increasing at a greater rate than inflation. The last, and smallest challenge by far, to large-scale infrastructure projects was the environmental review and permitting process.

The Congressional Research Service (CRS) has likewise concluded, on multiple occasions, that NEPA is not a primary or major cause of delay in project review. In fact, CRS has found that the most commonly identified causes of delay are completely unrelated to the NEPA review process. In one report, CRS concludes that for transportation projects, the lack of funding, securing community consensus, and accommodating affected stakeholders, including utility companies and railroads, account for the vast majority of delays.[5] In another report, CRS determined:

> "[T]here is little data available to demonstrate that NEPA currently plays a significant role in delaying federal actions" and "factors *outside the* NEPA process were identified as the cause of delay between 68% and 84% of the time."[6]

In a 2012 report, CRS also concluded that about 90% of federally-assisted highway projects are conducted under a Categorical Exclusion (CE), essentially allowing them to move forward without

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[4] Toni Horst, et al., *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*. AECOM, (2016). https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf (last accessed March 20, 2016).

[5] Congressional Review Service (CRS), Accelerating Highway and Transit Project Delivery: Issues and Options for Congress 1 (Aug. 3, 2011), available at http://www.aashtojournal.org/Documents/August2011/CRSinfrastructure.pdf.

[6] CRS, The National Environmental Policy Act: Background and Implementation 28, 30 (Feb. 29, 2008), available at http://www.cnie.org/NLE/CRSreports/08Mar/RL33152.pdf.

an environmental review process. Moreover, only four percent of projects required a detailed Environmental Impact Statement (EIS) to be prepared.

A return to the Crenshaw/LAX transit corridor project is also instructive. Although the project is a model for community engagement and effective management, getting the project off the ground, however, was no small feat. Without the approval of "Measure M," a half-cent sales tax approved by Los Angeles County voters in 2016 that provided a dedicated funding for twelve metro area transit projects, the city simply wouldn't have had the money to proceed. When projects have access to dedicated sources of funding (e.g., Los Angeles' Measure M), the NEPA review process is normally swift and rarely a major barrier to project completion.

Overall, the overwhelming evidence demonstrates that NEPA is not a primary source of delay when it comes to infrastructure projects. Therefore, we urge Congress to address the causes of delay identified by CRS and others.

III. Further reforms will only complicate and confuse the process

Congress has already made significant changes to the permitting process under NEPA, but many of these changes have not been implemented yet. Thus, there is no evidence indicating further changes are necessary. As the Committee is aware, changes to the NEPA process for infrastructure projects were enacted in the Moving Ahead for Progress in the 21st Century Act (MAP21), the Water Resources Reform and Development Act of 2014 (WRDA), and the Fixing America's Surface Transportation (FAST) Act.

Already, federal agencies are struggling to implement NEPA reforms that have been piled on top of one another in 2012, 2014, and 2015. In March 2017, the Department of Transportation's Inspector General (IG) found that the agency has delayed implementing a significant number of MAP-21 reforms because they must be revised to comply with additional measures mandated in the FAST Act. The IG further stated that, because of the interruptions caused by the additional FAST Act reforms, "the Department may not achieve all of the intended benefits under MAP-21...such as accelerated project delivery, reducing costs, and ensuring that the planning, design, engineering, construction, and financing of transportation projects are done in a more efficient and effective manner."

Making further changes to the NEPA review process before federal agencies fully implement these legislatively-mandated changes to the NEPA process will only serve to increase regulatory uncertainty and likely slow down the environmental review process.

Indeed, members of the business community seem to agree. In April 2017, the Business Roundtable sent a letter to the White House stating that "existing law already provides a mechanism for comprehensive reform of the process of permitting major infrastructure projects" and urging federal agencies to focus on implementing existing legislative reforms.

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major infrastructure projects" and urging federal agencies to focus on implementing existing legislative reforms.

These piecemeal legislative attacks on NEPA not only constrain agency flexibility but, by creating new burdensome NEPA requirements, they also unnecessarily complicate and delay implementation.

IV. Conclusion

To ensure that transportation decision-making is conducted in a transparent and informed fashion, Congress should ensure robust environmental reviews that fully comply with the National Environmental Policy Act. Our organizations look forward to working with you to achieve these important goals.

Sincerely,

Raul Garcia
Senior Legislative Counsel
Earthjustice

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