

CONGRESSIONAL TESTIMONY

The State of the Nation's Water and Power Infrastructure

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My name is Daren Bakst. I am the 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 Natural Resources, Subcommittee on Water, Power and Oceans for this opportunity to examine the federal regulatory barriers to water and power infrastructure development, with a specific focus on our nation's western states. After some general background, my testimony will discuss some of these major federal regulatory barriers, their impact, and recommendations on how to address them.

A Brief Overview

As policymakers seek to move forward with critical water and power infrastructure projects, federal regulations seemingly exist to ensure that these projects never see the light of day. Of course, many projects do come to fruition, but usually not without significant cost and delay.

Environmental reviews and the federal permitting process for infrastructure projects are at the center of the regulatory problem. If environmental considerations are to play a role in evaluating infrastructure projects, any environmental impact should be addressed in a timely and reasonable manner. Unfortunately, there is nothing timely or reasonable about the environmental regulatory obstacles that must be overcome to move forward with infrastructure projects.

While statutory changes to federal environmental laws are certainly necessary, many of the problems are a result of implementation of these underlying statutes. For example, the National

Environmental Policy Act (NEPA)¹ that plays such a prominent role in infrastructure development had, at least at the time of enactment, a worthy objective of ensuring that federal agencies take into consideration the environmental impact of projects. However, a primary problem lies in how this seemingly straightforward statute has devolved into a judicial and executive branch-created regulatory monstrosity that imposes endless obstacles for little to no environmental benefit.

To help jumpstart the development of water and power infrastructure, the focus should not be on how the federal government can use taxpayer dollars to finance projects, such as through loan guarantees. Instead, the focus should be on how the federal government is the culprit in blocking these important projects such as through environmental regulations. Funding and regulation are not unrelated issues. By addressing the regulatory problems, a key disincentive to funding and investment will be lifted.

Federal government intervention in funding projects can put taxpayers on the hook for risky projects that otherwise would not secure funding from private sources; in fact, if such projects were good investments, private capital would flow to such projects. Further, subsidized loans crowd out private lenders who are unable to compete with the federally supported loans.²

The Congressional Budget Office (CBO) has frequently discussed the economic problems with loan guarantees.³ In discussing past CBO analysis, a House Committee on Oversight and Government Reform and Oversight staff report explained:

The CBO also notes that “while such guarantees reduce the risk of loss to lender and borrower, they cannot reduce the project’s risk of economic failure.” Furthermore, the [CBO] paper explains that loan guarantees can be attractive to Congress because the costs, on paper, appear small but fail to fully account for unforeseen risks. Failing to heed these warnings has led to widespread taxpayer losses from loan guarantees, from Great Plains in 1985 to Solyndra and Beacon Hill in 2011.⁴ [Internal citations omitted].

Even if federal funding were justified, using taxpayer dollars now for such projects is “putting the cart before the horse.” The regulatory obstacles and inefficiencies that characterize environmental reviews and permitting must first be addressed. Until then, any federal funding for such projects would provide taxpayers little “bang for their buck” when so much of the money would be going to address unnecessary red tape.

¹ “The National Environmental Policy Act of 1969, as amended,” https://www.whitehouse.gov/sites/whitehouse.gov/files/ceq/NEPA_full_text.pdf (accessed February 9, 2018).

² “The Department of Energy’s Disastrous Management of Loan Guarantee Programs,” U.S. House of Representatives Committee on Oversight and Government Reform, March 20, 2012, <https://oversight.house.gov/wp-content/uploads/2012/03/FINAL-DOE-Loan-Guarantees-Report.pdf> (accessed February 9, 2018). This report highlights many of the problems with loan guarantees. See also Testimony of Nicolas Loris, Herbert & Joyce Morgan Research Fellow, The Heritage Foundation before the House Committee on Science, Space and Technology Subcommittee on Energy and Subcommittee on Oversight, “Examining the Department of Energy’s Loan Portfolio,” March 3, 2016, <https://www.heritage.org/testimony/examining-the-department-energys-loan-portfolio> (accessed February 9, 2018).

³ See e.g. Claudia Copeland and Mary Tiemann, “Water Infrastructure Needs and Investment: Review and Analysis of key Issues,” Congressional Research Service, December 21, 2010, <https://fas.org/sgp/crs/homsec/RL31116.pdf> (accessed February 9, 2018).

