Earthjustice

September 5, 2018

The Honorable Greg Gianforte
Chairman, Subcommittee on Interior, Energy and Environment
Oversight and Government Reform Committee
United States House of Representatives
1419 Longworth House Office Building
Washington, DC 20515

The Honorable Stacey Plaskett
Ranking Member, Subcommittee on Interior, Energy and Environment
Oversight and Government Reform Committee
United States House of Representatives
331 Cannon House Office Building
Washington, DC 20515

The Honorable Gary Palmer
Chairman, Subcommittee on Intergovernmental Affairs
Oversight and Government Reform Committee
United States House of Representatives
330 Cannon House Office Building
Washington, DC 20515

The Honorable Jamie Raskin
Ranking Member, Subcommittee on Intergovernmental Affairs
Oversight and Government Reform Committee
United States House of Representatives
431 Cannon House Office Building
Washington, DC 20515

Re: "Permitting: Finding a Path Forward"

Dear Chairmen Gianforte and Palmer and Ranking Members Plaskett and Raskin,

Thank you for the opportunity to provide written testimony for the Joint Subcommittees' September 6, 2018 hearing titled "Permitting: Finding a Path Forward." Please accept these comments for the hearing's official record.

This testimony addresses the importance of the National Environmental Policy Act (NEPA) for infrastructure projects and refutes false narratives that cite it as the main source of delay in the permitting process.

I. Robust Environmental Reviews under NEPA Produce Better Projects and Save Taxpayer Dollars

There is no question that our nation needs transportation infrastructure. But our nation also needs this infrastructure to be safe, intelligently planned, and ultimately effective in responding to public necessities. Much time has been spent scapegoating the environmental review process and making false attributions as to the degree that NEPA contributes to project delays for important infrastructure projects, but very little time has comparably been spent highlighting how the permitting process under NEPA makes our infrastructure development smarter, safer, fairer, and more effective.

Careful compliance with NEPA is fundamental to making sound decisions on federal infrastructure projects. NEPA ensures that the public and agency decision-makers will have the information they need to understand the impacts of a proposed action and to know whether reasonable alternatives exist to achieve the project goals while incurring fewer environmental, social, cultural, public health, and economic costs.

Robust environmental review and meaningful public input under NEPA lead to better, more effective infrastructure projects. Indeed, as eight past chairs of the Council on Environmental Quality have concluded, NEPA review is a prerequisite for responsible agency action:

> [C]onsideration of the impacts of proposed government actions on the quality of the human environment is essential to responsible government decision-making. Government projects and programs have effects on the environment with important consequences for every American, and those impacts should be carefully weighed by public officials before taking action. Environmental impact analysis is thus not an impediment to responsible government action; it is a prerequisite for it.[1]

For example, the Los Angeles County Metropolitan Transportation Authority's (LACMTA) Crenshaw/LAX Transit Corridor project is an 8.5-mile light-rail metro extension under construction that will serve the cities of Los Angeles, Inglewood, Hawthorne, and El Segundo by offering an alternative transportation option to congested roadways. Through the NEPA process, the LACMTA determined that a five-mile stretch of the project could utilize a rarely-used existing freight rail line corridor instead to limit disruption to local neighborhoods and significantly reduce costs. One of the visionary elements NEPA is its creation of broad opportunities for public participation in government decisions that affect their environment and local communities. Throughout the environmental review and planning process, local residents were continuously

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[1] September 19, 2005 Letter to the Honorable Cathy McMorris, Chair of the Task Force on Improving the National Environmental Policy Act from Russell E. Train (CEQ Chair 1970-1973), Russell W. Peterson (CEQ Chair 1973-1976), John Busterud (CEQ Chair 1976-1977), Charles W. Warren (CEQ Chair 1977-1979), J. Gustave Speth (CEQ Chair 1979-1981), Michael R. Deland (CEQ Chair 1989-1993), Kathleen A. McGinty (CEQ Chair 1995-1998), George T. Frampton Jr. (CEQ Chair 1998-2001), Gary Widman (CEQ General Counsel 1974-1976), Nick Yost (CEQ General Counsel 1977-1981) (emphasis added).

engaged in dialogue to ensure the project would be completed in an equitable, beneficial, and resourceful way that met the needs of local communities.[2]

