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AN EXAMINATION OF FEDERAL PERMITTING PROCESSES

HEARING

BEFORE THE

SUBCOMMITTEE ON
THE INTERIOR, ENERGY, AND ENVIRONMENT

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

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AN EXAMINATION OF FEDERAL PERMITTING PROCESSES

Thursday, March 15, 2018

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

The subcommittee met, pursuant to call, at 2:00 p.m., in Room 2154, Rayburn House Office Building, Hon. Blake Farenthold [chairman of the subcommittee] presiding.

Present: Representatives Farenthold, Palmer, Comer, Plaskett, and Raskin.

Mr. FARENTHOLD. Good afternoon. The Subcommittee on the Interior, Energy, and the Environment will come to order. Without objection, the presiding member is authorized to declare a recess at any time.

I will now recognize myself for five minutes for an opening statement.

Today, our subcommittee will examine the Federal permitting processes under the National Environmental Policy Act, known as NEPA, and the Clean Water Act. Numerous reports have documented how convoluted requirements and lengthy application periods for Federal environmental permits negatively affect infrastructure and development projects. Today's hearing will explore the problems and inefficiencies within those permitting processes in order to highlight opportunities for reform.

NEPA was passed with good intentions nearly 50 years ago but over time has evolved to become one of the most burdensome regulations facing any development project. NEPA review for complex projects that require an environmental impact statement can take years to complete and cost millions of dollars. The time for a full environmental review for a highway project has now grown from approximately two years when NEPA was first implemented in the '70s to over seven years in 2013. Even that seems quick compared to the 17 years it took one company to get a permit for mining in western Montana.

State and local governments are forced to navigate the bureaucracy of a myriad of Federal agencies in order to get a project approved under NEPA. In addition to all the red tape, applicants face the constant threat of litigation brought by environmental groups and other opponents to development. Even the most minor oversight in the review process can prompt a lawsuit from activists, adding further delay on top of an already lengthy process.

The permitting program established in section 404 of the Clean Water Act is similarly plagued by lengthy delays and high costs for applicants. One of the witnesses we will hear from today has been waiting nearly 30 years for a permit, and the project remains in limbo. Environmental Protection Agency and the Army Corps of Engineers share responsibility for administering this program and over the years have used their regulatory authority to expand the jurisdiction of the program and their own authority.

The requirements for section 404 permits are vague, and reports indicate that enforcement varies from district to district. This makes it very difficult for applicants to know what is required for a successful application. There is also no time limit imposed on the review process, so permit applicants face significant uncertainty and have difficulty planning for when they can begin work.

Not only is navigating the permit process difficult, there is also no guarantee that a project will be allowed to proceed. In 2013, the Supreme Court held that the EPA has the authority to retroactively veto section 404 permits issued by the Corps. In that case, the permit had been issued four years prior to the EPA's decision to veto it, and the permit holder was in full compliance with the conditions of their permit. When a project can be arbitrarily vetoed midway through development, it is difficult if not impossible to attract investors and creates enormous disincentives to undertake any project requiring a 404 permit.

Some of our panelists have had particularly egregious experiences trying to get a permit, and I look forward to hearing their perspectives on the issue. I hope this hearing provides a starting point for a productive discussion about ways to improve the Federal permitting process and get American infrastructure and development back on track.

Mr. FARENTHOLD. I will now recognize the ranking member, Ms. Plaskett, for her opening statement.

Ms. PLASKETT. Thank you very much, Mr. Chairman, and thank you, witnesses, for being here with us this afternoon.

We can all agree that environmental protection should go hand-in-hand with economic development. The Virgin Islands, which I am proud to represent, is a beautiful place that thrives on tourism and understands more than most places the importance of striking the balance between environmental regulations and development.

According to the American Society of Civil Engineers, our nation faces an infrastructure investment deficit of $2 trillion. For instance, the estimated $1 trillion is needed to fix America's drinking water infrastructure. Our nation's transit system has a backlog of projects to attain a state of good repair that will cost $90 billion and is projected to grow to $122 million.

America's public school system needs $58 billion to maintain and operate current facilities and an additional $77 billion to upgrade the current school facilities to reduce the maintenance backlog. In my district, the public schools are forced to run on four-hour rotations because of the destruction to school facilities during the recent hurricane season. This is expected to continue at least through the next school year until new facilities can be constructed.

Finally, America's roads and bridges are in need of $836 billion to repair a system that has been underfunded for years. Unfortu-

nately, President Trump's infrastructure proposal aggravates the infrastructure deficit. The Trump plan will cut more than $168 billion from Federal highways, Amtrak, and water infrastructure funding over 10 years. President Trump also proposes retreating from the Federal Government's lead role in financing infrastructure.

The Federal Government historically funded 80 percent of the highways and 20 percent would be funded locally. This new plan reverses the percentages and requires States to contribute 80 percent of projected costs in order to receive 20 percent match. State officials know that requiring an 80 percent local cost share for an eligible project is going to put most if not all projects out of reach. In the Virgin Islands and Puerto Rico it makes them basically out of the question.

The plan is little more than a wish list. It wishes that State and local governments and private investors will make up for reduced Federal investment in infrastructure, but we don't have the luxury of magical thinking. The civil engineers determined that inadequate infrastructure costs every American family $3,400. Isn't it time we face up to the fact that we cannot avoid the cost of investing in our infrastructure?

There is also much progress to be made in permitting. In the Virgin Islands where the cost of living is 33 percent higher than even the District of Columbia, every dollar in local economy is crucial to the survival of the islands, and we cannot afford drawn out delays in permitting for economic development projects. But there are ways to speed up projects that will not lead to environmental damage. Permitting agencies should have enough funding to complete reviews quickly, and coordination tools already available should be fully implemented. The most common factor delaying water and transportation projects is inadequate funding. What we need is long-term Federal support. That should be our priority.

I thank our witnesses for sharing their testimony today and look forward to this important discussion.

Mr. FARENTHOLD. Thank you very much. And now, I am pleased to introduce our witnesses. First, we have Mr. James Iwanicki. Did I get that right?

Mr. IWANICKI. Iwanicki.

Mr. FARENTHOLD. Iwanicki, all right. That wasn't even close to what was in—the phonetic spelling in my notes. I am sorry, Mr. Iwanicki. He is the engineer-manager of the Marquette County Road Commission in the upper peninsula of Michigan. We have Ms. Valerie Wilkinson, vice president and CFO of the ESG Companies in Virginia; Mr. Kevin DeGood, director of infrastructure policy at the Center for American Progress; and Ms. Diane Katz, senior research fellow and regulatory policy at the Heritage Foundation. Welcome to you all.

Pursuant to the committee rules, all witnesses are to be sworn in before they testify. Would you all please stand and raise your right hand?

[Witnesses sworn.]

Mr. FARENTHOLD. Let the record reflect all witnesses answered in the affirmative. You may be seated.

In order to allow time for discussion, please limit your testimony to five minutes. Your entire written testimony will be made part of the record. And as a reminder, you have got a clock in front of you, and you have also got three lights. Green means go, yellow means hurry up, and red means stop. Please also turn your microphone on, and the budget-conscious folks we are, we did not buy the most expensive microphones, so they sound much better the closer you get to them.

So now, we will recognize Mr. Iwanicki. Did I get that—I am getting closer.

WITNESS STATEMENTS

STATEMENT OF JAMES IWANICKI

Mr. IWANICKI. Thank you, Mr. Chairman and Madam Ranking Member, and other distinguish members of the subcommittee. Thank you for inviting me to testify on the Federal permitting process under the Clean Water Act. I am Jim Iwanicki. I'm the engineer-manager of the Marquette County Road Commission in the upper peninsula of Michigan. I'm very familiar with the Clean Water Act permitting process. Over the last five years, my agency has averaged over 20 Clean Water Act permits per year.

I'm here today to testify about my experience in trying to permit County Road 595 in order to improve the health, safety, and welfare of our citizens, along with having a positive economic impact on mining, logging, recreation, and tourism in the State of Michigan.

The Michigan DEQ was ready to issue a permit for County Road 595 pursuant to Federal Clean Water Act. EPA vetoed the State's position and stopped the permit from being issued. That is why I'm testifying about a road that never was, and counsel for the Road Commission is in Federal court seeking the opportunity to challenge EPA's veto. EPA's veto has caused heavy truck traffic to be routed through populated areas of Marquette County, through a university campus, three cities, and next to schools.

In January of 2012 the Road Commission submitted a 404 permit application for County Road 595. It was 21 miles in length, affected 26 acres of wetland, and it was a commonsense solution to a transportation need in the county. The cost of the project was $83 million. It was going to be funded through a public and private partnership with Rio Tinto. Rio Tinto was interested in the partnership because they were building a new nickel mine called the Eagle Mine, and they were refurbishing an old iron mill, the Humboldt Mill.

The distance between the mine and the mill as the crow flies is about 19 miles. The existing road system that goes to the mine and to the mill is over 60 miles one way. Five ninety-five would reduce travel time by an hour, and 595 would have been built in a working woods, not a pristine wilderness.

EPA only wanted to talk about preservation and would not allow us to use creation for a wetland mitigation plan. EPA continually changed the rules for wetland mitigation. In June of 2012 they said a 20-to-1 ratio would covered direct and secondary impacts of the project. By the way, the Michigan Department of Environmental

Quality replacement ratio is 12 to 1 max. We proposed to preserve 2.5 square miles next to the McCormick track. The McCormick track is a Federally protected wilderness area in the Ottawa National Forest. We proposed 640 acres of high-quality wetlands, a 25-to-1 ratio, plus 929 acres of upland for a total of a 60-to-1 ratio.

In December of 2012, the EPA wanted additional mitigation for secondary impacts and gave the Road Commission less than 30 days, including Christmas and the New Year's holiday, to come up with a solution. EPA also wanted us to secure mineral rights for the wetland preservation area. Federal rules only say to protect sites to the extent appropriate and practicable. EPA would not allow local units of government to be the land steward of the preservation area, as allowed by law.

Michigan Department of Natural Resources voluntarily—volunteered to be the land steward. They manage 4.6 million acres for the State of Michigan. When the—we told the EPA that they were willing to do that, their response was we were not sure they were qualified, and they would have to check into it.

EPA demanded creating wildlife crossings large enough to accommodate moose, bear, wolf, and cougar, but they would not tell us where they wanted these crossings. These may be NEPA requirements, but they are not requirements of the Clean Water Act when a State has assumed authority.

EPA was unwilling to negotiate resolutions openly by telling us directly what would satisfy their issues. In fact, during the last months of the project, they would not even tell us who the decisionmaker was going to be so we could talk to them directly and come up with a solution.

We had great political support for County Road 595. On the local, State, and Federal level it was bipartisan. The Michigan House and Senate approved; the Governor of the State of Michigan approved; Dan Benishek, at the time a Republican House Representative, approved; and both of our Democratic Senators, Carl Levin and Debbie Stabenow, approved the project.

Congress wrote the Clean Water Act specifically to allow States to assume Clean Water Act section 404 permitting authority in place of the U.S. Army Corps of Engineers and the EPA. Michigan has done that. Congress should do what it can to see that the local- and State-elected officials who have followed the Clean Water Act requirements can act in the best interest of their community without arbitrary and capricious interference from EPA bureaucrats in Chicago and Washington.

Congress should clarify the Clean Water Act. When a State has assumed section 404 permitting authority and intends to approve the project but the EPA objects, the permit application—the permit applicant should be allowed to challenge EPA's objections as arbitrary and capricious in court.

Thank you, and I'd be willing to answer any questions that the panel has.

[Prepared statement of Mr. Iwanicki follows:]



PACIFIC LEGAL FOUNDATION

Congressional Testimony
"An Examination of Federal Permitting Processes"

Before the U.S. House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Interior, Energy, and Environment

By Jim Iwanicki
Engineer-Manager of the Marquette County
(Michigan) Road Commission

March 15, 2018

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pacificlegal.org[1]

[1] Pacific Legal Foundation (PLF) is a nonprofit, public-interest organization that litigates nationwide to advance the American ideals of individualism and liberty, which establish a rule of law under which every person is secure in their inalienable rights to live responsibly and productively in their pursuit of happiness. PLF represents all clients free of charge. PLF is privately supported, primarily through thousands of small, individual donors, and accepts no government grants or contracts. PLF represents the Marquette County Road Commission in this case free of charge.

Good morning Mr. Chairman, Madam Ranking Member, and other distinguished Members of the Subcommittee. Thank you for inviting me to testify on the federal permitting process under the Clean Water Act.

My name is Jim Iwanicki and I am the Engineer-Manager of the Marquette County Road Commission (MCRC) in the upper peninsula of Michigan. My public agency is responsible to provide a safe and efficient system of county roads and bridges. Our population is over 67,000 residents and we maintain over 1,274 miles of roads and 94 bridges in the largest county in the State of Michigan. Marquette County is over 1,873 square miles and is larger than the State of Rhode Island. Our area also has an annual snowfall of 184 inches per year. I am very familiar with the Clean Water Act permitting process because of my role as Engineer-Manager with the Marquette County Road Commission. Over the last 5 years we have averaged over 20 Clean Water Act permits per year to maintain our system of roads and bridges. I'm here today to testify about my experience trying to win approval for a new county road, County Road 595, to improve the quality of life, the health, the safety, and the welfare of our citizens. This experience opened my eyes to the problems with the Clean Water Act permitting process and how it is implemented by the Environmental Protection Agency.

County Road 595 would have had a positive economic impact on the Mining, Logging, Recreation, and Tourism Industries for Michigan, but the EPA vetoed the CR 595 permit that the Michigan State Department of Environmental Quality (MDEQ) stood ready, willing, and able to issue pursuant to the federal Clean Water Act. The EPA arbitrarily refused to allow us to move forward pursuant to the state's planned approval, leaving us unable to build the road without submitting a new permit application and starting over with the U.S. Army Corps of Engineers. That was unacceptable to us in terms of the years it would take and the money it would cost, and thus we are now in federal court seeking the opportunity to challenge that EPA veto.

Let me share some background of County Road 595 and Marquette County.

Background Facts

In January of 2012, the MCRC submitted a Section 404 permit application to fill approximately 26 acres of wetlands in order to construct 21 miles of road at a cost of $83 million. Rio Tinto, a private commercial entity, intended to fund the construction through a public-private partnership. In addition, Rio Tinto spent millions in the—to date—futile effort to permit CR 595. (*See* Attachment 1 for a map of the area and where CR 595 would fit in the county.)

Rio Tinto took interest in funding the project because they planned to construct a new nickel and copper underground mine, the Eagle Mine, in northern Marquette County. The company also refurbished the old Humboldt Mill to process the ore, south of the mine. The mine and the mill have created about 300 direct new jobs.

The distance between the mine and the mill as the crow flies is about 19 miles. Using the existing road system to go from the mine to the mill would be approximately *60 miles one way*. CR 595 would have reduced travel time by an hour and about 40 miles each way. (*See* Attachment 2 for a more detailed map of the area and CR 595.)

The construction of CR 595 would have lasted two years and employed over 100 people during that time frame.

CR 595 would have been built in a working woods—not in pristine wilderness. The road alignment is based on existing public and private roads already in place and only after studying several alternative routes. (*See* Attachments 3, 4, and 6-9).

CR 595 was the common sense solution to Marquette County's transportation needs.

But the EPA stopped the project. After we started the permitting process with the MDEQ by submitting a permit application in 2011, the EPA objected to our project's purpose. We revised the permit application and then the EPA held a public hearing on the pending permit application in August of 2012. We then revised the permit application again and submitted it to the state DEQ. The MDEQ informed the EPA that it approved the new permit application and was ready to issue it in September, 2012.

The EPA lifted its objection to the project's purpose on December 4, 2012, but had other objections to the revised permit application which needed to be satisfied by January 3, 2013 (within 30 days), or jurisdiction would move to the Army Corps of Engineers and we would be forced to start over.

Rio Tinto needed certainty in their transportation route by January of 2013. Failure to have a permit for CR 595 in January, 2013, caused Rio Tinto to pull their $83 million funding commitment for CR 595 and they instead were forced to use the existing road system to truck the ore because the EPA refused to budge.

The EPA did not like how we proposed to mitigate the impacts of CR 595. Our proposed mitigation plan involved preserving over 1,576 acres of land (2.5 square miles) adjacent to

McCormick Tract in the Ottawa National Forest. The area included approximately 647 acres of high quality wetland (a 25:1 mitigation ratio) including an additional 929 acres of uplands (60:1 total acreage). (*See* Attachment 5.)

