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Hearing on Permitting: Finding a Path Forward
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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 (NPR) 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.