NEPA also helps to ensure that the public and local decision-makers are fully engaged in the decision-making process so that the best, most cost-effective alternative can be pursued. The proposed "Garden Parkway" toll highway outside of Charlotte, North Carolina was once slated to cost close to $1 billion – a debt taxpayers would have been paying off for the next forty years. Questions raised during the NEPA process, however, led to the discovery that if the highway was built, North Carolina would actually see net job losses over time. Moreover, the careful review of traffic patterns during the NEPA process revealed that the highway would actually make congestion on other area highways *worse*. As a result, North Carolina has now abandoned the project and is pursuing more cost-effective upgrades to I-85.

Effective environmental reviews are critical for infrastructure projects that often have a profound effect on the environment and on public safety. NEPA reviews are typically the only opportunity for members of the public to provide input into these projects. Effective NEPA reviews expose the true cost of environmentally damaging and ill-conceived proposals, leading to improved and far less damaging projects and substantial savings for federal taxpayers. As the Crenshaw/LAX Transit Corridor project demonstrates, the public's local expertise often improves projects, lowering their cost and actually shortening the time they take to complete. Similarly, as illustrated by the Garden Parkway example, NEPA can empower local communities by giving them the information they need to make the best decisions for their communities.

In testimony before the House Armed Services Committee regarding plans to address problems with obsolete nuclear reactors at the Savannah River site, then Secretary of Energy Admiral James Watkins, testified:

> "Looking back on it, thank God for NEPA because there were so many pressures to make a selection for a technology that it might have been forced upon us and that would have been wrong for the country."[3]

When resource agency concerns are ignored or necessary studies are not done, the results can be devastating. Prior to construction of the Mississippi River Gulf Outlet (MRGO)— a channel that provided a shorter route between the Gulf of Mexico and New Orleans' inner harbor in Louisiana— the U.S. Fish and Wildlife Service raised serious concerns and recommended additional environmental and hydrologic modeling, but the Army Corps of Engineers ignored this advice. By 2000, the MRGO had impacted over 600,000 acres of coastal ecosystems surrounding the Greater New Orleans area and destroyed over 27,000 acres of wetlands that once served as an important buffer from storm surge. During Hurricane Katrina, the MRGO funneled Katrina's storm surge into New Orleans, resulting in devastating and deadly flooding in St. Bernard Parish and the lower Ninth Ward.

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[2] FEDERAL TRANSIT ADMINISTRATION, RECORD OF DECISION ON THE CRENSHAW/LAX TRANSIT CORRIDOR PROJECT (Dec. 30, 2011), http://media.metro.net/projects_studies/crenshaw/images/20111230_CrenshawLAX_Record_of_Decision.pdf.

[3] Hearings on National Defense Authorization Act for Fiscal Year 1993 - H.R. 5006, and Oversight of Previously Authorized Programs before the House Committee on Armed Services, 102nd Cong. 912 (1992).

Still, NEPA provides more than just a voice for the environment. State, local and tribal agencies, private property owners, labor unions, and business associations routinely rely on NEPA to express their views and impact agency decisions. It also gives a voice to the most impacted and underrepresented, especially to the most vulnerable communities who usually have to bear the greatest burden where federal projects are first proposed. Overall, it allows citizen oversight, ensuring public resources are used in a way that is responsive to what the public needs and wants.

II. All the evidence demonstrates that the NEPA review process is not the source of delay

Over the last few years, a number of Members of Congress and witnesses before this committee have commented that NEPA and other regulations were a major cause of delay in infrastructure projects. This theory has been comprehensively examined and rebuffed by numerous studies, including studies conducted by the Congressional Research Service (CRS) and the U.S. Department of the Treasury.

The most recent report was released by the Treasury Department in December 2016. This report, like the others, found that "a lack of funds is by far the most common challenge to completing" major infrastructure projects.[4] The report listed three additional challenges to large-scale infrastructure projects in order of their impact on the project development process. The second largest challenge was lack of consensus when multiple public and private entities and jurisdictions are involved. The third largest challenge was capital costs increasing at a greater rate than inflation. The last, and smallest challenge by far, to large-scale infrastructure projects was the environmental review and permitting process.