The EPA was very aloof during the whole permit process. EPA officials would not tell us what would be acceptable to them to win approval of the permit application that the state was ready to issue. In fact, during the last month of the project—December, 2012—they would not even tell us who the decision maker was going to be. They were unwilling to negotiate resolutions openly by telling us directly what would satisfy them.

There are several examples of the EPA's unwillingness to follow the Clean Water Act and implementing regulations in vetoing the permit application. For example, the EPA demanded additional wildlife protection and they proposed creating wildlife crossings (tunnels or bridges) large enough to accommodate moose, bear, and cougar, and to place fencing to guide wildlife to the crossing. But they would not tell us where these crossings needed to go. And these requirements were the kinds of requirements that perhaps we would have to meet pursuant to NEPA, but these were not requirements we were required to meet pursuant to the permitting process outlined in the Clean Water Act when a state has assumed approval authority for the 404 permit, as Michigan and New Jersey both have done.

The EPA also wanted to limit secondary road connections to CR 595 by placing deed restrictions on CR 595 so adjacent landowners could not connect to the road. In other words, they were demanding that we place restrictions on property rights of private property owners—legal authority we did not have and would not want to have.

The EPA Overreach

The Marquette County Road Commission believes the EPA overstepped its authority in the following areas:

1. EPA would not allow MCRC to use any creation (establishment) of wetlands for mitigation, forested wetlands in particular, as allowed by 40 C.F.R. parts 230.92 and 230.93(a)(2).

2. The preservation ratios EPA required (*i.e.* 20:1) were beyond what was reasonable and not compliant with 40 C.F.R. part 230. MDEQ rules allow a maximum replacement ratio of 12:1 for wetland preservation.

3. EPA imposed requirements that mineral rights be obtained for the wetland preservation areas. Federal rules only require that site protection should include measures to protect sites "to the extent appropriate and practicable" (40 C.F.R. part 230.97(a)(2)) in regard to mineral extraction and other threats.

4. EPA continually changed the "rules" in regards to what was required for mitigation on the project. EPA suggested that wetland preservation be at a 20:1 replacement ratio in June, 2012, to cover indirect and secondary impacts, but in December, 2012, it required additional mitigation measures to address secondary impacts and gave MCRC less than 30 days (including Christmas and New Year holidays) to come up with such measures. The EPA public hearing in this process was held over three months prior to the December 4, 2012, EPA letter and the timing of the letter did not allow sufficient time for MDEQ or MCRC to respond to the requirements of EPA's letter due in substantial part to the holidays.

5. EPA would not allow the Marquette County Road Commission, Marquette County, or Michigamme Township (all legal governmental entities in the State of Michigan) to be the land steward of the proposed wetland preservation area, as allowed in 40 C.F.R. part 230.97(a) and when EPA was asked about having the Michigan Department of Natural Resources, which takes care of over 4.6 million acres for the State, as the land steward, the EPA said they would have to check into it. The EPA was not sure they were qualified.

Political Support for CR595

The objections from EPA officials in Chicago and Washington, D.C., flew in the face of the approvals that leaders in Michigan on both sides of the aisle had for this project. CR 595 was, and still is, supported by all local units of government in Marquette County where CR 595 would either go through or where the existing road to the mine goes through. This includes three cities (Marquette, Ishpeming, Negaunee), eight townships, the Marquette County Board, the two

Michigan State House of Representatives members who represented Marquette County at the time, the Michigan State Senate senator who represented Marquette County, 63 of the 110 members of the 96th Michigan State House, and 28 of 38 senators from the 96th Michigan State Senate, the Governor of the State of Michigan, Michigan Department of Transportation, Michigan Department of Environmental Quality, Michigan Department of Natural Resources, the Michigan State Police, Dan Benishek (R) U.S. House of Representative at the time, and both U.S. Senators Carl Levin (D), and Debbie Stabenow (D). Congress wrote the Clean Water Act specifically to allow states to assume Clean Water Act Section 404 permitting authority in place of the U.S. Army Corps of Engineers and EPA. When all relevant state officials and agencies want a project approved but bureaucrats in Chicago and Washington, D.C., can overrule them, then Congress's intent, as expressed in the plain language of the Clean Water Act, is overruled by Executive Agency bureaucrats who are unelected and accountable to no one. That was not the intent of Congress when it allowed states to assume permitting authority under the Act.

Result of EPA's Overreach

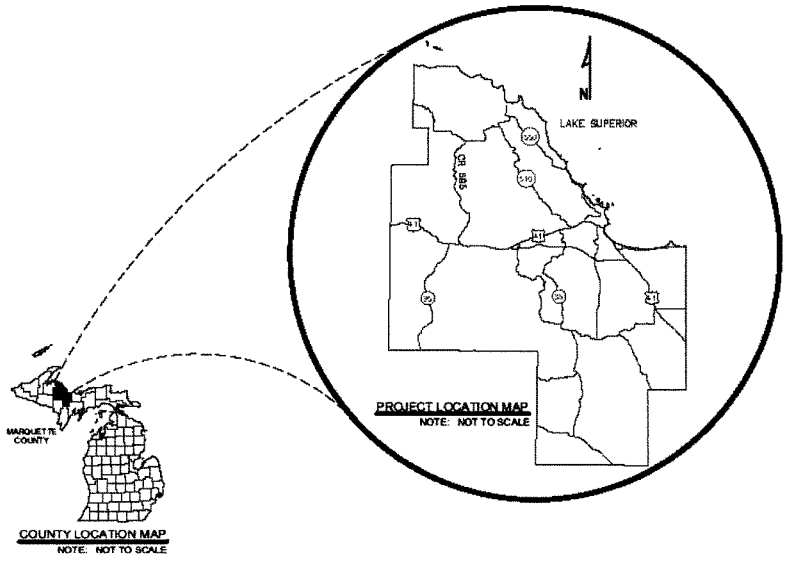
As a result of the EPA's overreach here, heavy truck traffic is now routed through the populated areas of Marquette County. That includes large trucks traveling each day adjacent to Northern Michigan University's campus, directly through small towns, and next to schools. Local units of government have been forced to address the safety issues created by EPA's lack of regard for the citizens of Marquette County. And this was all forced unnecessarily. The people of Michigan care greatly about their environment and the Michigan DEQ would not have approved the project if the concerns for pollution were not adequately addressed. The concerns *were* addressed. That's why the state DEQ wanted to approve the project. But instead I am here before you five years later testifying about the road that never was, and counsel for the MCRC is in court fighting for that road. Congress should do what it can to see to it that local and state elected officials who have acted in the best interest of their community, as the MCRC and state DEQ did here, can act without arbitrary and capricious interference from Washington EPA officials. That should not require Congress to amend the Clean Water Act, since Congress intended for a project like this one to be approved by the State of Michigan. But Congress should consider making explicit what is implicit in the law: when a state that has assumed Section 404 permitting authority intends to approve the project but the EPA objects, then the regulated party may challenge the EPA's objections as arbitrary and capricious in court.

Thank you.

James M Iwanicki, P.E.
Engineer Manager
Marquette County Road Commission

Testimony for the Subcommittee On
Interior, Energy, and Environment
March 15, 2018

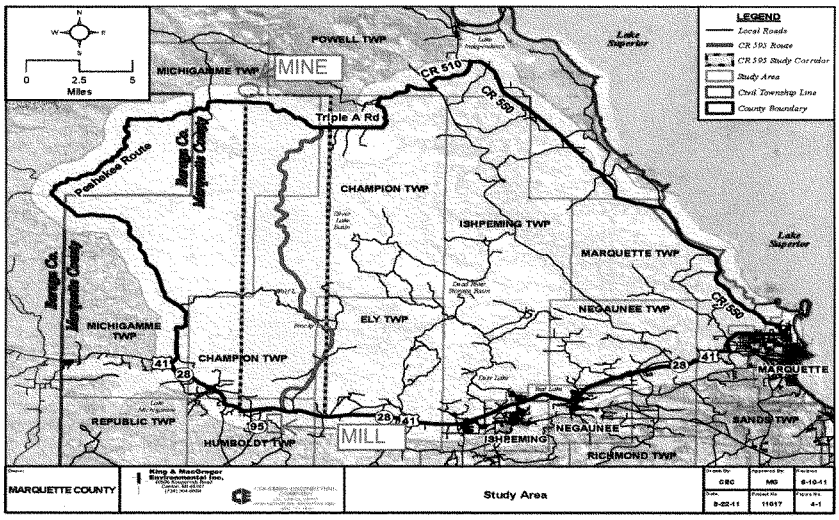
Attachment 1: Location of Marquette County



James M Iwanicki, P.E.
Engineer Manager
Marquette County Road Commission

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March 15, 2018

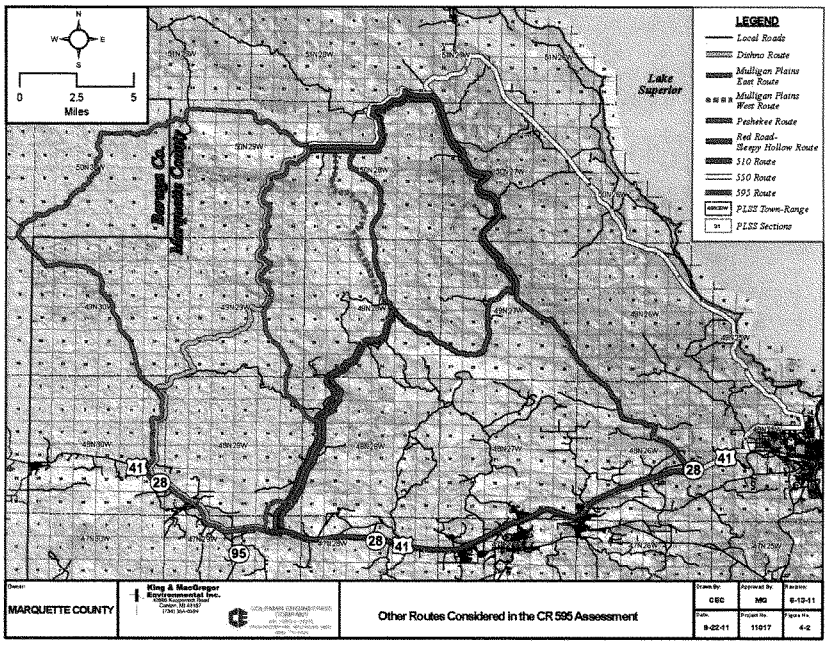
Attachment 2: Location of CR 595, Mine and Mill



James M Iwanicki, P.E.
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Marquette County Road Commission

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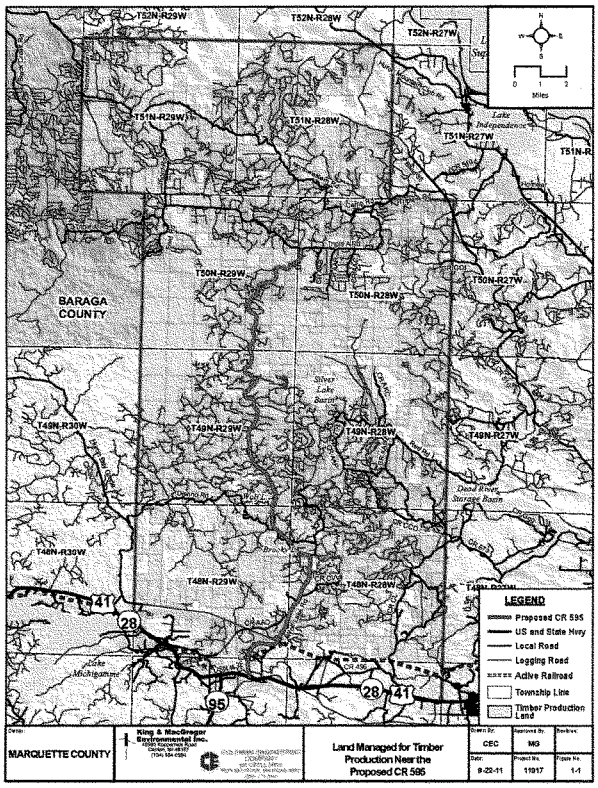
Attachment 3: Routes Studied



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March 15, 2018

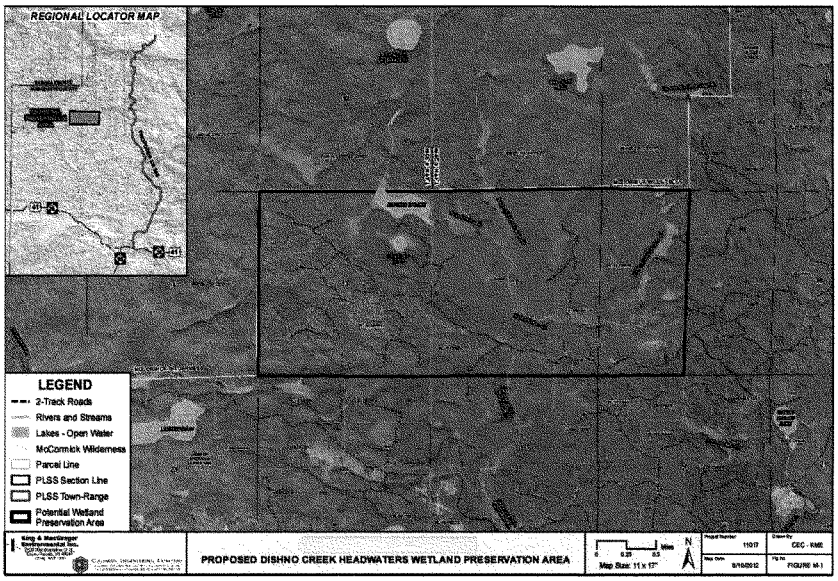
Attachment 4: Existing Roads in Area



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March 15, 2018

Attachment 5: Proposed Mitigation Area



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Engineer Manager
Marquette County Road Commission

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Attachment 6: Photo Along CR 595 Alignment



James M Iwanicki, P.E.
Engineer Manager
Marquette County Road Commission

Testimony for the Subcommittee On
Interior, Energy, and Environment
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Attachment 7: Photo Along CR 595 Alignment



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Attachment 8: Photo Along CR 595 Alignment



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Engineer Manager
Marquette County Road Commission

Testimony for the Subcommittee On
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March 15, 2018

Attachment 9: Photo Along CR 595 Alignment



Mr. FARENTHOLD. Thank you very much.
Ms. Wilkinson, you are recognized for five minutes.

STATEMENT OF VALERIE WILKINSON

Ms. WILKINSON. Chairman Farenthold, Ranking Member Plaskett, and members of the subcommittee, I appreciate the opportunity to testify. My name is Valerie Wilkinson, and I am the vice president and chief financial officer of the ESG companies, a small business based in Virginia Beach, Virginia.

Homebuilders have become frustrated with the expansion of Federal authority over private property and believe the current permitting process is broken. For almost 3 decades we've been held hostage by the EPA and the Corps, who have continually altered the Clean Water Act 404 permit requirements. This is perplexing as the relevant sections of the act have not changed since 1972.

Our nightmare began almost 30 years ago when our company proposed plans for a multi-use community to address the local housing demand. While we were clearing our land in 1989, the Corps asserted that our property contained jurisdictional wetlands and that a 404 wetland permit was required. We hired environmental experts to survey the land. However, the Corps completely dismissed their assessments. The delineation took years to complete because Corps officials disagreed on the criteria for determining wetlands.

The regulatory environment changed again in 1999 when Virginia adopted the Federal 404 regulations to create an expedited one-stop-shop permitting process. Virginia DEQ staff confirmed our expert's delineation, and we submitted our State permit request. We agreed to revise our plan to further avoid and minimize impacts and provided mitigation so for every acre impacted two acres of wetlands would be restored and another acre placed in preservation, resulting in no net loss of wetland acreage or functions. The DEQ applauded the fact that we exceeded the typical protective measures and issued a 15-year permit in 2003.

Since the State and Federal requirements are the same, we were stunned when the Corps disagreed with the DEQ's delineation and added 36.7 acres of impacted wetlands to the project. The basis of their decision for this 25 percent increase was vague and unsubstantiated. Although we strongly disagreed, we tried to move the permit forward by offering a number of amendments to our proposal that lessened the environmental impact and provided extensive alternatives analysis, which prove the other options unfeasible.

Five years after we received a State permit, the Corps, utilizing the same regulations, denied our request. The Corps wrongly claimed that we had not adequately addressed information requests even though we had replied to everyone, provided numerous offsite analysis, as well as 17 onsite alternatives and addressed every public comment to multiple public notices.

