



**Statement of Philip K. Howard
Chair of Common Good**

**“Modernizing NEPA for the 21st Century”
November 29, 2017**

**U.S. House of Representatives
House Committee on Natural Resources
Washington, DC**

Chairman Bishop, Ranking Member Grijalva, and Members of the Committee:

Thank you for inviting me to testify before the Committee today about the need to modernize environmental review.

America is living on infrastructure built 50-100 years ago. Aging roads, fragile power grids, inefficient ports, and an antiquated air traffic system hamper America’s ability to compete. Traffic bottlenecks, leaking pipes, waste overflows, and dirty power generation cause unnecessary pollution. Unsafe roads cause thousands of accidents each year.

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. One failure at a critical transit chokepoint—for example, the two century-old rail tunnels under the Hudson River that were damaged by Superstorm Sandy¹—could paralyze an entire region.

Rebuilding America’s infrastructure requires Congress to do two things: Provide funding and create clear lines of authority to give permits. Congress provided money in 2009 as part of the \$800 billion stimulus, but did not give the executive branch the authority to issue permits on a timely basis. Because “there’s no such thing as shovel-ready projects,” as President Obama put it,² the Administration ended up spending only 3.6% of the stimulus money on transportation-related infrastructure.³

My testimony today will focus on one element of permitting—environmental review under the National Environmental Policy Act (NEPA). Environmental review should be a vital tool in enhancing public input and improving the quality of projects. Instead, environmental review has become a bureaucratic swamp that bogs down vital projects and a potentially lethal weapon in the hands of anyone who opposes a project.

The effect, paradoxically, is that environmental review often harms the environment. Lengthy environmental reviews typically prolong bottlenecks and other inefficiencies which cause pollution. A 2015 report by the group I chair, [Two Years, Not Ten Years](#), quantified these and other permitting costs for different categories of infrastructure delays. For example, a six-year delay in rebuilding our nation’s

¹ See, e.g., Philip K. Howard, “[Billions for Red Tape: Focusing on the Approval Process for the Gateway Rail Tunnel Project](#),” Common Good, May 2016.

² Michael D. Shear, “[Obama Lesson: ‘Shovel Ready’ Not So Ready](#),” *New York Times*, October 15, 2010.

³ Executive Office of the President, Council of Economic Advisers, “[The Economic Impact of the American Recovery and Reinvestment Act Five Years Later](#),” February 2014, p. 34.

crumbling highway infrastructure would release an extra 51 million tons of CO₂ emissions. America's antiquated power grid wastes an amount of electricity equivalent to the output of 200 coal-burning power plants.⁴

Overall, we also found that a six-year delay more than doubles the effective cost of projects (including increased overhead and construction costs, lost economic opportunities, and the environmental costs of prolonged inefficiencies).

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. With multiple decision-makers, even preliminary decisions can take years. With the Bayonne Bridge, it took six months to pick the lead agency for environmental review and another year to agree on the scope of review. The Bayonne Bridge construction had virtually no environmental impact—it used the same right of way and foundations as the old bridge—but the final environmental assessment ran 10,000 pages, with another 10,000 pages of appendices.⁵

No one deliberately designed this review and permitting process. It serves no legitimate public interest, and, by delaying modernization of infrastructure, actively harms the environment. Nor do multi-thousand-page environmental reviews enhance transparency of important issues; lengthy reviews obscure them in a jungle of trivial detail.

Congress in recent years has improved the process at the margin 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. What's needed, however, is a simple hierarchy, where designated officials take responsibility to make needed decisions at each step without months of delay. 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.

The Distortion of NEPA

The 1970 National Environmental Policy Act was a landmark statute requiring that federally-funded projects review potential environmental impacts and consider alternatives before breaking ground. NEPA requires agencies to undertake an assessment of the environmental effects of their proposed actions so that they can strive to “achieve a balance between population and resource use.”⁶ NEPA is a tool for thoughtful process and democratic accountability, not a substantive requirement for environmentally-correct decisions.

NEPA is supposed 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. They were submitted to the Congress and went unchallenged.”⁷

⁴ Philip K. Howard, “[Two Years, Not Ten Years: Redesigning Infrastructure Approvals](#),” Common Good, September 2015.

⁵ See, e.g., *ibid.*, and Sam Roberts, “[High Above the Water, but Awash in Red Tape](#),” *New York Times*, January 2, 2014.

⁶ [42 USC § 4331](#).

