The Heritage Foundation

CONGRESSIONAL TESTIMONY

Permitting: Finding a Path Forward

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

House Committee on Oversight and Government Reform

United States House of Representatives

September 6, 2018

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

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

A Brief Overview

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

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

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

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

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

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

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

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

Principles to Address Regulatory Obstacles in Infrastructure Development

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

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

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

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

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

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

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

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

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

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

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

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

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

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

National Environmental Policy Act

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

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

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

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

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

[7] Ibid.

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

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

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

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

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

Costs and Delays

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

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

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

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

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

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

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

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

Endangered Species Act

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

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

[15] Ibid.
[16] "NAEP Annual National Environmental Policy Act (NEPA) Report for 2016," The National Association of Environmental Professionals, http://www.naep.org/nepa-2016-annual-report (accessed September 3, 2018).
[17] The Associated Press, "Federal judge clears way for completion of water project," U.S. News & World Report,, August 11, 2017, https://www.usnews.com/news/best-states/north-dakota/articles/2017-08-11/federal-judge-clears-way-for-completion-of-water-project/ (accessed September 3, 2018) and *Government of The Province of Manitoba et al. v. Zinke*, No. 16-5203 (D.C. Cir. 2017) https://envirostructure.lexblogplatformthree.com/wp-content/uploads/sites/386/2017/03/15110982-v1-DC-Circuit-NAWS-Opinion.pdf (accessed September 3, 2018).
[18] Ibid.
[19] "Intent to Prepare an Environmental Impact Statement for the Proposed Halligan-Seaman Water Management Project in Northeastern Colorado," 71 Fed. Reg. 5250 (February 1, 2006), https://www.federalregister.gov/documents/2006/02/01/06-933/intent-to-prepare-an-environmental-impact-statement-for-the-proposed-halligan-seaman-water (accessed September 3, 2018).
[20] US Army Corps of Engineers web page "Environmental Impact Statement—Halligan Water Supply Project," http://www.nwo.usace.army.mil/Missions/Regulatory-Program/Colorado/EIS-Halligan/ (accessed September 3, 2018) and City of Fort Collins webpage on the Halligan Water Supply Project, https://www.fcgov.com/utilities/what-we-do/water/halligan-water-supply-project/fa (accessed September 3, 2018).
[21] Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq., https://www.law.cornell.edu/uscode/text/16/chapter-35 (accessed September 3, 2018).
[22] U.S. Department of the Interior, Fish and Wildlife Service, "Environmental Conservation Online System: Listed Species Summary (Boxscore)," August 31, 2018, https://ecos.fws.gov/ecp0/reports/box-score-report (accessed August 31, 2018)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Clean Water Act

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

Navigable Waters and "Waters of the United States"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[46] 33 U.S. Code § 1251(b), https://www.law.cornell.edu/uscode/text/33/1251 (accessed September 3, 2018).
[47] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers et al.*, 531 U.S. 159 (2001). https://www.law.cornell.edu/supct/html/99-1178.ZO.html (accessed September 3, 2018).
[48] While there has been some disagreement as to whether Justice Kennedy's lone concurrence or Justice Scalia's plurality opinion should be the controlling opinion, the agencies should in fact look to the plurality. In addition to Justice Kennedy's concurrence providing a standard that is simply unworkable, it would certainly be difficult to argue that the agencies are acting unreasonably by looking to the views of four Justices of the Supreme Court from their plurality opinion. It is also the proper legal interpretation to look to the plurality instead of Justice Kennedy's concurrence based on Marks v. United States 430 U.S. 188 (1977) http://caselaw.findlaw.com/us-supreme-court/430/188.html (accessed September 3, 2018). See Hopper, M. Reed, "Running Down the Controlling Opinion in Rapanos v United States," (March 10, 2017). University of Denver Water Law Review, Forthcoming. Available at SSRN: https://ssrn.com/abstract=2983915 (accessed September 3, 2018). Further, it is not merely the plurality opinion but the CWA itself and other Supreme Court cases that should inform any new rule.
[49] *Rapanos v. U.S.*

Retroactive Vetoes of Section 404 Permits

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

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

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

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

National Ambient Air Quality Standards/Ozone Standard

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

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

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

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

[50] *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, (D.C. Cir. 2013), https://www.cadc.uscourts.gov/internet/opinions.nsf/DBEEA1719A916CDC85257B56005246C4/$file/12-5150-1432105.pdf (accessed September 3, 2018).
[51] U.S. Environmental Protection Agency web page entitled "Memo: Updating the EPA's Regulations Implementing Clean Water Act Section 404(c)," https://www.epa.gov/cwa-404/memo-updating-epas-regulations-implementing-clean-water-act-section-404c (accessed September 3, 2018).
[52] U.S. Environmental Protection Agency web page entitled "Criteria Web Pollutants," https://www.epa.gov/criteria-air-pollutants (accessed September 3, 2018).
[53] "Our Nation's Air," U.S. Environmental Protection Agency, https://gispub.epa.gov/air/trendsreport/2018/#home (accessed September 3, 2018).
[54] See e.g. "Implementing EPA's 2015 Ozone Air Quality Standards" James E. McCarthy and Kate C. Shouse, Congressional Research Service, August 16, 2018, https://fas.org/sgp/crs/misc/R43092.pdf (accessed September 3, 2018).

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

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

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

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

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

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

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

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

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

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

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

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

Recommendations

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

NEPA Recommendations

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

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

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

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

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

ESA Recommendations

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

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

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

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

CWA Recommendations

Congress should:

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

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

NAAQS Recommendations

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

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

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

Conclusion

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

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

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

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