Frustrated, we modified our project again in an effort to stay out of court and salvage some of our extensive investment. The significantly reduced plan decreased wetland impacts by 84 percent, and the Court accepted this as a modification to our original application. However, the Corps adopted a new regional supplement,

which expanded the definition of a wetland, and we were forced to start over again with a new set of rules.

Now, 13 years since first filing our Federal application, we have responded to countless requests for information, studies, data, only to be met with more delays and requests to update and revise the information. We've hired more consultants and experts. Many of these requests appear to be just stalling mechanisms, yet we've complied again and again. We have been prevented from developing any of our 428 acres for almost 30 years, and our 15-year State permit will expire in nine months. We have spent over $4.5 million in the process and over $40 million in our investment in the property, and we still are not close to a permit.

If constructed, our project will create jobs, increase property tax revenue, and provide affordable housing. I hope that our story can be used to advance positive reforms and repair a broken regulatory system. Congress must work to pass legislation that streamlines permitting and establishes a process that offers transparency, certainty, and reasonable deadlines.

Thank you for the opportunity to testify, and I look forward to your questions.

[Prepared statement of Ms. Wilkinson follows:]

Testimony of Valerie Wilkinson,

Vice President and Chief Financial Officer,

The ESG Companies

Before the House Oversight and Government Reform Committee
Subcommittee on Interior, Energy and the Environment

"An Examination of Federal Permitting Processes"

March 15, 2018

Chairman Farenthold, Ranking Member Plaskett, members of the subcommittee, on behalf of the more than 140,000 members of the National Association of Home Builders, I appreciate the opportunity to testify today. My name is Valerie Wilkinson, and I am a Vice President and the Chief Financial Officer of The ESG Companies. The ESG Companies is a group of family owned development, building, management and entrepreneurial companies based in Virginia Beach, Virginia. Our companies evolved from a small electrical contracting company started by our founder, Edward Garcia, after returning from serving in the Navy in the Pacific during World War II, and we have been providing strong, sustainable communities ever since.

I commend the subcommittee's desire to highlight the pitfalls of the current regulatory regime, and I appreciate the opportunity to tell our story. Our quest to obtain a federal wetland permit for our building project has spanned nearly 30 years. Throughout every step of the process, the rules have changed and new requirements have been added. Unfortunately, the land we acquired almost three decades ago still lays undeveloped and we continue to be held hostage by the federal government. After spending thirty years and over $4.5 million dollars in pursuit of the required permit, we still are not even close to obtaining a federal 404 CWA permit for our project.

Recognizing and supporting the need for a clean environment and the benefits that it brings to our nation's communities, home builders and land developers have a vested interest in preserving and protecting our nation's water resources. Since its inception in 1972, the Clean Water Act (CWA) has helped to make significant strides in improving the quality of our water resources and improving the quality of our lives. Our nation's home builders build neighborhoods, create jobs, strengthen economic growth, and help create thriving communities while maintaining, protecting, and enhancing our natural resources, including our lakes, rivers, ponds, and streams. We foster the American dream of home ownership. Under the CWA, home builders must often obtain and comply with section 402 storm water and 404 wetland permits to complete their projects. What is most important to these compliance efforts is a regulatory scheme and permitting process that is consistent, predictable, timely, and focused on protecting true aquatic resources.

The home building community knows all too well the frustration of a broken permitting process. Over the years, the federal government has expanded the scope of their regulatory authority and have frequently changed the requirements needed to obtain a federal wetland permit. These changes have made the permitting process virtually impossible to navigate and have caused many land use projects to come to a grinding halt, putting more people on the unemployment rolls. It is impossible for home builders and developers to support the needs of our community under an ever-changing regulatory system. With property rights being jeopardized by federal regulatory overreach, it is increasingly difficult to attract new companies into our industry. Unfortunately, our company has fallen victim to this broken system.

Our story begins in the mid-1980's when The ESG Companies began to acquire parcels of land in order to develop a mixed-use community in Chesapeake, Virginia. Our mission was to address the anticipated population growth and housing demand after forecasters announced that 8,000 new jobs would be created in the Chesapeake area. The proposed project consisted of a multi-use community comprising retail, office, multifamily, single family and town homes with recreational amenities. Multiple parcels of land were consolidated into the Centerville Properties, a 428-acre development with a total investment in the project today, including land and carrying costs, of over $40 million.

In 1989, after obtaining required zoning approvals from the City of Chesapeake, The ESG Companies began clearing the land to develop Centerville Properties. Almost immediately, the U.S. Army Corps of Engineers (the Corps) asserted that jurisdictional wetlands, which were subject to CWA protections, appeared to be present on the property. They issued a Cease and Desist Order to halt "any and all filling activities on or adjacent to the waters and wetlands located on the property" until a wetland delineation could be completed. This action was surprising because prior to this time, we, along with many builders like us, had been developing properties like this all over the region, and the Corps had never asserted jurisdiction over similarly situated seasonally wet, non-tidal forested land. Even while the Corps put us through this rigorous regulatory obstacle course, numerous properties in the vicinity with similar soils, hydrology and vegetation characteristics had been and continued to be developed without permits.

The Corps asserted jurisdiction over our property by using their newly expanded jurisdictional authority to regulate wetlands as "waters of the United States." The landmark Supreme Court decision, *United States v. Riverside Bayview Homes, Inc,*[1] solidified the Corps' authority to regulate wetlands adjacent to navigable waters. The Court decided that wetlands which "actually abut on a navigable waterway" are "adjacent" and subject to CWA authority.[2] While our property does not directly "abut" a navigable water and is connected only by a historical, non-navigable drainage ditch, the Corps claimed that there was a subterranean connection to a jurisdictional water due to the fact that our soil was seasonally saturated to the surface.

[1] 474 U.S. 121 (1985).
[2] *Riverside Bayview*, 474 U.S. at 135.

While we did not agree with the decision that we were subject to federal jurisdiction, we clearly understood that the rules had dramatically changed. Therefore, we immediately hired highly qualified and esteemed environmental consultants, Dr. Hilburn Hillstead, a biologist and environmental scientist with Law Environmental and a former official with U.S. Fish and Wildlife Service (USFWS), and Dr. Wayne Skaggs, a soil scientist and then professor at the University of North Carolina and member of the Soils Committee of the National Academy of Sciences to assist us with the wetland delineation and permitting process. From 1990 to 1995, our consultants attempted to work with local Corps officials to resolve any issues and clear a path that would allow our project to break ground. Surprisingly, Corps staff steadfastly refused to consider hydrology studies performed by Dr. Skaggs showing that the soil on site was not saturated to the surface by capillary fringe due to free standing water 12" below the surface. The Corps responded that it did not dispute Dr. Skaggs' findings, however its definition of surface is the "A" horizon within the root zone 12" below the top of the soil. Regrettably, the delineation took years to complete because at the time there was considerable confusion among Corps staff as to whether they should use the 1987 or the 1989 wetland delineation manual to determine the existence of wetlands. Even though the 1989 delineation manual had been expressly disallowed by Congress in the Fiscal Year 1993 Appropriations bill,[3] Corps field officials still used it to complete their field assessments on our project.

Prior to 1998, mechanized land clearing and excavating in wetlands to prepare the land for development was prohibited by a Corps rule. However, the D.C. Circuit Court of Appeals overturned the rule prohibiting these actions in 1998.[4] In July 1999, after the Court ruling, Tri City Properties, LLC (Tri City), one of The ESG Companies, obtained an erosion and sediment control and water discharge permit and moved forward with clearing and excavating the land under the supervision of lawyer and environmental specialist, William Ellis.

As it has always been our intention to be in full compliance with federal regulation, we notified the Environmental Protection Agency (EPA) and Corps prior to initiating the action and took videotapes of the work as it was undertaken. These video tapes were then provided to the EPA. The ditching was accomplished by excavating and loading the material directly onto trucks and hauling it to an offsite location under the supervision of an engineer. At no point was dredged or fill material re-deposited on the land. Yet, in May 2000, the EPA issued an Administrative Order for compliance, one of over 20 they issued that day in our general area, stating that illegal discharges, "if any," must cease immediately and a new wetland delineation must be completed. No illegal activity took place on our property. However, later that year the Commonwealth of Virginia adopted a new regulation that required a permit to excavate in wetlands. Therefore, to comply with this new state regulation, we filed an application with the Virginia Department of Environmental Quality (VADEQ) to continue excavating the land. In addition, we retained the services of Environmental Specialty Group headed by Julie Steele, a former Corps Norfolk District regulatory branch Section Chief as well as Dr. W. Thomas Straw, a hydrogeologist and currently Professor Emeritus of Geosciences at Indiana University. These specialists have

[3] Energy and Water Development Appropriation Act of 1993, P.L. 102-377, 106 Stat. 1315, 1992
[4] *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998).

extensive expertise in environmental geology and wetlands hydrology and worked to develop a new wetland delineation as requested by EPA through their Administrative Order for compliance.

After obtaining yet another wetland delineation and 15 years since we had first started readying the property for development, we were prepared to apply for our wetland permit. VADEQ and the Corps have joint permitting authority over the Commonwealth's wetlands. The expressed purpose of Virginia's statutory scheme was to provide a one-stop shop and prevent land owners from having to go through duplicative permit approvals. It is important to note that Virginia's wetlands regulations mirror the CWA section 404(b)(1) requirements. Since they use the same criteria and methodology, the state and the federal government should not differ in their regulatory assessments of our project. Unfortunately, coordination was not what we experienced, and our project only illustrates the disconnect between state and federal permitting partners.

In late 2000, we sent our new wetland delineation to the VADEQ to begin the permitting process. Our environmental consultant certified that the site contained 253.5 acres of palustrine, forested wetlands and 174.7 acres of upland. The VADEQ made multiple requests over an 8-month period that the Corps confirm the delineation; however, the Corps refused to participate, citing the outstanding Administrative Order. Therefore, Dr. Ellen Gilinsky, then VADEQ's Director of the Water Quality Programs Division who later served as a Senior Advisor to the EPA's Office of Water, and her colleague, Dave Davis, personally confirmed the wetland delineation we provided by performing their own field assessment of the property. Dr. Gilinsky and Mr. Davis invited Corps officials to accompany them on their field review so Corps staff could observe the wetland boundaries on the property. Corps staff attended but left without comment. The VADEQ confirmed the wetland delineation, showing 174.7 acres of uplands and 144.6 acres of wetland impacts, and the state permit process moved forward.

In late 2001, in an effort to find a mutually beneficial and expedient resolution to the outstanding Administrative Order, representatives from Tri City and their legal counsel, Robert Dreher, who now serves as the Associate Director of USFWS, met at EPA's Philadelphia offices with key EPA officials as well as a representative from the Environmental Defense Section of the U.S. Department of Justice (DOJ). Tri City proposed a settlement through a Consent Decree which included significant mitigation and preservation that the DOJ official believed it was in everyone's best interest, and EPA representatives agreed, with the caveat that they would need concurrence from the Corps to finalize the agreement. We were later notified that the Corps did not concur and would require a CWA 404 permit for any development to proceed.

As required by Virginia state law, VADEQ opened a notice and comment period and held two public hearings on our project. During this time, we continued to communicate with VADEQ and interested parties to respond to any and all concerns regarding the impact of the project. In an effort to move the project ahead, we agreed to make a number of significant changes to our development plans to lessen the number of wetlands impacted. The revised project allowed us to avoid over 100 acres of wetlands and required us to offset our impacts by creating 290 acres of wetlands offsite by restoring wetland function on prior converted cropland. This amounts to two acres of restored wetlands for every one acre impacted. We also agreed to contribute 145 acres of

wetlands on the adjoining property as a conservation buffer. As a result of these new development, mitigation and preservation plans, VADEQ concluded that the project met the requirements of **no net loss** of wetland acreage and functions. In addition, Tri City agreed to install state-of-the-art stormwater ponds and filtration features such as wetlands benches, bioretention areas, and grassy swales in order to reduce erosion and improve water quality. At our final public hearing, VADEQ acknowledged that the permit contemplated more protective measures than typically required. Once again, VADEQ attempted to share our new project plans with the Corps, only to be rebuffed. At this point it had become painstakingly clear that the Corps did not want to participate in any review of our project.

On November 21, 2003, almost twenty years after obtaining the property, the Virginia State Water Control Board approved and VADEQ issued a Virginia Water Protection Permit, allowing Tri City to impact 144.6 acres of wetlands. The permit, which expires in 2018, included the negotiated wetland conservation requirements as well as numerous other conditions relating to wildlife preservation, erosion and sediment controls and construction procedures. Shortly after the issuance of the permit, VADEQ Director Bob Burnley praised our project, in an official VADEQ publication, as "an excellent example of the success of Virginia's wetland protection program" due to the extensive restoration, preservations and minimization requirements. Our project was being used as the prime example of how development can occur with sound environmental protections.

On two occasions, the Virginia judicial system defended our State permit against legal challenges. The Chesapeake Bay Foundation (CFB) opposed the issuance of the permit in *Chesapeake Bay Foundation v. Commonwealth of Virginia*. The Circuit Court of the City of Richmond ruled in our favor by upholding the permit.[5] The CBF appealed the decision only to lose again when the Virginia Court of Appeals issued a final ruling upholding the validity of the permit on April, 22, 2014.[6] Our state permit still remains in full force and effect, but only for another 9 months.

While we still needed formal CWA section 404 approval from the Corps, we felt we had overcome the most challenging obstacle of securing the wetland permit from the Commonwealth. After all, Virginia and the Corps have joint permitting authority, and the Virginia regulations enacted the CWA 404 regulations verbatim. The Corps issued the first public notice on the property based on the VADEQ confirmed impacts in 2005, and Tri City provided responses to all public comments including those made by the EPA, the U.S. Fish and Wildlife Service and the cities of Virginia Beach and Chesapeake, as well as various environmental groups and individual citizens. The Corps then requested a significant volume of new and updated information which we also provided; however, it took approximately 1 year to receive a response from the Corps related to our submissions.

The Corps subsequently concluded that the VADEQ-approved wetland delineation, which was the basis of our approved state permit, was not accurate. This is the same wetland delineation

[5] Chesapeake Bay Found., Inc. v. Com., ex rel. Virginia State Water Control Bd., No. 1897-12-2, 2014 WL 1593323, at *4 (Va. Ct. App. Apr. 22, 2014).
[6] Id. at *16.

that the VADEQ asked the Corps to confirm three years earlier. With disregard to the VADEQ's regulators and their expertise, the Corps performed a new wetland delineation in 2007 that added 36.7 acres of wetlands to the project for a new total of 181.3 acres impacted. Contrary to the well-documented delineation that was performed by our environmental consultants and VADEQ, the basis of the Corps delineation is rather vague and, in some instances, a stretch. For example, the Corps relied on a single observation of "ponding water and blackened leaves in designated areas" as primary indicators of hydrology during their site visit. Due to the increase in wetlands impact per their confirmation, the Corps required that the project go through a second public notice process. Tri City again provided detailed responses addressing all public comments.

In response to the Corps' delineation, we quickly worked to amend our project proposal and offered a number of options to further reduce our environmental impact. One of the proposals we offered reduced wetland impacts from 181 acres to 80 acres with onsite 1:1 mitigation. We also worked through the Corps' Least Environmentally Damaging Practicable Alternatives (LEDPA) analysis and considered the Corps' impractical suggestion that we move our project to 90 acres of uplands on nearby Elbow Road. However, there were many complications with the Corps' LEDPA. First, the 90 acres is located along a narrow winding and dangerous section of road that could not support the main ingress and egress of a mixed-use development without millions of dollars of offsite infrastructure and road improvements that would have made the project financially infeasible. Second, the City of Chesapeake zoning laws prohibited us from moving the project to that area. In an attempt to overcome this obstacle, the Corps unsuccessfully tried to pressure city officials to waive current zoning restrictions and related proffers to allow the result it desired. Finally, as it is Congress' policy to "recognize, preserve and protect" the rights of the states to "plan the development and use…of land," the Corps has no authority to determine where a project should be built,[7] yet the Corps requires such "off-site alternatives" be considered even when not owned by the applicant. This action is an unfortunate example of the federal government's intrusion on local land use.

Three years after our permit request was filed with the Corps and 8 years after we had initiated the joint permitting process with the VADEQ, the Corps denied our request for a federal wetland permit. The Corps believed that we had failed to prove that the 90 acres of uplands on Elbow Road could not be developed and stated that we had not met the requirements of the LEDPA. The Corps also claimed that we did not adequately respond to requests for information even though we had filed all requested information, including analysis of numerous offsite alternatives, extensive analysis of 17 onsite alternatives and detailed responses to two rounds of public comments.

