AMERICAN PUBLIC WORKS ASSOCIATION

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Public Works Resource

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Legislative Hearing on *"H.R. _, H.J. Res.168 and H.R. 6129)"*

House Committee on Natural Resources

Statement of

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Chairman Westerman, Ranking Member Grijalva, and Members of the Committee, thank you for the opportunity to provide testimony. My name is Keith Pugh, and I am proud to once again represent the American Public Works Association (APWA), our 32,000 members, and public works professionals before this Committee. I started my career in public works as a municipal engineer with the City of Greensboro, N.C. in 1988 and worked my way up to the role of Director of Engineering Services for High Point, N.C., a position I held for fifteen years. Today, I continue my work with WithersRavenel, a 100% employee-owned multidisciplinary civil and environmental engineering firm that delivers engineering, planning, and surveying services across North Carolina.

APWA members serve in the public and private sectors providing expertise at all levels of government. They provide dedicated sustainable infrastructure and services to all people in rural and urban communities, both small and large. Working in the public interest, our members plan, design, build, operate and maintain transportation, water supply and wastewater treatment systems, stormwater management, drainage and flood control infrastructure, waste and refuse disposal systems, public buildings and grounds, emergency planning and response, and other structures and facilities essential to the economy and quality of life nationwide. APWA supports these efforts through our education and accreditation programs that promote best practices and adoption of new technologies and techniques.

NEPA is important to public works and serves as the regulatory framework for protecting America's environment while allowing the undertaking of vital infrastructure projects. In the half century since NEPA's enactment, environmental protection has become a prime consideration in the planning, design, and construction of infrastructure. Like any policy that has been in place through ten administrations, NEPA has needed to be updated to address societal needs. We need to protect our environment, but also apply lessons learned and identify efficiencies to reduce unhelpful impediments. On behalf of APWA, I would like to express our gratitude for the reforms already adopted since I last testified. The changes initially proposed through the BUILDER Act and finalized as part of the Fiscal Responsibility Act are critical to creating a more coordinated permitting process. Extending "One Federal Decision" to all infrastructure projects is delivering a more predictable, transparent, and timely federal review and authorization process. These commonsense reforms, like joint review schedules with time and page limits that allow for

flexibility depending on complexity, build on prior successful work in the Fixing America's Surface Transportation (FAST) Act and the Infrastructure Investment and Jobs Act (IIJA).

Federal funds combined with these changes are encouraging more communities to pursue overdue updates, maintenance, and in some cases full replacement or new critical infrastructure. However, challenges remain while supply chain shortages and inflation have somewhat eased. Many localities are facing costly increases from new or stricter regulatory requirements, and concerns about liability remain a deterrent to some improvements. While much of the agency process has been clarified by the previously enacted reforms, the legal process has not. APWA supports this as a logical next step in continuing the progress in streamlining for all infrastructure. A reasonable timeline for judicial review should allow for a more predictable and productive process. Public works professionals are doing what is best for their communities as they incorporate feedback from the people they serve every day in their work. Furthermore, APWA has consistently placed high priority on respecting and enhancing local control for infrastructure and strongly encouraging the federal government and industry to coordinate with state and local governments on infrastructure.

Thanks, in part, to anticipatory planning, most public works projects do not trigger litigation. However, the more a project becomes complex, the more avenues there are for litigation, which means easier projects may be favored at the expense of projects that could be transformational in terms of the benefits for the health, safety, and economic livelihood of some communities. Some are even relying on risky, aging and at times failing infrastructure. They are not necessarily deterred by the expense of improvements, but rather the accompanying and difficult to predict costs from potential litigation and where they will get the resources for such legal contests along with uncertainty of the outcomes in court. We see the consequences of underinvestment for people and the environment across the country; from avoiding stormwater and wastewater improvements that could reduce the hazards of flooding and contamination; to stunted transportation systems that are congested, offer few options and limited mobility for travelers, and higher emissions. While larger, more-resourced communities may be able to afford sufficient legal representation, smaller or disadvantaged communities may not be able to do this. Rather than risk a court battle over the perfect being the enemy of the good, they choose neither.