The Congressional Research Service (CRS) has likewise concluded, on multiple occasions, that NEPA is not a primary or major cause of delay in project review. In fact, CRS has found that the most commonly identified causes of delay are completely unrelated to the NEPA review process. In one report, CRS concludes that for transportation projects, the lack of funding, securing community consensus, and accommodating affected stakeholders, including utility companies and railroads, account for the vast majority of delays.[5] In another report, CRS determined:

> "[T]here is little data available to demonstrate that NEPA currently plays a significant role in delaying federal actions" and "factors *outside the* NEPA process were identified as the cause of delay between 68% and 84% of the time."[6]

In a 2012 report, CRS also concluded that about 90% of federally-assisted highway projects are conducted under a Categorical Exclusion (CE), essentially allowing them to move forward without

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[4] Toni Horst, et al., *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*. AECOM, (2016). https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf (last accessed March 20, 2016).

[5] Congressional Review Service (CRS), Accelerating Highway and Transit Project Delivery: Issues and Options for Congress 1 (Aug. 3, 2011), available at http://www.aashtojournal.org/Documents/August2011/CRSinfrastructure.pdf.

[6] CRS, The National Environmental Policy Act: Background and Implementation 28, 30 (Feb. 29, 2008), available at http://www.cnie.org/NLE/CRSreports/08Mar/RL33152.pdf.

an environmental review process. Moreover, only four percent of projects required a detailed Environmental Impact Statement (EIS) to be prepared.

A return to the Crenshaw/LAX transit corridor project is also instructive. Although the project is a model for community engagement and effective management, getting the project off the ground, however, was no small feat. Without the approval of "Measure M," a half-cent sales tax approved by Los Angeles County voters in 2016 that provided a dedicated funding for twelve metro area transit projects, the city simply wouldn't have had the money to proceed. When projects have access to dedicated sources of funding (e.g., Los Angeles' Measure M), the NEPA review process is normally swift and rarely a major barrier to project completion.

Overall, the overwhelming evidence demonstrates that NEPA is not a primary source of delay when it comes to infrastructure projects. Therefore, we urge Congress to address the causes of delay identified by CRS and others.

III. Further reforms will only complicate and confuse the process

Congress has already made significant changes to the permitting process under NEPA, but many of these changes have not been implemented yet. Thus, there is no evidence indicating further changes are necessary. As the Committee is aware, changes to the NEPA process for infrastructure projects were enacted in the Moving Ahead for Progress in the 21st Century Act (MAP21), the Water Resources Reform and Development Act of 2014 (WRDA), and the Fixing America's Surface Transportation (FAST) Act.

Already, federal agencies are struggling to implement NEPA reforms that have been piled on top of one another in 2012, 2014, and 2015. In March 2017, the Department of Transportation's Inspector General (IG) found that the agency has delayed implementing a significant number of MAP-21 reforms because they must be revised to comply with additional measures mandated in the FAST Act. The IG further stated that, because of the interruptions caused by the additional FAST Act reforms, "the Department may not achieve all of the intended benefits under MAP-21...such as accelerated project delivery, reducing costs, and ensuring that the planning, design, engineering, construction, and financing of transportation projects are done in a more efficient and effective manner."

Making further changes to the NEPA review process before federal agencies fully implement these legislatively-mandated changes to the NEPA process will only serve to increase regulatory uncertainty and likely slow down the environmental review process.

Indeed, members of the business community seem to agree. In April 2017, the Business Roundtable sent a letter to the White House stating that "existing law already provides a mechanism for comprehensive reform of the process of permitting major infrastructure projects" and urging federal agencies to focus on implementing existing legislative reforms.

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major infrastructure projects" and urging federal agencies to focus on implementing existing legislative reforms.

These piecemeal legislative attacks on NEPA not only constrain agency flexibility but, by creating new burdensome NEPA requirements, they also unnecessarily complicate and delay implementation.

IV. Conclusion

To ensure that transportation decision-making is conducted in a transparent and informed fashion, Congress should ensure robust environmental reviews that fully comply with the National Environmental Policy Act. Our organizations look forward to working with you to achieve these important goals.

Sincerely,

Raul Garcia
Senior Legislative Counsel
Earthjustice