In an effort to avoid litigation challenging the denied permit and to salvage at least part of our investment, we modified our project yet again. The significantly reduced plan allowed development on just 61 acres, impacting 29.8 acres of wetlands. In 2009, the Corps accepted this proposal as a modification of the previously denied permit and reopened the 2005 application.

[7] 33 U.S.C. § 1251(b).

The Corps issued their third public notice on our project with its modified scope and impact and Tri City again provided responses addressing all public comments.

As soon as we started to gain ground, the Corps issued a new regional supplement manual for field staff to use in making wetland delineations.[8] Contrary to claims made by the Corps at the time of release, these changes significantly expand the definition of wetlands and subsequently increased limits of wetlands into land that was formerly delineated by the Corps as uplands. This change specifically affected the Tri City property at Centerville. Two of the secondary indicators of hydrology were changed to primary indicators and used to expand the test for identifying wetlands. This change alone shifted very large areas from uplands to wetlands. We do not understand how the U.S. Army Corps of Engineers can adopt a 148- page "supplement" in 2010 to the 100- page 1987 Corps Wetland Manual, when Congress instructed the U.S. Army Corps of Engineers in 1993 to not utilize Department of Defense moneys to use any wetland manual other than the 1987 Wetland Manual. The use of the word "supplement" by the Corps appears to have provided an end-around of Congress.

The rules changed again in the midst of the process and the Corps applied these wetland manual changes to our pending project application. In essence, we were forced to start over with new rules. We were now required to go through a public notice for a fourth time based on the increased impacts, moving us even farther away from securing our permit. In fact, more than 60 days since the publication of our last notice, we received another 7-page request from the Corps for new and updated information on our project. It appears that we will be perpetually subject to vacillating circumstances.

Over the last ten years since the original permit denial, we have diligently continued to work with the Corps in an attempt to obtain a federal wetland permit. For us, these years have been spent responding to the Corps' constant requests for additional information, studies, and data. When we responded with the requested information and data, we were often met with follow-up requests to reformat the information in a painstakingly specific way. Indeed, the numerous reformatting requests appeared to be nothing other than an intentional stalling mechanism, as we swiftly complied with every request only to be faced with another. We had to hire additional environmental consultants to conduct more wetland delineations and wetland functional assessments, and even hired consultants suggested by the Corps. In addition, the Corps staff assigned to our project continually changed over the years and we struggled to keep them appropriately educated on our project. Over the years we have had dozens of field visits from Corps and EPA staff in order to survey and assess the land. We have complied every step of the way.

Since 1988, the Corps has successfully prevented Tri City from developing the land, the 15-year permit that VADEQ approved in 2003 will soon expire. The results of our 28-year effort to obtain required permits for the development of our property are contained in approximately 55 file boxes of records of submissions, correspondence, maps, scientific analysis and data

[8] "Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)." U.S. Army Corps of Engineers. November 2010.

collection related to this project and our pursuit of the required permits. In fact, if we laid the papers end to end, they would stretch over 30 miles, the distance from the U.S. Capitol to Dulles airport. It is hard to keep going when the continual requests and delays seem designed to further protract the process and frustrate our ability to ever reach a resolution and run out the clock on our state permit.

In 2015, the rules changed again when the EPA and Corps finalized a regulation to redefine the scope of waters protected under the CWA. The agencies added new terms, definitions, and interpretations of federal authority over private property that are more subjective and provided the agencies with greater discretionary latitude to expand their regulatory authority.

This rule fell well short of providing the clarity and certainty sought by the regulated community. It would increase federal regulatory power over private property and would lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. It is so convoluted that even professional wetland consultants with decades of experience would struggle to determine what is jurisdictional. The federal government should be working to provide a practicable and transparent permitting system rather than expanding their authority over private property.

Fortunately, the Trump Administration is working to rescind this rule. We are optimistic that the Administration will develop a new rule that respects congressional intent under the CWA while protecting the aquatic environment and improving the compliance process for the regulated community.

Recommendations for Streamlining Permitting

NAHB members were encouraged by President Trump's recent proposal to strengthen our nation's transportation and infrastructure. There are many aspects of this proposal that help establish a permitting regime that is consistent, timely and will prevent agencies from needlessly delaying projects.

We are supportive of the Administration's proposal that requires one agency to take the lead on evaluating projects. Many federal statues tie their approval/consultation requirements to those of the CWA – meaning that if a builder has to obtain a CWA permit, they must also obtain others, such as under the Endangered Species Act, National Historic Preservation Act, and National Environmental Policy Act. This means that builders not only have to consult with the Corps and EPA, but also with the Fish and Wildlife Service. And during these additional reviews, the developer does not have a seat at the table, and the consulting agencies are not bound by a specific time limit. This immediately places builders and developers at a disadvantage. These federal consultations, across multiple agencies, are just another layer of red tape that the federal government has placed on small businesses. Allowing builders to consult with one agency will ultimately reduce the time and resources needed to obtain a permit, while continuing to protect the environment.

The Administration's proposal offers the certainty the regulated community desires by giving the federal government a two year deadline to complete the permitting process. I cannot overstate how valuable this aspect of the proposal would be for my business. Having that certainty would allow us to predictably bring our product to market which not only benefits the home builder but also the home buyer.

In addition, we were pleased to see that the Administration's proposal included language that would reverse the Civiletti memorandum ("Civiletti Memo"). The Civiletti Memo, named for its author U.S. Attorney General Benjamin Civiletti, gives the EPA the final word on CWA 404 permits. The Civiletti Memo makes little sense given the Corps' expertise in administering the day-to-day operation of the 404 program. The Corps has decades of experience operating the 404 program and has conducted hundreds of thousands – perhaps millions – of CWA jurisdictional determinations and issued countless 404 permits over the years. EPA does not have this experience and does not make jurisdictional determinations nor issue section 404 permits. Yet, the Civiletti Memo allows EPA to delay, block, or second-guess the Corps' expertise in managing the 404 program. To address this, the Civiletti Memo should be rescinded and the government must confirm that the Corps has ultimate administrative authority to operate the 404 program, issue permits, and make jurisdictional determinations under the CWA.

While the Corps, not the EPA, should have authority over federal permitting, they must stop acting as a roadblock to states and tribes that wish to administer the CWA 404 permitting program for certain waters within their borders. Section 404(g) of the CWA authorizes states to assume authority to administer the 404 "dredge and fill" program in some but not all navigable waters and adjacent wetlands. Section 404(g)(1) describes the waters over which the Corps must retain administrative authority even after program assumption by a state. Only two states, Michigan and New Jersey, have been approved to assume the Section 404 program. While other states have explored assumption, those efforts have not borne fruit in part due to uncertainty over the scope of assumable waters and wetlands. Unfortunately, the Corps has sought to retain far too many waters under federal authority thereby contradicting the intent of Congress under 404(g). The Corps' overly expansive interpretation of waters and wetlands to be retained under Corps' authority leaves little, if any, waters for states to assume 404 permitting authority over. In giving authority to the states as envisioned by Congress, red tape in Washington will be cut and permit costs and delays for home building projects and related infrastructure projects will decrease.

In addition, the Corps must stop expanding CWA jurisdiction using supplements to the 1987 wetland delineation manual. To identify and delineate wetlands, the Corps published the "1987 Corps of Engineers Wetlands Delineation Manual" (the 1987 Manual). The 1987 Manual describes technical guidelines and methods to determine whether an area is a wetland for purposes of CWA Section 404 and subject to federal permitting. Over time, the Corps has made a practice of "supplementing" the national 1987 Manual with regional variations. These "regional supplements" relax the three-parameter test needed to determine that an area is a jurisdictional wetland, allowing regulators to reject scientific studies conducted by highly credentialed professionals, and arbitrarily make findings of wetland hydrology based on a single

observation of field indicators, such as ponding water on the ground surface or blackened leaves. Such use of unsupported field indicators expand the Corps' regulatory authority unlawfully. As more and more features, such as common woodlands and farm fields, become jurisdictional wetlands, more home building projects will face increased costs and delays. To avoid this undesirable outcome, the Corps must eliminate the regional supplements and assert jurisdiction only in instances where wetland plants, soils, and hydrology are actually present and clearly definable in the field by the Corps and private consultants.

Finally, Corps headquarters should assert centralized control and oversight over its regulatory program. Unfortunately, due in part to the absence of strong oversight and central guidance from Corps Headquarters on important regulatory interpretations, there has been inconsistency among Corps districts as they implement the CWA Section 404 program. These inconsistencies create uncertainty for both regulators and project proponents and make it difficult for Corps staff to administer the program. The results are increased project delays and costs. To reduce regulatory confusion stemming from district-by-district interpretations of regulations and guidance, Corps headquarters must establish clear lines of authority to direct the implementation of key regulations and policies. Until Corps headquarters makes this fundamental change, there will continue to be inconsistency, uncertainty, and delay associated with the CWA Section 404 permitting process.

Conclusion

After more than three decades of stalls, delays and changing federal requirements, our most recent project proposal totals 53.8 acres, a 233-acre reduction from the original development proposal. If constructed, the project will benefit the City and the public in the form of increased employment opportunities, increased property tax revenue estimated at well over $1.1 million per year, sales and use tax revenues, proffers for a school site, and increased public amenities.

For over thirty years we have complied with every request, modified our building plans, and created an extremely aggressive conservation plan to combat environmental impacts. It is difficult to say what else we can do to move this project forward. Most recently, at the request of the Corps and the EPA, we have conducted another extensive review of the feasibility of developing the 90 acres of uplands near Elbow Road; however, this again has been deemed infeasible as it would require rezoning which the City has recently denied to a similarly situated parcel, 2,000 feet south of our property. Most businesses do not have the time, money and fortitude to engage in these lengthy fights and are forced to abandon such projects. We believe this is the Corps main objective. We are fortunate to have the means to stay in this fight, and our Chairman, Edward Garcia, now 92, is dismayed that the very liberties and fairness that he and his three brothers fought for during WWII are now being eroded by an overzealous regulatory bureaucracy. Eddie is not about to step away from this fight because he understands how important it is not only for our project but also for all landowners. While the project remains at a standstill and we still have no clear end in sight, I hope that our story can be used to advance positive reforms to repair our broken regulatory system.

I encourage you to pass legislation that would implement some of these commonsense changes. I am hopeful that in the coming weeks, you will seriously consider a legislative proposal that will establish a permitting process that offers transparency, certainty and reasonable deadlines. This will go a long way towards improving the way we do business and making the homes we build more affordable.

Mr. FARENTHOLD. Thank you. And I am sorry for what you are having to go through.

Mr. DeGood, you are recognized for five minutes.

STATEMENT OF KEVIN DEGOOD

Mr. DEGOOD. Thank you. Thank you, Chairman Farenthold, Ranking Member Plaskett, and members of the subcommittee, for the opportunity to testify. It is a privilege to contribute to this committee's work.

In recent years, environmental review and permitting have come under sustained attack, often based on spurious claims about the length of time needed to complete Federal reviews. The President's infrastructure plan is only the latest example.

The hard truth is that infrastructure projects cost money, yet when taken together, the President's budget and infrastructure plan call for cutting $1.40 from existing Federal of the structure programs for every $1 of proposed expenditure. The net cut would reduce total construction activity. In Washington, everybody wants to go to the ribbon cutting, but nobody wants to pay the bill.

Instead of real spending, the President has proposed deep environmental deregulation. The White House and other opponents of environmental review paint a dire picture of a Federal bureaucratic Leviathan implacably turning out red tape to our collective detriment. If only, the argument goes, project sponsors didn't have to study the potential impacts of building, then everything would be cheaper, faster, and better. This tidy narrative is false.

First, environmental review produces better projects and saves taxpayers' money in the long run. History shows that building first and asking questions later often leads to irreparable social and ecological damage. Second, only a small fraction of infrastructure projects must complete a full review. And third, project review times for many categories of projects have actually fallen in recent years.

In 1969, Congress passed NEPA to address growing public concern over the serious community and environmental damage caused by Federal actions, including the construction of new infrastructure projects. The fundamental goal of NEPA is to allow informed decision-making by providing the public with detailed information on the potential harms associated with infrastructure projects. Failing to consider potential impacts from infrastructure projects is penny wise and pound foolish.

Take, for example, the Kissimmee River in Florida. The river carries water south from Lake Kissimmee to Lake Okeechobee, which then releases water into the Everglades and recharges the Biscayne aquifer, which provides drinking water to millions of residents of South Florida. In early 1960s, prior to NEPA, the Army Corps reconstruct the this 103-mile meandering Kissimmee River into a 56-mile-long, 300-foot-wide drainage canal in the name of flood control. The resulting environmental damage was so severe that Congress authorized the partial restoration of the Kissimmee River just 21 years after completion of the channelization project. When adjusted for inflation, the channelization cost $194 million, and the partial restoration will cost more than $1 billion, a fivefold increase in constant dollar terms.

Opponents of review often argue that transportation projects, especially highways, face inordinate delays. In fact, only 4 percent of highway projects require a full environmental impact statement. Since 2009, the average review time for major highway projects has fallen to 3.6 years. That may sound like a lot, but it's important to remember that mega-projects often come with mega-complexities. By rushing environmental review, we increase the risk of funding infrastructure that will produce substantial social and environmental harms that could have been mitigated with a bit of forethought and planning.

The push for further environmental deregulation is especially troubling since Congress has already voted three times in the past six years to speed the review process. In fact, Federal agencies have yet to promulgate many of the regulations implementing reforms to NEPA, included within MAP–21, WRRDA, and the FAST Act. Moreover, the Trump administration has yet to appoint a director for the Federal Permitting Improvement Steering Council or to appoint a head of CEQ. In short, Congress has granted the Federal executive numerous administrative and regulatory powers to speed the environmental review process. These reforms need time to be fully implemented and given time to work before further changes are made to law.

Unfortunately, these facts haven't stopped the Trump Administration from proposing to dramatically rollback review by shortening the statute of limitations for filing legal claims, allowing certain types of construction to proceed before review completion, and limiting the scope of alternatives analysis. These and other proposed changes would lead to less community input and greater environmental harms, including dirtier air and water.

In many respects, the fight over NEPA is a fight about values and power. Environmental review is the process by which we value people, places, and the environment by trying to minimize the harms from development. Review also serves to empower local communities. Moving critical information and decision-making out from behind closed doors where planners and developers tend to operate, yet without adequate time to study a project or the ability to seek legal remedy when mitigation efforts are inadequate, the concept of community and environmental protection lose their meaning.

Weakening environmental review would simply add to our fiscal burden by rushing construction of poorly conceived projects that would require extensive remediation later on. There are no shortcuts to fixing our nation's infrastructure backlog. The only real solution is for Congress to once again take the investment—I'm sorry, to make the investment necessary to ensure our country can prosper and compete for decades to come.

Thank you.

[Prepared statement of Mr. DeGood follows:]

An Examination of Federal Permitting Processes

Subcommittee on Interior, Energy, and Environment
Committee on Oversight and Government Reform
U.S. House of Representatives

Testimony by Kevin DeGood
Director of Infrastructure Policy
Center for American Progress
March 15, 2018

Thank you Chairman Farenthold, Ranking Member Plaskett, and members of the subcommittee for the opportunity to testify on federal environmental review and permitting. It is a privilege to contribute to this committee's work.

In recent years, environmental review and permitting have come under sustained attack—often based on spurious claims about the length of time needed to complete federal reviews. The President's infrastructure plan is only the latest example.

The hard truth is that infrastructure projects cost money. Yet, when taken together, the President's budget and infrastructure plan call for cutting a $1.40 from existing infrastructure programs for every $1 of proposed expenditure. This net cut would reduce total construction activity. In Washington, everybody wants to go to the ribbon cutting, but nobody wants to pay the bill.

Instead of real spending, the President has proposed deep environmental deregulation. The White House and other opponents of environmental review paint a dire picture of a federal bureaucratic leviathan implacably churning out red tape to our collective detriment. If only, the argument goes, project sponsors didn't have to study the potential impacts of building, then everything would be cheaper, faster, better.

This tidy narrative is false. First, environmental review produces better projects and saves taxpayers money in the long run. History shows that building first and asking questions later often leads to irreparable social and ecological damage. Second, only a small fraction of infrastructure projects must complete a full review. And Third, project review times have fallen in recent years.

