

TESTIMONY BY
SCOTT SLESINGER
LEGISLATIVE DIRECTOR
OF THE
NATURAL RESOURCES DEFENSE COUNCIL

The Federal Permitting Process for Major Infrastructure Projects, Including the Progress
made by the Federal Permitting Improvement Steering Council since passage of the
FAST Act in 2015

U.S. Senate Permanent Subcommittee on Investigations

Homeland Security and Government Affairs Committee

United States Senate

September 7, 2017

Thank you for the opportunity to testify today. My name is Scott Slesinger, and I am the Legislative Director for the Natural Resources Defense Council (NRDC). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 2.4 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing. I appreciate the opportunity to testify, and hope that my remarks will assist the Subcommittee as it considers the important issues raised by Title 41 of the Fixing America's Surface Transportation (FAST) Act.”

Why NEPA is important

I would like the Committee to appreciate why the National Environmental Policy Act (NEPA) and the federal permitting requirements to protect our air, water and wildlife are so important. With an emphasis on "smart from the start" federal decision making, NEPA protects our health, our homes, and our environment. Passed by an overwhelming bipartisan majority and signed into law by President Nixon, the law was prompted in part by concerns from communities whose members felt their views had been ignored in setting routes for the Interstate Highway System. NEPA has empowered the public, including citizens, local officials, landowners, industry, and taxpayers, and demanded government accountability for more than 40 years.

NEPA is democratic at its core. In many cases, NEPA gives citizens their only opportunity to voice concerns about a federal project's impact on their community. When the federal

government undertakes a major project such as constructing a dam, a highway, or a power plant, or if a private entity needs a federal permit so it can pollute the air or water, it must ensure that the project's impacts – environmental and otherwise – are considered and disclosed to the public. And because informed public engagement often produces ideas, information, and solutions that the government might otherwise overlook, NEPA leads to better decisions – and better outcomes – for everyone. The NEPA process has saved money, time, lives, historical sites, endangered species, and public lands while encouraging compromise and resulting in better projects with more public support. Our website <https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories> highlights NEPA success stories that prove this point. Thanks to this law, tens of thousands of Americans have participated in important federal decisions.

Implementation of the NEPA process has not been perfect. Due to lack of funding, many agencies have had their NEPA staffs decimated. This has led to an over-reliance on consultants instead of conducting environmental analyses in-house. Because agencies must oversee and approve contractors' work, the process is often further delayed. There is a persistent but false narrative that NEPA is the primary cause of project delay. This is simply not true. Repeated investigations by the Congressional Research Service underscore both that factors other than federal NEPA reviews are the primary cause of project delays, and that better resource allocation at a federal agency can expedite decision making.

The Congressional Research Service report found that:

“The time it takes to complete the NEPA process is often the focus of debate over

project delays attributable to the overall environmental review stage. However, the majority of FHWA-approved projects required limited documentation or analyses under NEPA. Further, when environmental requirements have caused project delays, requirements established under laws other than NEPA have generally been the source. This calls into question the degree to which the NEPA compliance process is a significant source of delay in completing either the environmental review process or overall project delivery. **Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope.**"¹

The Chamber of Commerce report, "Project No Project" (www.projectnoproject.com), contrary to its executive summary, confirms these findings. The Chamber's own case studies show that it is not federal rules that are causing the delays, but rather state and local laws, zoning, lack of funding, and citizen opposition to projects.

Recent Changes to the NEPA and Permitting Process

NRDC's role in Senator Portman and Senator McCaskill's FAST Act goes back to July 2013 when I, along with my fellow panelist Bill Kovacs from the Chamber of Commerce, testified on one of the many iterations of House bills to weaken the NEPA process, the RAPID Act. At the hearing, Democratic Rep. Steve Cohen of Tennessee and Republican Rep. Tom Marino of Pennsylvania agreed that we both made good points and that we should sit down and come to an agreement. We had a few discussions but failed to come to an agreement. When the Portman-McCaskill bill, which was based loosely on the RAPID Act, moved in the Senate two

¹ *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, CRS 7-5700, R42479, April 11, 2012.

ii Ibid.

years later, we again sat down with officials from the Chamber and the Senate and tried to work something out. With significant input from the Administration, NRDC supported the final agreement—although it included many provisions we opposed.

One reform that the Chamber and NRDC both agreed on from the beginning was the need for more funding and more staff to conduct permitting and environmental reviews. As I mentioned earlier, the loss of agency expertise and the lack of staff support for NEPA and permitting in the agencies is responsible for many problems in implementing NEPA. Therefore, the key reform in the FAST Act is that it grants the authority to use non-appropriated funds to augment agency funds in order to complete the required reviews. It also created a Permitting Dashboard to track and improve project timeliness. We urge the permitting board to quickly implement a system to collect fees from project sponsors, which would address bottlenecks by allocating those funds to agencies whose regulatory budgets have been decimated. This is especially critical because fear of deep cuts proposed by the Trump administration is prompting many qualified staff to leave the federal government.