⁷ Daniel A. Dreyfus, “NEPA: The Original Intent of the Law,” *Journal of Professional Issues in Engineering*

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.⁸

NEPA has rightly been called “the Magna Carta of environmental law,”⁹ and 160 nations have adopted similar frameworks for environmental analysis of government-backed projects since its inception. Other greener countries such as Germany, however, conduct their environmental reviews in months, not years.

What happened in America is that NEPA diverged from its original goal of public transparency to being an implied mandate for perfect projects. But there is no such thing as a perfect project. 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 Cape Wind offshore wind farm project has faced numerous NIMBY lawsuits since its NEPA process began in 2001 as wealthy beachfront property owners use lawsuits to try to kill the project and protect their ocean views.

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 a life of its own, often unrelated to any meaningful public purpose. 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.¹⁰

Fear of litigation skews decision-making towards mollifying the squeaky wheel. For instance, labor unions sometimes “greenmail” projects, burying them in environmental lawsuits until project proponents agree to labor demands. 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

Education and Practice 109, no. 4 (1983), pp. 252-3.

⁸ [40 CFR § 1502.7](#).

⁹ See, e.g., Daniel R. Mandelker, “[The National Environmental Policy Act: A Review of Its Experience and Problems](#),” *Washington University Journal of Law & Policy* 32 (2010), p. 293.

¹⁰ See Department of Transportation, Federal Highway Administration, “Tappan Zee Hudson River Crossing Project Final Environmental Impact Statement,” July 2012, and Philip Mark Plotch, *Politics Across the Hudson: The Tappan Zee Megaproject* (Rutgers University Press, 2015).

was originally proposed, with no resolution in site.¹¹

At this point, environmental review is often a weapon for opponents to demand changes or other concessions that undermine the common good. The public harm includes dramatically higher costs and delayed environmental benefits. 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.

Fixing NEPA by Returning to Its Original Purpose

The solution is to return to the original purpose of NEPA—to provide a short and plain statement of material impacts of projects. Congress can achieve this by enacting provisions that allocate authority to designated officials, and restating a few basic principles that will serve as a course correction to officials and courts. Specifically, Congress could enact a statute along the lines of what I attach here providing that:

1. Permitting processes should take no longer than two years, and authority should be given to designated officials and courts to allow them to enforce that schedule.
2. The Chair of CEQ should have the authority, consistent with the mandate of NEPA, to decide all issues relating to the scope and adequacy of environmental review. For the Bayonne Bridge project, for example, the review could have consisted of 50 pages on construction impacts, not 20,000 pages. The CEQ Chair will not have to decide most issues—just the availability of a common sense decision will give backbone to officials down the line to resist absurd detail.
3. Courts should only have authority to review EISs for misstatements or omissions which have a material environmental impact, and must do so within an accelerated litigation timetable.
4. The Chair of CEQ should be authorized to accelerate permitting where projects have a net positive environmental impact or where sponsors solicit meaningful public participation before the project is fully developed. Public input generally improves projects, but is needed in the planning process, not after the project design is set in stone.
5. For projects of interstate significance, state and local reviews and permits should be preempted if they delay approval beyond the federal timetable. This is comparable to FERC provisions for gas pipelines.
6. Finally, an official designated by the President should have authority to resolve disagreements among federal agencies.

Conclusion

Rebuilding America's decrepit infrastructure is a goal shared by most Americans. Streamlining permitting is good government, not bad government. Raising money to modernize infrastructure is a good investment, not government waste. This could be the impetus for bipartisan agreement in Congress. If Democrats agree to cut red tape and modernize NEPA, Republicans agree to unlock funding sources.

¹¹ Barry Meier, "[Trump Wants More Big Infrastructure Projects. The Obstacles Can Be Big, Too.](#)," *New York Times*, November 18, 2017.



Accelerate Infrastructure Permitting

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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 subparagraph (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.**

Common Good (www.CommonGood.org) is a nonpartisan reform coalition that proposes simplified regulatory and legal structures to empower officials to use common sense and meet deadlines. Common Good's report "[Two Years, Not Ten Years: Redesigning Infrastructure Approvals](#)" details the costs of delaying infrastructure permits. In August 2016, Common Good launched "Who's in Charge Around Here?," a national bipartisan campaign to build support for simplifying government. The Co-Chairs of the campaign are Bill Bradley and Philip Howard, with support from, among others, Mitch Daniels, Tom Kean, and Al Simpson. Learn more at www.SimplifyGov.org.

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