In 1969, Congress passed the National Environmental Policy Act, or NEPA, to address growing public concern over the serious community and environmental damage caused by government action, including the construction of new infrastructure projects. The fundamental goal of NEPA is to allow informed decisionmaking by providing the public with detailed information on the potential harms associated with infrastructure projects. These harms could include anything from the loss of wetlands to the destruction of historic buildings or damage to the social, economic, or cultural character of a neighborhood.

Failing to consider potential impacts from infrastructure projects is penny wise and pound foolish. Take, for example, the Kissimmee River in Florida. The river carries water south from Lake Kissimmee to Lake Okeechobee, which then releases the water into the Everglades and recharges the Biscayne aquifer that provides drinking water to millions of people in Miami and across south Florida.

In the early 1960s, prior to NEPA, the Army Corps reconstructed the 103-mile meandering Kissimmee River into a 56-mile, 300-foot wide drainage canal to reduce flooding. The resulting environmental

damage was so severe that Congress authorized the partial restoration of the Kissimmee River just 21 years after completion of the channelization project. When adjusted for inflation, the channelization cost $194 million. The partial restoration will cost more than $1 billion—a five-fold increase.

Opponents of review often argue that transportation projects—especially highways—face inordinate delays. In fact, only 4 percent of highway projects require a full environmental review. Since 2009, the average review time for major highway projects has fallen to 3.6 years. That may sound like a lot, but it's important to remember that mega-projects come with mega-complexities. By rushing environmental review, we increase the risk of funding infrastructure that will produce substantial social and environmental harms that could have been mitigated with a bit of forethought and planning.

The push for further environmental deregulation is especially troubling since Congress has already voted three times in the past six years to speed the review process. In fact, federal agencies have yet to promulgate regulations implementing many of the reforms to NEPA included within MAP-21, WRRDA, and the FAST Act. Moreover, the Trump administration has yet to appoint a director for the Federal Permitting Improvement Steering Council established by Title 41 of the FAST Act or to appoint a head of the Council on Environmental Quality. In short, Congress has granted the federal executive numerous administrative and regulatory powers to speed the environmental review process. These reforms need to be fully implemented and given time to work before making further changes to law.

Unfortunately, these facts haven't stopped the Trump administration from proposing to dramatically rollback review by shortening the statute of limitations for filing legal claims, allowing construction activity to begin before review completion, and limiting the scope of alternatives analysis. These and other proposed changes would lead to less community input and greater environmental harms, including dirtier air and water.

In many respects, the fight over NEPA is a fight about values and power. Environmental review is the process by which we value people, places, and the environment enough to try and minimize the harms from development. Review also serves to empower local communities, moving critical information and decision-making out from behind closed doors where planners and developers tend to operate. Yet, without adequate time to study a project or the ability to seek legal remedy when mitigation efforts are inadequate, the concept of community and environmental protection lose their meaning.

Weakening or eliminating environmental review would simply add to our fiscal burden by rushing construction of poorly-conceived projects that will require expensive remediation later. There are no shortcuts to fixing the nation's infrastructure backlog. The only real solution is for Congress to once again make the investments necessary to ensure our country can prosper and compete for decades to come.

Mr. FARENTHOLD. Thank you. Ms. Katz, you are recognized for five minutes.

STATEMENT OF DIANE KATZ

Ms. KATZ. Thank you. Chairman Farenthold and Ranking Member Plaskett and members of the subcommittee, thank you for inviting me to testify today. My name is Diane Katz. I'm a senior research fellow in regulatory policy at the Heritage Foundation. The views expressed in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation.

Proponents of President Trump's infrastructure initiative claim that it would create millions of jobs, accelerate economic growth, and increase productivity. However, work must actually commence in order for benefits to accrue, and a variety of Federal, State, and local regulations imposes years of delay and higher costs that serve little purpose except to empower the Federal Government and antidevelopment activists.

Among the most problematic of these regulations are the National Environmental Policy Act, or NEPA, and the section 404 permitting regime under the Clean Water Act. Four decades of experience with both has exposed a raft of regulatory flaws, including politicized science, arbitrary standards, and protracted litigation. The average time—as the chairman referred to earlier, the average time to complete a NEPA impact assessment of a transportation project has expanded from 2.2 years in 197 to 6.6 years in the past 5 years.

Every day of delay increases project costs and postpones the benefits of modernized and safer infrastructure. NEPA is rendered largely obsolete by the vast number of categorical exclusions that agencies routinely grant to waive environmental reviews. The Federal Highway Administration alone grants more than 50 types of exclusions, and waivers constitute between 90 percent and 99 percent of State transportation projects. Even the Obama administration granted NEPA waivers to more than 95 percent of the projects funded by the American Recovery and Reinvestment Act of 2009. It makes us wonder what the use of regulation is if 90 percent of the time its compliance is waived.

The Clean Water Act section 404 permitting is also a regulatory quagmire. There is no agreement between Congress, the EPA, the Army Corps of Engineers, State and Federal courts, or the U.S. Supreme Court on the parameters of Federal wetlands jurisdiction. The regulatory uncertainty is costly to individuals, businesses, and the Nation.

Shoddy science also exacerbates the chaos of section 404 permitting. For example, the EPA established a scientific advisory board in 2013 to review the science on the conductivity of wetlands to downstream waters. The research was supposed to interpret the science on wetlands to help clarify Federal wetlands jurisdiction. But EPA didn't wait for the results before revising the wetlands regulation in 2015, a revision the dramatically expanded Federal powers over private property and spawned lawsuits nationwide.

The regulatory complexity of infrastructure projects is magnified to the extent that interagency coordination is necessary. Federal

agencies are constantly embroiled in political skirmishes simultaneously called to account by Congress, the White House, courts, and activists. Each operate by a different set of regulatory procedures and few if any observed deadlines. These and other regulatory hurdles undermine U.S. competitiveness. The United States ranked a measly 15th out of 33 OECD countries for ease of permitting in the World Bank's 2017 Doing Business study. Even Estonia and Portugal ranked higher. And the U.S. only ranked as mostly free in 2018 in the Heritage Index of Economic Freedom.

Since the passage of NEPA in 1969 and the Clean Water Act in 1972, there have been dramatic changes in America's economic, social, political, and environmental landscapes. Back then, NEPA was the vanguard of environmental protection, but today, there is no shortage of other regulations to protect water and air quality; wetlands and endangered species; and to control runoff, hazardous waste, construction debris, demolition dust, and every other byproduct of infrastructure modernization. Going forward, any new infrastructure funding should be conditional on meaningful regulatory reform, starting with repeal of NEPA and the devolution of section 404 permitting authority to States.

Thank you.

[Prepared statement of Ms. Katz follows:]

An Examination of Federal Permitting Processes
Testimony before the
Subcommittee on Interior, Energy, and Environment
Committee on Oversight and Government Reform
U.S. House of Representatives
March 15, 2018
Diane Katz
Senior Research Fellow in Regulatory Policy
The Heritage Foundation

The Trump Administration on February 12, 2018, unveiled a $1.5 trillion initiative to repair the nation's roads, bridges, airports, and railways. Proponents of the initiative claim that an infrastructure splurge would create millions of jobs,[1] accelerate economic growth, and increase productivity. However, work must actually commence in order to yield these supposed benefits, and a raft of federal, state, and local regulations impose years of delay that erodes the nation's quality of life and global competitiveness.

Among the most problematic of these regulations are the National Environmental Policy Act (NEPA) and the Section 404 permitting regime under the Clean Water Act (CWA). Four decades of experience with both statutes has exposed a raft of regulatory flaws, including politicized science, arbitrary standards, and protracted litigation.

The average time to complete a NEPA impact assessment of a transportation project—just one of several permitting hurdles—has expanded from 2.2 years in the 1970s to 4.4 years in the 1980s, to 5.1 years between 1995 and 2001, to 6.6 years in 2011.[2] Every day of delay increases project costs and postpones the benefits of modernized—and thus safer—infrastructure for little or no environmental benefit.

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[1]Researchers at Georgetown University calculated that a $1 trillion investment in infrastructure spending would create as many as 11 million jobs through 2027. See Anthony P. Carnevale and Nicole Smith, "Trillion Dollar Infrastructure Proposals Could Create Millions of Jobs—Will the New Jobs Lead to Sustainable Careers?" Georgetown University Center on Education and the Workforce, 2017, https://cew.georgetown.edu/wp-content/uploads/trillion-dollar-infrastructure.pdf (accessed February 22, 2018). Research by former Heritage Foundation analyst James Sherk challenges the claim that increased infrastructure spending would create jobs and boost the economy. According to Sherk, "These arguments have little empirical justification. Infrastructure projects require more physical and human capital than brute labor. Consequently, most workers hired on new federal construction projects would come from existing projects—not unemployment lines. Additional infrastructure spending would do little to reduce unemployment." See James Sherk, "Additional Infrastructure Spending Would Employ Few New Workers," Heritage Foundation *Issue Brief* No. 4081, November 7, 2013, http://thf_media.s3.amazonaws.com/2013/pdf/IB4081.pdf.

[2]AECOM, "40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance," U.S. Department of the Treasury, 2016, https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf (accessed February 22, 2018). The average time to prepare all types of NEPA-related environmental impact statements in 2016 was 5.1 years, according to: National Association of Environmental Professionals, "NAEP Annual National Environmental Policy Act (NEPA) Report for 2016," http://www.naep.org/index.php?option=com_content&view=article&id=285:NEPA_2016_Annual_Report&catid=19:site-content&Itemid=241 (accessed February 23, 2018).

The NEPA is rendered pointless by the vast number of "categorical exclusions" that agencies routinely grant to waive an environmental review. The Federal Highway Administration alone lists more than 50 types of such exclusions,[3] and waivers constitute between 90 percent and 99 percent of the NEPA decisions involving state transportation programs.[4] Even the Obama Administration granted waivers to more than 95 percent of the 192,707 projects funded by the American Recovery and Reinvestment Act of 2009.[5]

Section 404 permitting is also a regulatory quagmire; there is no agreement among Congress, the Environmental Protection Agency, the Army Corps of Engineers or the U.S. Supreme Court on the definition of "waters of the United States," the basis of federal jurisdiction for wetlands.[6] The regulatory uncertainty delays the repair of teeth-rattling roads, deteriorating bridges, and timeworn rails and runways.

It also inhibits investment. Mining consultancy Behre Dolbear notes that despite overall investor confidence in the United States, problems with permitting "creates sufficient uncertainty to sometimes destroy the viability of new projects."[7]

That's evident in various country rankings of business receptivity. For example, the United States ranked a measly 15th out of 33 OECD countries for ease of permitting, according to the World Bank's 2017 "Doing Business" study.[8] (Even Estonia, France and Portugal ranked better.) In the 2018 Heritage Index of Economic Freedom,[9] the U.S. was designated as " Mostly Free" (18th out of 180 countries).

Whatever the outcome of the Trump Administration's infrastructure initiative, Congress and the President must eliminate regulatory hurdles before committing tax dollars or soliciting private investment. Otherwise, a sizable proportion of the funds will be wasted fighting regulatory roadblocks instead of rebuilding the nation's infrastructure.

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[3]"23 CFR 771.117–FHWA categorical exclusions," Legal Information Institute, https://www.law.cornell.edu/cfr/text/23/771.117 (accessed February 23, 2018).
[4]U.S. Department of Transportation, "National Environmental Policy Act Categorical Exclusion Survey Review," November 27, 2012, https://www.fhwa.dot.gov/map21/reports/sec1318report.pdf (accessed February 23, 2018).
[5]The White House Council on Environmental Quality, "The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects," November 2, 2011, https://energy.gov/sites/prod/files/2013/09/f2/CEQ_ARRA_NEPA_Report_Nov_2011.pdf (accessed February 23, 2018).
[6]Daren Bakst, What You Need to Know About the EPA/Corps Water Rule: It's a Power Grab and an Attack on Property Rights, Heritage Foundation Backgrounder No. 3012, April 29, 2015, http://thf_media.s3.amazonaws.com/2015/pdf/BG3012.pdf
[7]Behre Dolbear, Where to Invest in Mining 2015, http://www.mining.com/wp-content/uploads/2015/08/WHERE_TO_INVEST_2015_08.pdf
[8]A high ease of doing business ranking means the regulatory environment is more conducive to the starting and operation of a local firm. The rankings for all economies are benchmarked to June 2017. See World Bank, Doing Business Economy Rankings, http://www.doingbusiness.org/rankings?region=oecd-high-income
Terry Miller, Anthony B. Kim, James M. Roberts, 2018 Index of Economic Freedom, Heritage Foundation, https://www.heritage.org/index/download
[9]Terry Miller, Anthony B. Kim, James M. Roberts, 2018 Index of Economic Freedom, Heritage Foundation, https://www.heritage.org/index/download

What is NEPA

The National Environmental Policy Act of 1969[10] requires federal agencies to assess the potential environmental effects of proposed government actions (including government financing, technical assistance, permitting, and regulations). Every executive branch department must comply, and individual projects often include multiple agencies.

As part of assessing the impact on the "environment," agencies are required to consider the aesthetic, historic, cultural, economic, and social effects of proposed actions.[11] This overly broad mandate provides virtually endless opportunities for bureaucratic wrangling and legal challenge.

As set forth by Congress, the purpose of NEPA is to:

> [E]ncourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.[12]

Such sentiments reflect lawmakers' faith that federal bureaucrats can dispassionately assess their own actions as long as they amass enough data and solicit public comment (including comment from local, state, municipal, and tribal authorities).[13] But the NEPA predates the Environmental Protection Agency (EPA) and virtually all of the nation's other environmental statutes, and thus its architects were relatively naive about the machinations of bureaucratic self-interest, the distortions of policy wrought by judicial activism, and the limits of environmental science. All of which have rendered the NEPA process costly, time-consuming, and riddled with conflict.

Unlike many other environmental statutes, the NEPA is not a "substantive" law; rather than mandate specific outcomes, it imposes procedural obligations on federal agencies. The Council on Environmental Quality (CEQ) within the Executive Office of the President *guides* (and only guides) agencies' implementation of the NEPA. However, each agency decides on its own assessment model and dictates whether or how to modify projects based on their interpretation of the NEPA.

There are several steps in the process:

- **Categorical Exclusion (CE).** A CE constitutes a type of NEPA waiver for a category of actions that do not significantly affect the human environment either individually or cumulatively.[14] An action that qualifies for a CE is not required to prepare an environmental assessment or an environmental impact statement.

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[10]National Environmental Policy Act of 1969, 42 U.S. Code 4321-4347, January 1, 1970, https://ceq.doe.gov/laws-regulations/laws.html (accessed February 22, 2018).

[11]Council on Environmental Quality, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," 40 CFR Parts 1500-1508, 2005, https://energy.gov/sites/prod/files/NEPA-40CFR1500_1508.pdf (accessed February 23, 2018).

[12]National Environmental Policy Act of 1969.

[13]Daniel R. Mandelker, "The National Environmental Policy Act: A Review of Its Experience and Problems," *Journal of Law & Policy*, Vol. 32, No. 293 (2010), pp. 293–312.

[14]Council on Environmental Quality, "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act."

- **Environmental Assessment (EA).** An EA determines whether the proposed federal action will significantly affect the environment. If the assessment indicates that the impacts will not be significant, the agency next prepares a Finding of No Significant Impact" (see below). If the impact is likely to be significant, the agency must prepare an "environmental impact statement."
- **Finding of No Significant Impact (FONSI).** This is the determination by the agency that a proposed action will not have a significant impact on the environment and therefore does not require further action under the NEPA.
- **Mitigated FONSI.** This is a determination by the agency that a proposed action will not require further action under the NEPA if mitigation requirements (such as erosion controls) are met.
- **Environmental Impact Statement (EIS).** An EIS is a thorough analysis of a proposed action's effect on the "human environment," as well as an evaluation of alternatives to the proposed action. As mandated by the Clean Air Act, the EPA reviews and comments on all environmental impact statements prepared under the NEPA.[15]
- **Record of Decision (ROD).** A ROD refers to the agency's rationale for choosing a specific course of action, including an account of the factors considered by the agency and the alternatives evaluated, a description of any mitigation measures to be implemented, and an explanation of any monitoring requirements.

The EPA is required to review the adequacy of each draft EIS and the proposed actions therein. If EPA officials deem the review unsatisfactory, the case is referred to the CEQ. (The EPA also publishes notices in the *Federal Register* soliciting public review and comment on pending EISs.)[16]

The NEPA in Practice

Congress intended the NEPA to be a planning tool for "integrat[ing] environmental concerns directly into policies and programs." In actuality, the process has become an administrative contrivance; agencies often conduct assessments—if they are undertaken at all—well after project planning is underway, and too late for the results to influence strategic choices as Congress intended.