⁴ “The Department of Energy’s Disastrous Management of Loan Guarantee Programs,” U.S. House of Representatives Committee on Oversight and Government Reform, March 20, 2012, <https://oversight.house.gov/wp-content/uploads/2012/03/FINAL-DOE-Loan-Guarantees-Report.pdf> (accessed February 9, 2018).

Principles to Address Regulation in Water and Power Infrastructure Development

When examining how water and power infrastructure projects are approved, the federal system is set up to discourage or create as much “pain” as possible for permit applicants. In effect, the assumption is no matter how worthy a project, the applicant is going to have the burden of proof to justify the project. If these projects really are important, the burden should be imposed on the government and those seeking to block the projects. Regardless, there are some common sense and noncontroversial principles that should apply. The federal government should:

Improve its management of the permitting process. Without even touching substantive environmental requirements, Congress and the Executive Branch should be looking at ways to streamline the permitting process 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 important to federal 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 the most important issues.

Respect the role of states in the environmental process. Congress has long 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.

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) 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 25, 2012, <https://www.uschamber.com/sites/default/files/documents/files/120425-re-TESTIMONY-HouseJudiciaryCommitteepermitstreamliningtestimony.pdf> (accessed February 9, 2018).

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?

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

National Environmental Protection Act

On January 1, 1970, President Richard Nixon signed the National Environmental Protection 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 environmental impact of their 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 may cause a significant environmental impact. 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

Congress did not envision that NEPA was going to create undue delays as it does today. Regarding EISs, 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

⁶ Council on Environmental Quality webpage on The National Environmental Policy Act, <https://ceq.doe.gov/> (accessed February 9, 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 February 9, 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 February 9, 2018).

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, they 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 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

NEPA and its Impact on Western States: A Few Recent Examples

Western states know all too well the burden of NEPA when it comes to water and power infrastructure. Here are just a few recent examples:

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 February 9, 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 February 9, 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 February 9, 2018).

¹³ *Ibid.*

¹⁴ *Ibid.*

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 February 9, 2018).

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.

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 2006.¹⁸ 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.¹⁹

China Mountain Wind Farm. The NEPA process²⁰ can also have adverse effects on power projects, including renewables. 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.²¹ In 2011, the BLM released their draft EIS.²² 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.²³ 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.²⁴

¹⁷ The Associated Press, “Federal judge clears way for completion of water project,” WTOP, August 11, 2017, <https://wtop.com/canada/2017/08/federal-judge-clears-way-for-completion-of-water-project/> (accessed February 9, 2018) and “Government of The Province of Manitoba and State of Missouri v. U.S. Department of Interior,” 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 February 9, 2018).

¹⁸ “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 February 9, 2018).

¹⁹ 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 February 9, 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 February 9, 2018).

²⁰ This example also shows the impact of the Endangered Species Act. Ultimately, the project was reportedly not pursued because of BLM suspending the NEPA permitting process.

²¹ “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 February 9, 2018).

²² “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 February 9, 2018).

²³ 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 February 9, 2018).

²⁴ 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 February 9, 2018).

Bipartisan Recognition of NEPA Problems

There is a wide and bipartisan recognition that NEPA reform is necessary. For example, on August 15, 2017, President Donald Trump issued Executive Order 13807 that addresses NEPA reforms.²⁵ 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.²⁶

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.”²⁷ Some of these projects included an electric grid update project in Kansas and a wind farm project in Texas.²⁸

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.

Endangered Species Act

In 1973, the Endangered Species Act (ESA)²⁹ was enacted into law to promote the conservation of species. Unfortunately, the law has failed and, in so doing, has created major obstacles for water and power projects.

In February, 2017 Senator John Barrasso (R-WY) provided an excellent summary of the law’s failure:

Of 1,652 species of animals and plants in the U.S. listed as either endangered or threatened since the law was passed in 1973, only 47 species have been delisted due to recovery of the species...

²⁵ 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 February 9, 2018).

²⁶ “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 February 9, 2018).

²⁷ 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 February 9, 2018).

²⁸ Ibid.

²⁹ Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq., <https://www.law.cornell.edu/uscode/text/16/chapter-35> (accessed February 9, 2018).

“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.³⁰”

The ESA’s harmful impact has certainly been felt in the west. For example, in testimony before this subcommittee, 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.³¹

In recent testimony before the Senate Committee on the Environment and Public Works, the National Association of Counties highlighted a 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.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.