Making Fast-41 Work

Additionally, we have all heard the President talk about launching a trillion-dollar infrastructure program. For this to succeed, the permitting board needs close to \$30 million to get up and running. The House Committee's token appropriation to the board of \$1 million is barely enough to hire a few staffers and very likely inadequate to carry out its statutory duties in hosting the Permitting Dashboard's tracking of projects.

The permitting board needs strong leadership to improve the permitting process and we applaud Senator Portman's and Senator McCaskill's letter urging the President to quickly appoint an executive director. The FAST Act gives the executive director significant authority. The person selected must have the political skills to bring together the siloed interests within the federal family—not just for the purpose of establishing a faster system, but also to ensure better environmental outcomes. Leaving in place an acting executive who is not a political appointee undercuts the permitting board's ability to get significant cooperation from department and agency leaders.

I would also note that the permitting process and NEPA involve complicated areas of scientific disciplines and the law. The executive director must have broad experience and sufficient qualifications in order to successfully lead in the implementation of this statute.

NEPA Attacks Continue

Despite the enactment of this legislation in 2015, this Congress has seen a large number of bills introduced in both houses that would further amend the NEPA process without regard for their impact on process changes already made in FAST-41. Rather than simplifying current processes, these bills would create new conflicts, sow confusion, and delay project reviews. And you can safely bet that these consequences would unfairly be blamed on NEPA.

Legislation has reached the House floor that would establish different and inconsistent permitting and NEPA processes for hydroelectric power projects, water supply projects, natural gas pipelines, international pipelines, fisheries management, and other project types.

The Senate has several similar bills in play. Adopting new measures now would exacerbate effective administration of existing law. For example, the Department of Transportation (DOT)'s Inspector General confirmed that the agency has been hamstrung by repeated policy changes in recent Congresses. Although DOT had completed most of the reforms mandated by MAP-21 in 2012, the Department was forced to delay implementation of others because they had to be revised to comply with additional requirements of 2015's FAST Act.²

The President Trump's first Infrastructure Permitting Executive Order – as Senators Portman and McCaskill wrote in a letter to the President – also contradicted authorities and responsibilities already in FAST-41, to the consternation of project sponsors that were already participating in the permitting board's existing process. Further revisions or regulatory changes as the Administration implements FAST-41 will only add confusion and delay implementation of it. If the objective is to improve infrastructure project reviews and permitting, then right now Congress' most important challenge is to exercise oversight over implementation. While we don't applaud everything in the law, its robust provisions were enacted less than two years ago. Adding to the law would exacerbate effective administration of it. The most valuable action by the Congress would be continued oversight and adequate funding of the administrative processes.

The President's revised Infrastructure Executive Order of August 15, 2017, ameliorated most of the inconsistencies with the earlier order. However, it also gave a green light to wasteful

² Office of the Inspector General, *Vulnerabilities Exist in Implementing Initiatives Under MAP-21 Subtitle C to Accelerate Project Delivery*, March 6, 2017, available at: <https://www.oig.dot.gov/sites/default/files/DOT%20Implementation%20of%20MAP-21%5E3-6-17.pdf>

federal construction in areas susceptible to flooding by revoking an executive order (E.O. 13690) that previously updated flood protection standards. These standards would make sure that public schools, hospitals, military bases, water treatment plants — all public facilities and infrastructure built with federal funding — are constructed with a higher margin of safety for floods and future sea level rise. Revoking these standards will ensure that billions of dollars are wasted rebuilding vulnerable public facilities that could have been built more safely or in a safer location.

We Cannot “Streamline” Our Way Out of Lack of Funding

I cannot conclude without noting that the emphasis on “streamlining” seems to be a diversionary tactic from the real problem of our failing infrastructure. Our airports, our transportation system, our sewer and drinking water systems have been systematically underfunded since 1993, when the gas tax was last raised. Since that time, inflation has eroded the Transportation Trust Fund by over 40 percent. The funding for sewers and drinking water systems have suffered similar erosion. Any world traveler, and in fact, President Trump himself, has noted that the airports and roads of our country now suffer in comparison to other developed and even some developing countries. Again, this is because of a lack of adequate funding.

Rather than addressing the real issue of funding, Administration officials and Members of Congress complain about the requirement for federal permits and environmental reviews. Senators, we cannot streamline our way out of our infrastructure problem. Countries all over

the world — including those with better infrastructure than our own — have adopted statutes based on our NEPA statute; bullet trains, modern subways, and efficient airports around the world have been built subject to NEPA-like requirements. What these countries have that the United States currently lacks is a national commitment to adequately funding infrastructure to compete in the 21st century.

I want to thank Senator Portman and Senator McCaskill for working to find reasonable and responsible fixes to the NEPA process. We support your ongoing efforts to ensure that your legislation is fully implemented, and that it improves the quality of reviews and leads to better environment outcomes without unnecessary delays.

NRDC stands ready to assist this Committee in its further deliberations. Thank you again for the opportunity to participate in this hearing and I look forward to your questions.