Agencies control the result of a NEPA analysis by shaping its "scope," that is, delineating the purpose of and need for a project. This "scoping" will define the assessment parameters as well as the project alternatives that must be considered.[17] Consequently, the agencies effectively control the outcome of the NEPA review through deliberate scoping.

The result of this process is unavoidably political in nature, and not scientific.

The very heart of the NEPA—the EIS—is based on a conceptual view of the environment as static and predictable. Agencies construct a baseline measure of environmental conditions and

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[15]In the event that EPA officials regard an agency's review as "unsatisfactory from the standpoint of public health or welfare or environmental quality," the case is referred to the White House CEQ. However, the lead agency is not obligated to alter its proposed course of action in the face of objections from either the EPA or the CEQ.
[16]The EPA maintains a database of EISes: Environmental Protection Agency, "Environmental Impact Statement (EIS) Database," https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/search (accessed February 23, 2018).
[17]Mandelker, "The National Environmental Policy Act."

model the anticipated impact of a project. This approach disregards the resilience and dynamism of ecosystems.[18]

In reality, perfect information about the environment does not exist, nor can scientists accurately forecast how complex environmental systems will respond to ever-changing conditions over time. Therefore, the impact analyses are largely comprised of assumptions with weak predictive value. As noted by CEQ researchers in a study of NEPA effectiveness: "(W)e often cannot predict with precision how components of an ecosystem will react to disturbance and stress over time."[19]

Moreover, the NEPA is rendered pointless by the vast number of "categorical exclusions" (CEs) that agencies routinely grant to waive an environmental review. The Federal Highway Administration (FHWA) alone lists more than 50 types of such exclusions,[20] and a survey by the U.S. Department of Transportation found that waivers constitute between 90 percent and 99 percent of the NEPA decisions involving state transportation programs.[21] Even the Obama Administration granted waivers to more than 95 percent of the 192,707 projects funded by the American Recovery and Reinvestment Act of 2009.[22]

Any regulation for which 90 percent or more of compliance is waived is a pointless regulation.

Congress has tinkered with marginal reforms in several statutes, and the CEQ has issued more than 35 sets of guidelines on NEPA implementation—all of which have made the review process unpredictable and inordinately politicized.

There is significant variation in the documentation necessary to obtain a categorical exemption depending on the agency and the environmental issues of primary importance in any particular region. Just because a project obtains an exemption from one agency, there is no guarantee that other agencies will likewise grant one.

Public meetings and hearings are held throughout the review process, and every procedural step is open to legal challenge. Consequently, environmental purists have considerable opportunities to delay projects or to extort mitigation commitments.

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[18]Sam Kalen, "The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy," *William & Mary Environmental Law and Policy Review*, Vol. 33, No. 2 (2009), http://scholarship.law.wm.edu/wmelpr/vol33/iss2/4 (accessed February 28, 2018).

[19]Council on Environmental Quality, "The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years," January 1997, http://digital.library.unt.edu/ark:/67531/metadc31142/m1/1/ (accessed February 23, 2018).

[20]"23 CFR 771.117–FHWA categorical exclusions," Legal Information Institute, https://www.law.cornell.edu/cfr/text/23/771.117 (accessed February 23, 2018).

[21]U.S. Department of Transportation, "National Environmental Policy Act Categorical Exclusion Survey Review," November 27, 2012, https://www.fhwa.dot.gov/map21/reports/sec1318report.pdf (accessed February 23, 2018).

[22]The White House Council on Environmental Quality, "The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects," November 2, 2011, https://energy.gov/sites/prod/files/2013/09/f2/CEQ_ARRA_NEPA_Report_Nov_2011.pdf (accessed February 23, 2018).

Activists for years have used judicial review to challenge (and delay) development. The Government Accountability Office (GAO) has reported that the mere filing of a lawsuit and the project delays that result are often as important to plaintiffs as whether they ultimately prevail in court.[23]

Consequently, agencies seek to prepare litigation-proof analyses in hopes of staking a defensible position (and avoiding public embarrassment). Exhaustive demands for data and other information raise project costs and create years of delay. Companies trying to secure a federal permit are hardly in a position to complain.

The complexity of the NEPA is magnified to the extent that projects require interagency coordination. Federal agencies are constantly embroiled in political skirmishes, simultaneously called to account by Congress, the White House, courts, and activists. Few, if any, observe deadlines.

Under limited circumstances,[24] some states are allowed to assume authority for administering the NEPA review.[25] To date, the FHWA has authorized six states to prepare NEPA documentation for highway projects: Alaska, California, Florida, Ohio, Texas, and Utah. Federal officials monitor a state's actions and perform audits to ensure compliance with a memorandum of understanding between the state and federal governments.

Devolving NEPA administration to the states is certainly better than continuing the federal bureaucracy. But whether the states or the feds are calling the shots, the entire NEPA regime is redundant. Under the Clean Air Act, for example, federal, state, and even local regulators control demolition dust, emissions from construction equipment, and airborne debris from clearing land. State laws and the Clean Water Act regulate runoff from site surfaces as well as wetlands protection. The Endangered Species Act governs the effects of development on habitat and wildlife, and waste disposal is controlled under local and state statutes as well as the federal Resource Conservation and Recovery Act—to name a few. These and other regulatory mechanisms all provide opportunities for the government to impose the same mitigation actions available through the NEPA.

Failed Attempts to Fix NEPA

Since its passage in 1969, the NEPA has persisted despite dramatic changes in America's economic, social, political, and environmental landscapes—and enactment of countless other federal, state, and local regulations. The CEQ has issued more than 35 separate guidance documents upon which agency-specific requirements are based. However, guidance is purely

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[23]Government Accountability Office, "National Environmental Policy Act: Little Information Exists on NEPA Analyses," April 2014, https://www.gao.gov/assets/670/662543.pdf (accessed February 23, 2018).

[24]States must apply to the Department of Transportation's FHWA or the Federal Transit Authority, which review the state's suitability to assume the authority based on meeting regulatory requirements. States must sign a memorandum of understanding (MOU) with the federal agency and consent to the jurisdiction of federal courts by waiving sovereign immunity for any responsibility assumed for the NEPA. The MOU is for a term of not more than five years and may be renewed.

[25]The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU); the Moving Ahead for Progress in the 21st Century (MAP-21) Act; and the Fixing America's Surface Transportation (Fast) Act).

advisory in nature, and thus Congress has had virtually no say in the NEPA regulatory framework despite its application to a wide variety of federal actions.

Congress has enacted dozens of provisions to streamline the NEPA process since 2005.[26] Some of them might seem useful, such as limiting the comments of participating agencies to subject matter within its expertise or jurisdiction, or barring claims for judicial review of a federal permit for highway projects unless they are filed within 150 days of final agency action.

However, 22 of 34 highway project provisions and 17 of 29 transit provisions were optional.[27] An analysis by the GAO found that some state officials reported that the revisions were ineffective because they had already developed similar processes, either through agreements with the U.S. Department of Transportation or at their own initiative. As a result, those states did not realize any new time savings from the amendments.[28]

Trump Administration Reform Efforts

President Trump has likewise sought to streamline the NEPA beginning in his first month in office. Executive Order 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, directed agencies to designate select infrastructure projects as "high priority" for the purpose of expediting permitting reviews.[29]

Executive Order (EO) 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure,[30] instituted a policy of "One Federal Decision." The executive order calls for designating a "lead" agency for each major project to navigate NEPA reviews. Relevant agencies will compile reviews into a single ROD (unless the project sponsor requests otherwise).

The executive order also calls for reducing the processing time for environmental reviews to "not more than an average of approximately two years." Once an ROD is issued, permit decisions should be completed within 90 days.[31]

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[26]Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (2005), Public Law 109–59; Moving Ahead for Progress in the 21st Century (2012), Public Law 112–141; Fixing America's Surface Transportation Act (2015), Public Law 114–94.

[27]Government Accountability Office, "Highway and Transit Projects: Evaluation Guidance Needed for States with National Environmental Policy Act Authority," January 2018, https://www.gao.gov/assets/690/689705.pdf (accessed February 23, 2018).

[28]Ibid.

[29]The White House, "Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects," January 24, 2017, https://www.whitehouse.gov/presidential-actions/executive-order-expediting-environmental-reviews-approvals-high-priority-infrastructure-projects/ (accessed February 23, 2018).

[30]The White House, "Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure," Executive Order 13807, August 15, 2017, https://www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-discipline-accountability-environmental-review-permitting-process-infrastructure/ (accessed February 23, 2018).

[31]EO 13807 also calls for the director of the Office of Management and Budget to establish a "performance accountability system" to score agencies on the efficiency of their infrastructure permitting. The OMB Director will consider each agency's scorecard during budget formulation and determine whether penalties are appropriate.

In his order, the President stated: "Inefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations, have delayed infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment."

Meanwhile, on September 14, 2017, the CEQ published an initial list of actions it plans to take to further implementation of EO 13807.[32]

The President's infrastructure plan features numerous proposals to reform the NEPA and eliminate other regulatory barriers to permitting.[33] The most notable is the proposal to "Expand Department of Transportation NEPA Assignment Program to Other Agencies."

Current law allows only the Department of Transportation's FHWA and Federal Transit Authority to authorize states to administer NEPA reviews. The President is proposing to allow other agencies to do the same for other types of infrastructure projects. In addition, the President is proposing to allow states to make permit determinations required by the Clean Air Act,[34] and for flood plain protections and noise abatement for transit and highway projects.

Other significant reform recommendations in the infrastructure plan include:

- **One Agency, One Decision.** The President is proposing that a lead agency be required to develop a single NEPA review document to be used by all agencies, and a single ROD to be signed by all cooperating agencies (similar to the "One Federal Decision" directive in EO 13807). The proposal also calls for a firm deadline of 21 months for lead agencies to complete their environmental reviews and issue either a FONSI or ROD, and a firm deadline of three months thereafter to approve or reject the permit application.
- **Performance-based pilot projects.** The President is proposing to use environmental performance measures in place of environmental reviews for up to 10 projects (based on project size, national or regional significance, and opportunities for environmental enhancements). The project sponsor would agree to design the project to meet performance standards and permitting parameters established by the lead federal agency (and public comment) in lieu of an environmental review.

A second pilot would authorize the Secretary of Transportation (or other infrastructure agencies) to negotiate mitigation agreements that address project impacts in lieu of NEPA review. The mitigation could include the purchase of offsets, avoidance of anticipated impacts, and in-lieu-fees dedicated to an advanced mitigation fund.

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[32]Council on Environmental Quality, "Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process," *Federal Register*, September 14, 2017, https://www.gpo.gov/fdsys/pkg/FR-2017-09-14/pdf/2017-19425.pdf (accessed February 23, 2018).

[33]The White House, "Legislative Outline for Rebuilding Infrastructure in America."

[34]This provision would not change the EPA's responsibilities under the Clean Air Act.

- **Revise statute of limitations for infrastructure permits or decisions.** Under current law, legal challenges to infrastructure permits may be filed up to six years after the decision has been issued.[35] The President is proposing to revise the statute of limitations to 150 days.

Useful as such proposed reforms may seem, there is no fixing the NEPA. Predating the EPA, the NEPA was at one time the legislative vanguard for environmental law and regulation. But that was nearly 40 years ago, and it is now out of sync with current environmental, political, social, and economic realities. In fact, the intended goal of environmental stewardship is actually thwarted by agencies' circumvention of the NEPA reviews, the project delays, and the higher costs imposed by the redundant regime, as well as by the politicization of science and the influence of special interests.

Simply put, the NEPA cannot be fixed, it must be rescinded.

The Chaos of Section 404 Permitting

Congress enacted the Clean Water Act of 1972 ''to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'' Section 404 of the act prohibits the discharge of any pollutants, including dredged or fill material, to ''navigable waters,'' except in accordance with the Act. The CWA states that the term "navigable waters" refers to "the waters of the United States." However, the statute provides no further definition, which has led to decades of costly regulatory disputes and arbitrary enforcement.

The EPA administers most provisions of the CWA, but the U.S. Army Corps of Engineers administers Section 404 permitting. In 2014, the two agencies proposed a new 88-page definition that vastly expanded the scope of federal jurisdiction over wetlands. (It drew 698,000 public comments.)[36] The new definition, finalized in 2015, hardly settled matters; it prompted numerous lawsuits nationwide instead.

The deeply flawed 2015 rule was stayed nationwide by the U.S. Circuit Court of Appeals for the Sixth Circuit. As a result, the agencies have administered Section 404 under the definition of ''waters of the United States'' in place before the 2015 Rule.[37]

President Trump in February 2017 issued an executive order[38] requiring the EPA and the Corps to solicit public comment on rescission or revision of the 2015 rule. On January 22, 2018, the Supreme Court held that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule.

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[35]When states assume NEPA administration, the statute of limitations is two years. A statute of limitations of 150 days would be consistent with the statute of limitations Congress already has enacted for surface transportation projects.

[36]Tiffany Dowell Lashmet, Murkey Water: The ongoing debate over the 'waters of the United States," PERC Reports, Vol. 36, No. 2, Winter 2017, https://www.perc.org/2017/12/08/murky-water/

[37]On January 22, 2018, the U.S. Supreme Court held that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule.

[38]Executive Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ''Waters of the United States'' Rule, February 28, 2017, https://www.gpo.gov/fdsys/pkg/FR-2017-03-03/pdf/2017-04353.pdf

The EPA's shoddy science has only exacerbated the chaos enveloping the Section 404 permitting regime. For example, the agency established a scientific advisory board in 2013 (supposedly) to review the state of the science on the connectivity of streams and wetlands with downstream waters.[39] According to the EPA, the report, when finalized, "will provide the scientific basis needed to clarify CWA jurisdiction, including a description of the factors that influence connectivity [of streams] and the mechanisms by which connected waters affect downstream waters."[40]

Alas, the agency didn't wait for the report before proposing the 2015 rule. Consequently, the public was never given the chance, through the rulemaking process, to challenge the scientific basis of the agencies' expanded jurisdiction.

Indeed, federal agencies too often mask politically driven regulations as scientifically based imperatives. The supposed science underlying these rules is often hidden from the general public and unavailable for vetting by experts. But credible science and transparency are necessary elements of sound policy.

The NEPA process is likewise mired in politicized science and uncertainty. Instead of producing environmental analyses of high technical quality, some scientists have criticized the NEPA assessments as nothing more than "massive amounts of incomplete, descriptive, and, often, uninterpreted data."[41] And the more complex the proposed action, the more flawed the data and analysis will be.[42]

On the upside, the CEQ in April 2017 announced the withdrawal of its guidance for federal agencies' consideration of greenhouse gas emissions in NEPA reviews.[43] The extent to which greenhouse gases affect climate—if at all—remains undetermined and government modeling amounts to little more than guesswork.

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[39]Environmental Protection Agency, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft)," September 24, 2013, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345 (accessed April 15, 2015).

[40]Ibid.

[41]Sonja Klopf, Nada Wolff Culver, & Pete Morton, A Road Map to a Better NEPA: Why Environmental Risk Assessments Should Be Used to Analyze the Environmental Consequences of Complex Federal Actions, Sustainable Development Law & Policy, Fall 2007, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1155&context=sdlp

[42]Sonja Klopf, Nada Wolff Culver, & Pete Morton, A Road Map to a Better NEPA: Why Environmental Risk Assessments Should Be Used to Analyze the Environmental Consequences of Complex Federal Actions, Sustainable Development Law & Policy, Fall 2007, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1155&context=sdlp

[43]Council on Environmental Quality, Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, Federal Register, April 5, 2017, https://www.gpo.gov/fdsys/pkg/FR-2017-04-05/pdf/2017-06770.pdf

Conclusion

President Donald Trump's infrastructure plan features 15 pages of recommendations to streamline permitting.[44] The very fact that so many provisions warrant reform illustrates that there is more wrong than right with the NEPA and other permitting regimes. Any new infrastructure funding should be conditional on meaningful regulatory reform—starting with repeal of the NEPA.

[44]The White House, "Legislative Outline for Rebuilding Infrastructure in America," February 12, 2018, https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf (accessed February 23, 2018).

Mr. FARENTHOLD. Thank you very much.

We will begin our questioning with the gentleman from Alabama, Mr. Palmer. You are recognized for five minutes, sir.

Mr. PALMER. Thank you, Mr. Chairman. I might need about 30 minutes, but I will try to do it in five, maybe a little grace from the chairman.