³⁰ 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 February 9, 2018).

³¹ 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 February 9, 2018).

³² 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-81f5-2fd3de1841c3/E00EF20BC1503ED107B7533A83AAD4AC.ufner-naco-testimony-01.10.2018.pdf (accessed February 9, 2018).

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].”³³

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.

Clean Water Act

There are two specific issues that are of particular concern regarding the Clean Water Act (CWA):³⁴ 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.”³⁵ 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.³⁶ The Obama Administration’s 2015 Clean Water Rule³⁷ 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.³⁸ 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.”

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 water and energy projects.³⁹ Cities and counties have expressed concerns that even public safety

³³ 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 February 9, 2018)

³⁴ Clean Water Act, 33 U.S.C. §1251 et seq, <https://www.law.cornell.edu/uscode/text/33/chapter-26> (accessed February 9, 2018).

³⁵ 33 U.S. Code §1362, <https://www.law.cornell.edu/uscode/text/33/1362> (accessed February 9, 2018).

³⁶ See e.g. 33 U.S. Code § 1251(b), <https://www.law.cornell.edu/uscode/text/33/1251> (accessed February 9, 2018).

³⁷ 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 February 9, 2018).

³⁸ U.S. Environmental Protection Agency web page on the latest with the WOTUS rule, <https://www.epa.gov/wotus-rule> (accessed February 9, 2018).

³⁹ 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,

ditches to help protect prevent flooding may be subject to permitting requirements.⁴⁰

Securing permits can be costly and time-consuming. In *Rapanos v. United States*,⁴¹ 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.”⁴²

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)⁴³ highlighted the Corps’ inconsistent enforcement across districts and even asserted that definitions were intentionally left vague.⁴⁴ The Clean Water Rule would have created even more confusion and was filled with vague and subjective definitions. 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.

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*,⁴⁵ the court held that the EPA could retroactively veto such permits; the EPA’s veto was four years after the Corps issued the permit.

<https://regproject.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-WOTUS.pdf> (accessed February 9, 2018)

⁴⁰ 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 February 9, 2018).

⁴¹ *Rapanos v. U.S.*, 547 U.S. 715 (2006), <https://www.law.cornell.edu/supct/html/04-1034.ZS.html> (accessed February 9, 2018).

⁴² *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).

⁴³ The GAO is now known as the Government Accountability Office.

⁴⁴ *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 February 9, 2018).

⁴⁵ *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](https://www.cadc.uscourts.gov/internet/opinions.nsf/DBEEA1719A916CDC85257B56005246C4/$file/12-5150-1432105.pdf) (accessed February 9, 2018).

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

Recommendations

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

NEPA Recommendations

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 environmental laws? It is unlikely. Quite simply, there is a strong case for repealing NEPA.

However, short of repeal, there needs to be reforms, and these reforms must be major and not mere tinkering with the law.

Some specific NEPA reform recommendations include:

Create a default assumption. Environmental considerations should be taken into account, but there should be a clear statutory directive that projects shall be approved within a specified period of time (i.e. two years) with no exceptions unless the agency has acted in an arbitrary and capricious manner or its failure to meet process requirements constitutes a major defect that likely has materially changed any final decision.

Narrow NEPA reviews. The multitude of other regulatory requirements makes a full-scale NEPA review both unnecessary and redundant. Reviews should be limited to major environmental issues that are not dealt with by any other regulatory or permitting process.

Establish functional equivalence. Myriad other statutes require environmental impact analyses. Rather than duplicating others' work, NEPA should provide for agencies to treat existing analyses as functional equivalents of a NEPA analysis. When case facts among projects are similar, agencies also should incorporate previous analyses and those by other agencies rather than beginning anew.

Limit alternatives studied. The NEPA process is unnecessarily prolonged by evaluation of alternative actions that stray beyond the actual purpose of the proposed project. NEPA evaluations should be limited to alternatives that would accomplish the stated goal at less cost and with available technologies.

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.

Conclusion

Americans want and expect safe drinking water and reliable electricity. When they turn on the tap, they want running water and when they flick the switch, they want 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 water and electricity to be provided to Americans. By reforming existing environmental law as outlined in this testimony, infrastructure development will get jumpstarted while improving, not hindering, environmental protection.

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