

COMMENTS

Leaning on NEPA to Improve the Federal Permitting Process

by David J. Hayes

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I. Introduction

Large infrastructure projects typically face a daunting array of federal reviews and approvals that revolve around a variety of potential environmental concerns. When a single agency is involved, the permitting process tends to proceed in an orderly way. But when multiple agencies enter the picture—which is typical for large, complex projects—the process breaks down. The time line for obtaining approvals stretches out as agencies with differing priorities and resources follow their own paths, leading to inefficient and costly duplication of effort and missed opportunities to reduce the environmental impacts of large projects.

President Barack Obama has launched a little-known effort to improve the permitting process for infrastructure projects. The president's initiative has identified a number of permitting improvements, but it does not include a serious effort to force multiple agencies to align their permitting processes. A key to forcing multiple agencies to work together on project reviews and approvals is found in an unlikely place: the National Environmental Policy Act (NEPA).¹ The statute is overdue for a makeover that will strengthen how it identifies and analyzes environmental impacts for federal decisionmakers. In doing so, it can provide the framework that will require multiple agencies to act as one when reviewing large projects.

Why does permitting matter? There is nothing sexy about the federal permitting process. It may not be apparent why it is worth anyone's serious attention. I offer three reasons. First, when permitting processes go awry, important undertakings may be delayed, escalating project costs and pushing out the time lines for needed water, energy, or transportation projects. It is not difficult to find permitting horror stories for major infrastructure projects. The Cape Wind offshore wind project in Massachusetts submitted its permit application in 2001, but did not obtain approvals until 2011. While this is an extreme example, it is not unusual for federal permit applicants

to face four- or five-year wait times for new transmission lines, highways, rail lines, port facilities, and other infrastructure projects.

Second, because the issuance of permits and approvals is a core governmental function, dysfunctional permitting processes undermine our already dim view of governmental competence. This is particularly true for infrastructure projects that provide the backbone of our shared economy. Indeed, commentators have specifically called out delayed infrastructure investments when lamenting our national inattentiveness to “the boring acts of governance.”²

Third, with the advent of new, “disruptive” technologies and business models, fundamental questions are being raised as to whether regulatory approvals developed in a different era should still hold in today's changing economy.³ These questions need to be asked and answered with regard to the multiple environmental reviews that are required for large projects. For that exercise to proceed based on the merits, the process of approving permits must be improved, so that the underlying substantive inquiry is not clouded by frustrations borne of permitting delays, inefficiencies, and incompetence.

2. See David Brooks, *Goodbye, Organization Man*, N.Y. TIMES, Sept. 15, 2014, available at http://www.nytimes.com/2014/09/16/opinion/david-brooks-goodbye-organization-man.html?_r=0.

3. For example, as disruptive technologies take on traditional business models, from taxis to hotels to other service providers, they increasingly are encountering regulatory constraints that were developed in another time and for a different context. One commentator has described the phenomenon as the “biggest disruption: America's laws.” See Ron Klain, *Airbnb's Biggest Disruption: America's Laws*, FORBES, Sept. 10, 2014. Likewise, regulatory roadblocks are slowing down some social impact investments in new public/private partnership models and creative financing arrangements that can advance new affordable housing, food and medical delivery, and educational services. As the U.S. National Advisory Board on Impact Investing recently put it, the future of impact investing “depends to a great extent on the degree to which the federal government will enact policy and regulatory changes to unleash the sector's potential.” U.S. National Advisory Bd. on Impact Investing, *Private Capital, Public Good: How Smart Federal Policy Can Galvanize Impact Investing—and Why It's Urgent* (2014), available at <http://www.nabimpactinvesting.org>.

1. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

II. The President's Infrastructure Permitting Initiative

Spurred on by business leaders participating on the President's Council on Jobs, President Obama recognized the need to improve the permitting process for infrastructure projects and, on March 22, 2012, issued Executive Order No. 12604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*. The Executive Order directed federal agencies to “take all steps within their authority, consistent with available resources, to execute Federal permitting and review processes with maximum efficiency and effectiveness, ensuring the health, safety, and security of communities and the environment while supporting vital economic growth.”⁴

The Administration's review of today's permitting process has identified lack of coordination among multiple agencies as a root cause of the infrastructure permitting morass.⁵ When multiple agencies are involved, which is usually the case for large infrastructure projects, permitting typically proceeds in a linear fashion, with lead agency A completing its permitting responsibilities first, and then handing off the project to agency B so that it, in turn, can initiate and complete its review before turning the project over to the next agency in line. The predictable results are long delays that drive up the cost and extend the time lines of important projects, while at the same time losing opportunities for project proponents to work cooperatively with agencies to improve the fundamentals of proposed projects, including better siting, mitigation, and other environmental goods.