This is an issue near and dear to my heart and close to me, particularly with my district. Mr. Iwanicki, early last year, the committee held a hearing on environmental barriers to infrastructure development, and one of the witnesses was Richie Beyer. He is the county engineer in Elmore County, Alabama. In his testimony, he used the example of a simple project to place a 1.5-inch-thick wearing surface on roadway, and he noted that the completion, the project file will be 20 times thicker than the overlay that was placed on the road. The cost an average would be two times more than a similar project funded solely with local funds. It was $160,000 per mile under the Federal guidelines versus 80,000 local only. And the project will have taken 9 to 12 months longer than if it had been a local project, all for a road that is materially the same, regardless of the funding source. Does this track with your experience in Marquette County?

Mr. IWANICKI. I would say it tracks perfectly with our experience in Marquette County. Our costs are much lower when we can use local money and it's a locally bid project and we have to follow the same regulations. But as soon as we get Federal money involved, it skyrockets its costs.

Mr. PALMER. How important is it to you to provide a reliable service on rural roads? This is a rural road.

Mr. IWANICKI. The Marquette County Road Commission serves about 67,000 people, and we're the largest county in Marquette County. We have about 1,274 miles of local county road that we take care of. I have $150 million need to fix our local roads, and that's with about a $14 million budget. So my constituents depend on the Road Commission to do the best they can with our limited resources to make smooth roads for them.

Mr. PALMER. And you are certainly well aware that even though rural roads represent less than half of traffic in the United States, it represents over 50 percent of traffic fatalities?

Mr. IWANICKI. You are correct.

Mr. PALMER. Okay. On bigger projects, one in particular is in my district. It's the northern beltline. This was a project that was approved—funding was approved for this in 1989, and typically, it takes 15 to 20 years to complete a project like this. What this is is the completion of the beltline around the city of Birmingham of I–459. It is a Federal project. It is a multi-lane highway. It is absolutely essential not only for economic opportunity in the Birmingham metropolitan area but for the whole region. It improves east/west traffic, economic traffic between Atlanta west and north/south traffic from the Gulf Coast to up north. And like I said, it typically takes 15 to 20 years. This was approved in 1989, and now they are saying that it might be completed in 2054. Ms. Katz, would you like to comment on that?

Ms. KATZ. What's ironic in those types of instances—and unfortunately, they're not all that rare—is that many of these projects

have environmental benefits that are foregone in the name of environmental permitting. If you have new road projects that are going to reduce the amount of, you know, traffic jams and so on and make routes quicker, those are environmental benefits. There are also a number of safety—public health and safety benefits to having more modern infrastructure, and so there's a lot that we lose. It's not just money that we lose. There a lot more important things that we lose for these projects and permitting go off the rails.

Mr. PALMER. Let me read a couple of quotes from a Pew Charitable Trust report from Stateline about this. They actually talk about this project in Alabama, but here are a couple of statements, one from Philip Howard, founder and chairman of the Common Good, a nonpartisan group focused on good government. He says, "A delay is bad for the environment, it is bad for the economy, it is bad for jobs, it is bad for global competitiveness. There is nothing good about it."

Now, here's a comment from Bill Reinhardt, editor of a monthly newsletter called Public Works Financing. He said, "You delay the benefit the project was supposed to deliver. If the project was supposed to be delivered in 2012 and it isn't delivered until 2022, then you delay all the economic benefit, the lifestyle benefit, the employment benefit. If you don't deliver the public good, the public suffers." How would you respond to that?

Ms. KATZ. I'd say that's absolutely corrects, and what's tragic about it is that it's avoidable.

Mr. PALMER. It certainly is. Mr. Chairman, going back if I may if you will indulge me for just another minute or so ——

Mr. FARENTHOLD. Without objection, the gentleman is recognized for another minute.

Mr. PALMER. Thank you. Going back to the county engineer Richie Beyer's testimony, he is talking about a situation where they had a flood and it washed out a pipe. And they wound up having to get all the permitting, and they spent almost a quarter of the funding that was necessary for this just to get—before they could even start the project. What should have taken just a few weeks wound up taking months. And this made the road impassable.

That's the kind of stuff that we are dealing with right now. We have overregulated ourselves, we are overregulating our infrastructure, and it makes it extremely expensive, much more expensive than it ought to be. I think that's what we ought to be talking about in our infrastructure funding efforts.

I yield back, and I thank the chairman for his indulgence.

I would also like to enter the Pew article into the official record if I may.

Mr. FARENTHOLD. Without objection, so ordered.

Mr. FARENTHOLD. I will now recognize the ranking member for her questions for five minutes.

Ms. PLASKETT. With the chair's indulgence, I would ask that Mr. Raskin go ahead of me.

Mr. FARENTHOLD. We will recognize the esteemed professor for five minutes.

Mr. RASKIN. Mr. Chairman, thank you very much, and, Ms. Plaskett, thank you.

Welcome to all of our witnesses.

So I am new to the whole issue, so I am looking for clarification here because I know it is being said that section 404 is responsible for slowing down needed infrastructure improvements, and I know that this story has been invoked by the President in his infrastructure plan as well. But I want to make sure I know exactly what the law is so we are all clear in terms of the terms of the discussion.

The NEPA requires Federal agencies to evaluate the potential environmental effects of major actions. It does not prohibit any action at all, is that right, Mr. DeGood?

Mr. DEGOOD. That's correct.

Mr. RASKIN. Okay.

Mr. DEGOOD. It's a procedural statute.

Mr. RASKIN. And so it really requires the decision-makers be methodical and transparent about considering the environmental impact of their projects. Is that right?

Mr. DEGOOD. Correct.

Mr. RASKIN. Okay. Is it true that it forces all projects to go through a detailed environmental review process and environmental impact statements?

Mr. DEGOOD. No, I mean it varies by project category, but it's usually in the single-digit percentages.

Mr. RASKIN. Of all of the projects that are coming forward?

Mr. DEGOOD. Correct.

Mr. RASKIN. Okay. And I have heard reference to the fact that 95 percent of projects are categorical exclusions. Is that because they just don't have sufficient environmental impact to make a difference? And what happens to a categorical exclusion project? How long does that take? Does it take years or months to get that through or ——

Mr. DEGOOD. You know, I can speak most directly about surface transportation and say that there are two kinds of categorical exclusions, those that are documented and those that are undocumented. For an undocumented, it can be a matter of a few days, and for a documented, potentially a few months but almost never longer than that. So in the time it takes you to put together a bid prospectus, you can have all of this documentation wrapped up.

Mr. RASKIN. So you are saying in more than 9 out of 10 cases it would be a categorical exclusion, and you are talking about a matter of months or weeks or even a few days?

Mr. DEGOOD. Yes.

Mr. RASKIN. Okay. Around 4 percent are environmental assessments. What does that mean and how long does that take?

Mr. DEGOOD. So environmental assessments can vary quite a bit if you're not sure whether or not your project is likely to have a substantial impact. Sometimes you'll undertake an environmental assessment, which is typically a shorter process. That's a little less involved. And during that process, if you come across something that is going to be a significant impact, you can expand it to be a full environmental impact statement. And if not, you come to the end of that process and you have a finding of no significant impact, then you can proceed with your project.

To show you that that's not just small projects in terms of either dollars or scope, here in northern Virginia the I–66 public-private partnership to expand that facility outside the Beltway had a two-step process. They first started with the tier 1 EIS but then ultimately were able to complete that entire environmental review under the environmental assessment. So it's not just that EA is applied to smaller projects or small-dollar projects. They can apply to very big multi-billion-dollar facilities.

Mr. RASKIN. Okay. So 1 percent or fewer of the projects then require environmental impact statement. How do I know if my project is going to require an environmental impact statement? Whose decision is that?

Mr. DEGOOD. Well, ultimately, it's the Federal Government's decision, but you as the project sponsor are going to have a very good sense of that going into it. So if you're doing something like, say, repaving an existing State highway inside of the active right-of-way, it's likely that you're going to have a categorical exclusion. If you're engaging in a greenfield construction, which is to say you're building out into an area which is not currently developed, it's almost assuredly going to be the case that you need to have a full environmental impact statement.

Mr. RASKIN. Okay, but I have heard different people raise disagreements over this or that project, and obviously we can't relitigate the whole administrative process. That is why we have an administrative process. So without entering into the specifics of any particular project, is it that the case that we could cut this process in a way that would save hundreds of billions of dollars for the economy? And does this really have hundreds of billions of dollars of impact on the economy?

Mr. DEGOOD. No. I mean, many of the figures in the Common Good report I rebutted in a piece that we have up on our website. A lot of the assumptions and a lot of data in that just simply were not sound. There are not hundreds of billions or trillions of dollars' worth of savings to be had for shortening or eliminating environmental review.

Mr. RASKIN. I mean, it sounds good. If we could do it, I think most people would want to do it, but it does seem, given that such a tiny fraction of the cases even go through the environmental impact statement stage, that it seems hard to believe. Okay. I think my time is up, so, Mr. Chairman, I will yield back. Thank you.

Mr. FARENTHOLD. Thank you very much. We will now recognize the gentleman from Kentucky, Mr. Comer, for five minutes.

Mr. COMER. Thank you, Mr. Chairman.

Ms. Katz, my first question is can you describe the steps a local government or private developer must take to follow NEPA?

Ms. KATZ. You probably can't account for all of them because there are so many, but if there is any nexus with the Federal Government in the project, then the—you know, the company has to obtain a review or a categorical exclusion from the Federal Government. Contrary to what Mr. DeGood said, there's no way of knowing whether or not you'll have to do in EIS because different agencies can make different decisions in different ways about what kind of assessment you'll have to undertake.

That's just the beginning—the very beginning of the process. There are—you know, depending on the type of projects, State—we have the State and Federal regulations and permits that one has to, you know, apply for and receive.

Mr. COMER. But why is the process so slow?

Ms. KATZ. Why is government so slow?

Mr. COMER. That is right.

Ms. KATZ. You know, there is—you have different agencies all working in different ways at different time periods and, you know, I think if you had this going on strictly at the State level, there'd be—you know, you'd—there'd be a lot more accountability in terms of, you know, getting people to act. Unfortunately, Washington doesn't much care about what's happening in Marquette, and it tends to move—and the Federal Government has so expanded its reach that it has so much to do, it just takes a very long to do everything.

Mr. COMER. Let me ask, on average, how long does it take for an applicant to get signoff that their project is a NEPA complaint on average?

Ms. KATZ. The fact—the data I have is for transportation projects, and so it takes on average now almost 7 years, whereas in Europe, where they also do environmental permitting, it takes about two years.

Mr. COMER. It is bad that Europe, with their type of government, can get it done that much faster than the United States. Let me ask, how can the process be improved to facilitate infrastructure growth?

Ms. KATZ. Well, I don't think we need NEPA at all. I mean, NEPA was, you know, developed in 1970, and since that time, we have, you know, a plethora of other environmental safeguards. Most agencies treat NEPA as pro forma anyway, so I think getting rid of NEPA would help. There are a lot of projects that don't undergo the most intensive assessments. The problem is that you'd never know which ones will, and those that do cost a great deal.

Mr. COMER. My last question, you can explain how does the high cost of permitting affect taxpayers.

Ms. KATZ. Well, this goes, you know, to what we were talking about, opportunity costs. For every day of delay, the cost of Federal projects increase of course, and that leaves fewer resources to do a great many other things. Also, infrastructure improvements produce environmental, public health, and economic benefits, and all of those, you know, are delayed by regulatory barriers.

Mr. COMER. Well, I really appreciate ——

Ms. KATZ. Not to mention even the loss of our economic freedom. That's incalculable of course.

Mr. COMER. Absolutely. And I appreciate your answers to the questions. I appreciate everyone who testified. You know, it is a goal of this Congress and this administration to try to reduce the regulatory burden. I appreciate the Chairman for bringing this topic to be discussed today in committee, and hopefully, this Congress can begin to take steps to try to ease the regulatory burden so that we can get more development done, you know, in the right way but by significantly reducing the regulatory burden and compliance that is holding back the private sector and holding back

local governments from expanding and investing in the infrastructure that they need.

But thank you, Mr. Chairman. I yield back.

Mr. FARENTHOLD. Thank you very much. We will now recognize the ranking member for five minutes.

Ms. PLASKETT. Thank you, Mr. Chairman. We have been talking quite a bit about infrastructure, and in my opening statement I discussed the President's infrastructure plan with a budget cut of $122 billion from the highway trust fund. Mr. DeGood, what would you predict what happened to the Nation's highways if the plan to cut $122 billion goes into effect?

Mr. DEGOOD. Well, I think we can say with a great deal of certainty that there would be a reduction in the total amount of maintenance and construction work happening around the Nation. We should also recognize that the highway trust fund is something that provides funding to every community, big and small, urban and rural. And one of the real challenges with the cuts that the President is proposing is that it would have this regional impact. Places that are struggling economically would not be able to go out and raise the kinds of revenues that this administration is talking about them doing, and I think would lead to further regional economic and social inequality.

Ms. PLASKETT. I know that the civil engineers have given us a D-plus. With these budget cuts, do you—I am concerned about what our grade will be after that. Are you?

Mr. DEGOOD. Absolutely. I think there would be some States and some metropolitan regions that have more dynamic economies today that might be able to raise additional revenues, and maybe those regions wouldn't fall behind, but I think that they are more the exception than the norm. For instance, this White House has pointed to ballot initiative that was passed in Los Angeles County Measure M in 2016 by more than two-thirds of county voters. It's important to remember that Los Angeles County has an annual GDP of more than $700 billion. It's not particularly representative of the rest of the country. I myself am from Toledo, Ohio, and I know that Toledo does not look like Los Angeles and would struggle to try to match with that kind of revenue base.

Ms. PLASKETT. I don't think many of us look like Los Angeles. Having grown up in New York, I think that is a good thing, maybe not a bad thing. But one of the things that you are talking about in terms of just revenue growth and growth in revenue—and for me, one of the other things that we look at when we talk about infrastructure is jobs and the importance of jobs. How many jobs could $2 trillion in infrastructure spending create? Is there an extrapolation that will be able to tell us what that is?

Mr. DEGOOD. Rough estimates on Federal infrastructure spending are that every $1 billion produces roughly 12,500 direct and indirect jobs per year, so if you want to talk about $2 trillion, you'd have to factor in sort of over how many years that was. But if you're saying $200 billion a year, so $200 billion times 12,500 is a rough estimate of what the annual job creating power of that would be.

Ms. PLASKETT. So if the same one would $200 billion in cuts be equal to two—so that's not a loss of jobs but just jobs not realized, correct?

Mr. DEGOOD. I think some of that is a loss of jobs and some of that is the jobs are not realized. It partly depends on whether or not States would try to step up and fill that void. And as I mentioned previously, I think some would be able to and some would not.

Ms. PLASKETT. Ms. Katz, you discussed that you didn't think that NEPA was really necessary, that it was pro forma in some respects. I know that Congress recently did reforms to NEPA. The FAST Act is supposed to have streamlined the permitting process and expanded the list of activities that receive categorical exclusions from environmental review. Do you have any reports which show what the outcome of the FAST Act reform has been?

Ms. KATZ. What I did for a recent report is that I went through both the—or the MAP–21 Act, the FAST Act, and the—I'll tell you where it is in the second—the SAFETEA–LU Act, and I looked at whether the reform was optional or a requirement. And the vast majority of the so-called reforms were categorical exclusions, and there were a handful of requirements. And from what I've been able to tell, it hasn't done anything.

Ms. PLASKETT. But how do we know what the effects of the FAST Act have been? You are looking at what the acts were supposed to give, but in fact we don't have reports as yet on what the FAST Act—what the streamlining reports have shown to be able because it has been so recent, has it not? I mean, ——

Ms. KATZ. Well, it hasn't changed the fundamental problems with NEPA. That's why we ——

Ms. PLASKETT. But we don't know if Congress' reforms have actually had an effect as yet. Mr. DeGood, do you know what the effects of those reforms have been? Do we have statistical analysis as yet as to what Congress' reforms have done?

Ms. KATZ. I don't know.

Mr. DEGOOD. We do not. I mean, the simple answer is we do not. I believe there are three covered projects, which have been put under the FAST–41 dashboard. But because this administration has not appointed a director to that Permit Steering Council, it's really not performing at the way Congress had intended. So I think what we need to do is give it more time and push the administration to take advantage of all the authorities that Congress has already given them.

Ms. PLASKETT. So my conclusion would be—and I see that my time is up at this point—is that Congress has done some reforms as yet through the FAST Act to streamline the permitting process. However, we are asking now to—we are having hearings to do even additional streamlines to that, but we haven't even seen what the reforms that we recently passed have been. And it would be my position that we should wait for the reports to come back, impress on the President the need to fill those slots so that Congress can get the statistical analysis to determine if there is additional work that needs to be done. Thank you.