Some seemingly simple projects may even be intimidating for small, tribal, and rural communities that are concerned about going through NEPA. In my experience, when federal funds are introduced, we've projected at least a 25% increase in the project budget, though the final cost could be significantly higher. This is due to administrative burdens placed on the local government, design professionals working on the project, the contractor, and the inspection close-out process. This was especially the case for small agencies that could not access other financing sources, lacked staff capacity, and had to contract with outside assistance thereby spending a large portion of project dollars on permitting requirements rather than on infrastructure improvement. For infrastructure programs to be most effective, the whole process should not be so intimidating that it dissuades some of our most-in-need communities from attempting projects. Accordingly, we are encouraged to see the draft text includes a provision that notes an agency action may not be determined to be a major federal action solely based on an interstate effect or the provision of federal funds for the action or related project.

The draft legislation also maintains the opportunity for legal recourse, if necessary, but reiterates that NEPA is a procedural statute and could be tailored more towards finding solutions, such as improvements to a project as opposed to an open-ended process that consumes resources with nothing to show at the end. If a project proves contentious and requires an Environmental Impact Statement (EIS) and supplemental review, the case with appeals could still take three years in the court system. This, along with the time limits in place for completing an EIS, means some projects could still take more than five years before construction even starts. Consequently, some in public works may have desired a more limited timetable, though we understand this legislation would apply to all projects under NEPA. As practitioners responsible for a diverse array of infrastructure, we believe this represents a sincere attempt at reaching a consensus. Just as agency procedures needed more coordination, legal procedure needs this now.

We further appreciate the legislation seeking to better define the parameters for review and engagement, including:

- The definition of “reasonably foreseeable” being in the area directly affected by the major Federal action, directly under the control of the agency, and having a reasonably close causal relationship between a change in the environment and the project.
- Sensible limits on undertaking new research unless new research is essential to a reasoned choice among alternatives, and if the overall costs and time frame of obtaining this research are reasonable.
- No federal agency shall be required to consider any research after receipt of a completed application, though an agency may consider relevant research made available after a completed application, but not after a final agency action, if the information is peer reviewed and determined to be essential in determining environmental effects.
- Agencies adhere to the scope of their jurisdiction and if errors or deficiencies are found, the agency responsible can address those issues within 180 days *and* the project can proceed during this period provided the activity does not directly concern the issues and will not pose a risk of a proximate and substantial environmental harm.
- Comments shall be limited to matters relating to the proposed action with respect to which such cooperating agency has jurisdiction by law or special expertise.

As for civil actions:

- When there is a public comment period, the civil action must be pursued by a participant in the proceedings who submitted a comment during the public comment period and the comment was sufficiently detailed to put the applicable Federal agency on notice of the issue upon which the party seeks review and is related to the comment.
- The civil action must concern an alternative or environmental effect and does not challenge categorical exclusions.
- A review of a supplemental environmental document shall be based on information contained in the final document that was not included in a previous document.
- Projects can only be canceled, delayed or stayed by a court when the court determines a project will pose a risk of proximate and substantial environmental harm and there is no other equitable remedy available as a matter of law.

- A project sponsor that approved an extension of a deadline may not obtain review of a failure to act in accordance with such deadline unless the agency is delaying for reasons other than those necessary to complete their review.
- Lastly, the Standard of Review stating a decision shall be upheld by a court if it is supported by substantial evidence in the record taken as a whole, whether such evidence is specifically referenced by the agency. The court shall affirm if there is enough relevant evidence for reasonable minds to accept the decision even if it is possible to draw contrary conclusions from the evidence. Additionally, a decision shall be upheld by a court if a challenging claim is not substantiated by clear and convincing evidence.

Combined, these efforts will help to reduce duplicative work by preventing unnecessarily redoing steps in the process, more clearly delineating responsibilities, and promoting more collaboration from start to finish. Public works, thanks to advances in technology, is receiving more feedback from affected parties and collecting more data for analysis to base their decisions on than ever before.

It is our goal to examine and offer a reasonable number of alternatives for projects that are technically and economically feasible. Whether it is roads, bridges, emergency management, sanitation or water, we are stewards for our communities and know we can deliver these projects in an efficient manner and to not incorporate public works in further permitting reform would be a disservice to the public in terms of quality of life and taxpayer resources.

Chairman Westerman, Ranking Member Grijalva and Members of the Committee, thank you and your staff for holding this hearing and your continued work on permitting. We are especially grateful for the opportunity to submit this statement and speak to the experiences of our members. APWA remains committed to assisting you and Congress as you progress on these reforms.