Statement of Philip K. Howard
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"Permitting: Finding a Path Forward"
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U.S. House of Representatives
Subcommittee on Intergovernmental Affairs and
Subcommittee on the Interior, Energy, and Environment
Committee on Oversight and Government Reform
Washington, DC

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

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

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

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harm the environment by prolonging bottlenecks that produce congestion and pollution, and preventing replacement of outdated systems with new technologies.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

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

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

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

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

The Complexification of NEPA

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

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

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

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

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

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

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

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

Efforts to Fix the Current Approval Process

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

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

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

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

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

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

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

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

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

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

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

Congress Needs to Act

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

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

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

Accelerate Infrastructure Permitting
March 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Issue Identification and Resolution.—

(4) DISPUTE RESOLUTION —

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

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

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

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

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

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

6. Judicial Review (§41007)

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

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

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

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

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