Mr. FARENTHOLD. Thank you. I will now recognize myself for five minutes.

Mr. Iwanicki, I heard the story about all the back and forth you went with the EPA and Corps of Engineers. To me, it just sounds crazy. The Corps and the EPA and your county government, the State government of Michigan, aren't we all supposed to be on the same team looking out for the people and the environment?

Mr. IWANICKI. I believe you're correct, and I guess that was the most frustrating part of the whole experience is that the EPA kept moving the goal posts on us. They kept moving the goal line, and every time we came up with ——

Mr. FARENTHOLD. Did somebody in your office just make somebody at the EPA mad and say we are going to stick it to them or do you think this is—I mean, was there personality problem? It seems ——

Mr. IWANICKI. I don't think there was a personality problem. I think there was an issue problem. And I think they were trying to make an issue, in my opinion, of mining in the upper peninsula of Michigan. And, you know, we are—helped build this country with our copper mining and iron ore mining, and we are a resource area for this country. And when you have places like Copper Harbor, Ironwood, Iron Mountain and you got two local papers called the Mining Gazette and the Mining Journal ——

Mr. FARENTHOLD. I have visited the area. I have actually ——

Mr. IWANICKI.—those resources are important to us, and we need to make sure that we do it responsibly and have the ability to get those resources to the rest of the country.

Mr. FARENTHOLD. Just out of a point of personal curiosity for me, you talked about bear and cougar crossings. How do those work? My experience with most wild animals in Texas is they cross the road where they want to cross the road.

Mr. IWANICKI. That was a very frustrating issue with this permit process because, you know, up until like a month before or several months before, they didn't even recognize cougar in the upper peninsula of Michigan. And when asked where they wanted them, they would not tell us where they wanted of them, and they wanted also to place fencing to channel the animals to those crossings.

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

Ms. Wilkinson, you talked about your long process. I think you outlined three definitional changes of what a wetland is based on the Corps and the EPA. Is there a settled-upon definition now?

Ms. WILKINSON. It varies from district to district. The regulations are extremely confusing and vague and seem to be capricious in their application. Our experts in the field who this is their life what they do, can't second-guess and can go in knowing what is going to be claimed as jurisdictional, and a lot of that has to do with primary and secondary indicators.

Understand in our area in Chesapeake, Virginia, the land we're often talking about a seasonably wet. "To the surface" means actually 12 inches below the surface, and it is—it's non-titled forested land, so if you went out and walked on it or were on it, you would not think of this as the type of wetland aquatic resource that we typically do. And ——

Mr. FARENTHOLD. There are no endangered species or anything that ——

Ms. WILKINSON. No. We have gotten letters to that extent. That has been dealt with with U.S. Fish and Wildlife.

Mr. FARENTHOLD. And you have actually offered to mitigate on additional property and create substantially more wetlands than would be affected under every ——

Ms. WILKINSON. Yes.

Mr. FARENTHOLD.—every Corps report, is that correct?

Ms. WILKINSON. Yes, absolutely we did, and that's why the DEQ held us up kind of as an epitome of the permitting process when we, again, through the 404 regulation, so that's a ——

Mr. FARENTHOLD. So does this change based on—I know the Corps rotates in new colonels every three years. Does this change based on that leadership or do you think it's beyond just who happens to be in charge of your Corps district at the time?

Ms. WILKINSON. It's a combination. It changes at the Corps, changes at the EPA, also the changes in the interpretations or the regulations when the supplements come out or any additional information. So it's kind of all of the above adds to this ever-changing environment.

Mr. FARENTHOLD. Okay. And, Ms. Katz, you talked about waivers that came out specifically during the stimulus under the previous administration. And are the waivers sometimes politically based or are they more factually based? I mean, how arbitrary is the waiver process?

Ms. KATZ. Well, what I can tell you is that each agency comes up with its own waivers, and the—there is no oversight over, you know, whether the waivers they come up with, you know, have a solid basis beneath them. So there's a great deal of arbitrariness in terms of what a waiver is and who gets it.

Mr. FARENTHOLD. And just real quick because I am out of time, but I do want to ask one other question if the committee will indulge me. Mr. Iwanicki suggested that maybe part of his issue getting permitted was the environmental effects of something that the road would be servicing or the policy of not wanting to do mining in that area. Do you see that in other places, Ms. Katz?

Ms. KATZ. Absolutely. I'm a regulatory expert, and I follow all of these things very, very closely. And the political science drives much of our regulatory decision-making and policy much more than natural science.

Mr. FARENTHOLD. All right. Thank you. I see I did go over 45 seconds. Thank you for the indulgence.

I think before we vote we do have time for one more round of questioning since there are only three of us here. So I will recognize Mr. Palmer again for five more minutes.

Mr. PALMER. Thank you, Mr. Chairman.

First of all, Mr. DeGood said that about 9 out of every 10 projects are not subject to delay. Is that correct?

Mr. IWANICKI. Again, it depends on the category of project that we're talking about, but ——

Mr. PALMER. Small projects, for instance? I meant across different Federal agencies, but yes. Typically speaking—and again, I can speak most to service transportation—yes, 9 out of 10 are better ——

Mr. PALMER. That hasn't been our experience in Alabama, so I am not going to dispute what you are saying, although I think we will research it extensively to see if that is the case. But like I said, it is not our experience in Alabama. But given that you have made that statement that 9 out of 10 small projects are not subject to delay, would you support an exemption of projects that are less than $5 million in Federal funding, which was, you know, based on the flexibility that was in MAP–21 and the FAST ACT? Could we

——

Mr. IWANICKI. Impacts are not tied to the dollar amount. The impact has to do with the type of work in question.

Mr. PALMER. No, I am asking you ——

Mr. IWANICKI. No, I would not. No, I would not. It's not a question of dollars.

Mr. PALMER. I didn't think you would, but I thought I would ask you anyway just in case. But I want to give you an example of—and this is in your district I believe or close to it. It may not be. I don't know all the districts in Texas, but in Houston I got small, medium, and large. It sounds like ——

Mr. DEGOOD. Everything is large in Texas.

Mr. PALMER. Yes, everything is large in Texas, but when you hear this, you are going to appreciate how large some things are in Texas. For instance, for a small project, a 2.7-mile-long widening of a local road, it was delayed 33–1/2 months, and it cost $96,000 a month, Mr. Chairman, in delays, $3.5 million total. Now, you get to the medium-sized projects, which was on U.S. Highway 59 that was a 2.6-mile-long widening, that was delayed almost 5 years, and that cost $297,000 a month. That's almost $18 million. And then one more large—and we won't stay on this line—it is a 1.5-mile-long interchange on I–10, that was an 11-month delay, $447,000 per month, $5.1 million. It is an enormously wasteful deal going on here with a lot of permitting delays that are absolutely unnecessary.

I yield back.

Mr. FARENTHOLD. Thank you very much.

I will now recognize Ms. Plaskett for five more minutes of questions.

Ms. PLASKETT. Chair, I don't know if I have five more minutes, but first, I did want to say, Mr. Iwanicki and Ms. Wilkinson, I really understand what you are going through. In the Virgin Islands we have had projects for, whether it be National Marine Fisheries, Army Corps of Engineers, or others that have taken years for permitting, as well as our own permitting processes. Then, when you get the Endangered Species Act on top of it, that can really drive the length of time in which projects—we have had projects that have been delayed because in the interim that the project was initially drawn up, other species were put on the list after the initial project, which changed things as well. So I really do empathize and understand the issues that you are talking about.

You know, but one of the things I am hopeful for is that I have been with the chairman very much in favor of some kind of streamlining, and it is my hope that the FAST Act will do some of that and once we do an evaluation of that, determine how we can do even more to assist.

But one of the things that I think is an even larger issue is the lack of funding, the lack of support that those who are doing this process have. The Army Corps of Engineers, the National Marine Fisheries, those at environmental protection agencies, to be able to address the needs and the uptick in the amount of projects that Americans are trying to do to improve their roads, their ports, et cetera. And so I am hopeful that rather than cutting in funding, we can support the scientists and others who are willing to do that so that we compete with other places such as France and Europe. For the Virgin Islands, we are competing with places like Saint Martin and Cuba, who have no EPA, who may be building beautiful buildings very quickly, but I guarantee 20 years from now, those buildings will be at fault and the environment will be compromised.

Mr. DeGood, did you have anything? I see you nodding your head emphatically. I love it when people are agreeing with what I said. Please help me here.

Mr. DEGOOD. Sure. I will just throw out a number I think to put a perspective on this when we talk about investment and what does it mean when the Federal Government plays a leadership role. If we look in real inflation-adjusted terms, 1955, before the passage of the Interstate Highway Act, compared to 1970, the Federal Government increased its expenditures on highway construction again in real dollar terms by 543 percent.

Ms. KATZ. They were building.

Mr. DEGOOD. That's what it means to say that you have a national program of infrastructure investment. That's what it means for the Federal government to play a leadership role. So I think if we want to be serious about addressing the backlog that you addressed in your opening remarks that the Army Corps—I'm sorry, that the American Society of Civil Engineers has put forward, that's the level of Federal involvement that we need to see.

Ms. PLASKETT. And now I agree. I heard Ms. Katz say that is because they were building. They were building it as opposed to repairing or fixing it, correct?

Ms. KATZ. They were building the interstate system.

Ms. PLASKETT. Right. And I think right now, we are at a place and time where we can have a 1950s building and interstate system that was created in 1950s in the 21st century. Other places like Japan, Europe have just gone three generations ahead of us while we are just trying to repair a 1950s system rather than rebuilding a completely new system that meets the 21st century and beyond. So I think that it is time for us to be investing in this so that we can not only keep up it still be the innovators and the new—as my kids say, the new-new that is out there for the world.

I yield back.

Mr. FARENTHOLD. Thank you very much, and I will now recognize myself for the second round of questioning, and then we will let you guys go.

I want to talk for a second about the EPA's ability under section 404 to retroactively kill a project. Mr. Iwanicki, can you tell us how that affects public projects or public-private partnerships?

Mr. IWANICKI. I don't have any direct experience with them killing a project after it's been permitted, but I know that what they

did with our mining project, one of—or with our road project for the mine was that, you know, my counterparts in the U.P. needed us to challenge them because they were afraid if they used those same standards on all our roads in the U.P., we couldn't do anything to fix them or create new ones for our citizens.

Mr. FARENTHOLD. Great. Ms. Wilkinson, do you want to talk about how, as a private entity looking to do some development, the prospect of after getting your permit and potentially being under construction the EPA coming in and vetoing your permit would affect that?

Ms. WILKINSON. Yes. Uncertainty is detrimental to any project. It makes it very difficult when you're making your initial investment decisions. It makes it difficult to do—attract equity investors. It makes it difficult to get loans when they're concerned that you could be moving forward and have a problem. You know, we just—we don't have a seat at the table with these other agencies. The Corps is the one day to day that we're dealing with. And it's a very difficult hill to climb to know that you could make it through all of these—this time, these years, this entire process, and then have a veto.

Mr. FARENTHOLD. I can understand the frustration. Just moving the goalpost is bad enough, but after you've scored, taking the points off the board has got to be even worse.

Ms. Katz, Mr. Iwanicki talked a little bit about the mining industry in the upper peninsula of Michigan. It is my understanding that there is a real issue here. We have got testimony submitted for the record that indicates the United States only attracted about 7 percent of worldwide mining exploration dollars in 2016, down nearly 20 percent from the late '90s due in significant part to our really burdensome, unpredictable permitting system. Have you seen other evidence that permitting problems negatively impact U.S. competitiveness? And are there signs of similar effects in other sectors of the economy?

Ms. KATZ. There certainly are, and in my testimony, my full testimony, as well as in my remarks here today, you know, I noted just a couple of the survey results that are related to business receptiveness in different countries, and the U.S. has been losing ground to other countries because just in the Obama administration alone the regulatory burden—cost burden increased $122 billion a year. That's on top of what already existed. And so the regulatory load is becoming unsustainable. And when that happens, people take their money elsewhere.

Mr. FARENTHOLD. Thank you very much. I appreciate everybody's testimony. I would like to thank the members and staff for putting together a great hearing and the work you and the folks that helped you did. I would like to thank you all for appearing before us today.

We will keep the record open for two weeks for any members to submit written opening statements or questions. If we get any of those questions, we will forward those to you by mail and would appreciate your taking a few moments to answer those.

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

[Whereupon, at 3:07 p.m., the subcommittee was adjourned.]

APPENDIX

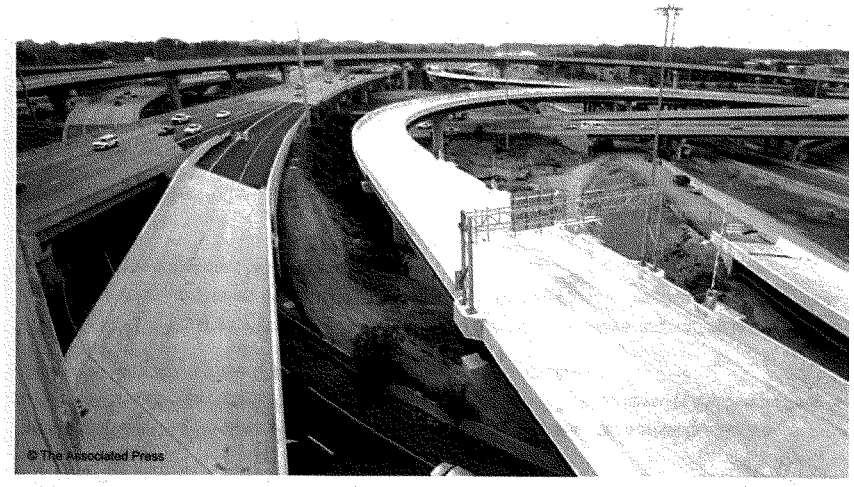
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STATELINE

States Strive to Eliminate Costly Construction Delays

February 24, 2016



Newly built roads in Fairfax County. Virginia and other states are trying new ways to cut down on costly transportation project delays.

By Katherine Barrett and Richard Greene

Once it's done, the 52-mile Northern Beltline in central Alabama will allow interstate travelers to avoid Birmingham traffic. But the $5.3-billion project has been controversial since planning began in the late 1980s.

Holding Contractors Accountable

Some states are pursuing various strategies to avoid such pitfalls. One is simply to require that transportation officials provide regular — and public — progress reports.

The Florida Transportation Commission produces quarterly reviews of Transportation Department spending and annual progress reports on ongoing projects. The commission has been overseeing the transportation agency since the late 1980s, but advances in information technology have allowed it to sharpen its focus. In the late 1990s, Florida transportation projects took on average 34 percent longer than expected to complete. By 2015, the average delay was down to 7 percent.

Virginia also has been aggressive about tracking projects and making the progress reports public. The state began doing so in 2000, after it became clear it would cost more — much more — than was projected in 1994 ($350 million) to widen lanes and add new bridges and ramps to a heavily traveled interchange in Fairfax County, about 15 miles from Washington, D.C. The state increased the project budget to about $676 million in 2003, and it was completed on budget in 2007.

In the second quarter of 2004, 29 percent of Virginia transportation projects were on time and 70 percent were on budget. In the fourth quarter of 2015, 84 percent were on time and 89 percent were on budget.

Many states now reward or penalize contractors depending on whether they complete a project within a set number of days. California, for example, has used incentives and penalties to accelerate the completion of projects and minimize traffic delays.

"I may pay a slight premium and that's transparent in the contract. The time component translates to a dollar amount and that determines the working days. If they go over, there's a penalty," said Malcolm Dougherty, the state's transportation chief.

A.J. de Moya, vice president of the Florida-based de Moya Group, a highway and bridge design and construction firm, has worked on many state jobs that included incentives or penalties. He says they are effective — as long as they are substantial. "The bonus has to be large enough to make it worthwhile."

John Porcari of WSP Parsons Brinckerhoff, one of the world's largest design, engineering and construction companies, said states are using incentives more frequently, particularly in congested urban areas.

Porcari was deputy secretary of transportation during President Barack Obama's first term and headed Maryland's transportation agency under two governors. He said incentives are attractive to both transportation officials and contractors.

Construction creates "huge disruptions to the traveling public, and every day you can avoid that closure means less impact on people," he said. For contractors, "if there is a significant incentive for delivering early, they'll do all kinds of things to get that incentive payment."

Other states are withholding any payments until the project is close to completion.