The Administration has it right: The primary cause of permitting problems lies in the fact that multiple agencies have jurisdiction over many infrastructure projects, and they undertake their reviews and permitting obligations on their own timetables and with minimal coordination with other agencies.⁶ This linear permitting approach presents a recipe for trouble, both in terms of timing and

results. With respect to timing, when multiple review or permitting processes proceed seriatim, with each agency only dealing with its review responsibilities after the package arrives at its front door, permitting delays pile on top of each other. This inherent timing problem is exacerbated by the reality that the nonlead agencies may be pulled in different directions by their own priorities and workloads, and they may not have either the incentive or the bandwidth to give full attention to the permit package when it finally hits their desk.

Thus, project proponents may think that they are “done” when the primary permitting agency completes its work, only to learn, often the hard way, that successive federal reviews or permitting steps—such as endangered species or migratory bird reviews required by the U.S. Fish and Wildlife Service (FWS) or the National Oceanic and Atmospheric Administration, or a cultural resources review required by the National Historic Preservation Act, or a height review required by the Federal Aviation Administration or the military—can tack on many months or even years to the process.

This linear approach to federal permitting also can lead to suboptimal results. When agencies are on the sidelines until late in the process, the project that they are finally presented with is likely to have well-defined and studied features that have been through a one-, two-, or three-year environmental impact statement (EIS) process, and have been validated by the lead agency. If these late-reviewing agencies identify a serious flaw in the project that was overlooked by, or was not in the jurisdictional purview of, the lead agency, it may be too late to reorient the project to avoid that result.

What might have been a relatively easy adjustment for a project proponent to make early in the permitting process, before the EIS was prepared and the lead agency completed its work, now becomes difficult or impossible. The project may need to be stopped at a late date and after a significant investment has been made by the proponent and other reviewing agencies; it may need to be redesigned at great expense; it may trigger the need to complete a supplemental EIS on the newly reconfigured project, leading to further delay; and/or it may lead a late reviewing agency to retreat to a second-best solution that proposes a patchwork of mitigation for impacts that could have been avoided completely if they had been identified earlier in the process.

III. Attacking the Multiple-Agency Review Challenge

Recommendations offered by the Steering Committee formed under the president's Executive Order propose a

4. See Exec. Order No. 13580, *Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska*, 76 Fed. Reg. 41989 (July 15, 2011).

5. See generally Steering Comm. on Federal Infrastructure Permitting & Review Process Improvement, *Implementation Plan for the Presidential Memorandum for Modernizing Infrastructure Permitting* (2014) (hereinafter *Steering Committee Report*), available at <http://www.permits.performance.gov/pim-implementation-plan-2014.pdf>.

6. The Steering Committee Report notes, for example, that “Over time . . . legal and regulatory requirements have resulted in more than 35 distinct permitting and review responsibilities across more than 18 Federal agencies and bureaus, implemented by staff at headquarters and hundreds of regional and field offices.” *Id.* at 7. By way of example, the U.S. Army Corps of Engineers (the Corps) may take the lead in preparing an environmental impact statement (EIS) because a project needs a wetlands permit from the Corps, but the same project also may trigger a Bureau of Land Management (BLM) right-of-way permit, and/or reviews by the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act or by the Advisory Council for Historic Preservation under §106 of the National Historic Preservation Act. The EIS that the Corps prepares for the project should cover the

environmental issues important to the BLM's, the FWS', and the Advisory Council's decisions, as well as to the Corps' wetlands-related considerations.

grab-bag of best practices to address the multiple-agency review challenge. They are intended to encourage (and sometimes shame) agencies to coordinate their reviews of infrastructure projects. The blueprint issued by the Administration in May 2014, for example, calls for the development of “policies and tools” that will encourage agencies to improve their synchronization of permit reviews, develop common and transparent permit review schedules, and the like. Early attention by multiple agencies to project planning, siting, and application quality also is emphasized, as is promoting training and awareness among agencies to reduce duplication of effort and to more efficiently identify mitigation options, including landscape-level opportunities to better leverage investments in compensatory mitigation.⁷ Many of these ideas already have been road-tested under special Administration initiatives, such as the U.S. Department of the Interior’s (DOI’s) successful coordination of multiple-agency permitting reviews for renewable energy projects on public lands⁸ and the president’s coordination of multiple-agency energy permitting in Alaska under Executive Order No. 13604.⁹

While the Steering Committee recommendations talk about “institutionalizing” these best practices, the committee does not identify any legal lever that will compel agencies across the board to play better in a common permitting sandbox. Simply put, the recommendations have no teeth. In the absence of a mechanism to institutionalize interagency coordination, the Steering Committee lays out a plan to proceed with permitting reforms on a pilot program basis, guided by a Policy for Coordinated Project Reviews and an Interagency Infrastructure Permitting

Improvement Center that will act as a clearinghouse to share best practices across agencies.¹⁰

Some good undoubtedly will come out of these efforts, and the selected projects that get attention under the Steering Committee’s pilot program may move through the permitting system more quickly and efficiently. But without an institutional mechanism to force agencies to coordinate their permitting activities, the Administration’s effort is not likely to lead to systemic, long-term improvement in how multiple agencies go about their review and approval of large infrastructure projects.

IV. A Counterintuitive Idea: Using NEPA Reforms to Address the Multiple-Agency Permitting Problem

It is conventional wisdom that the EISs required by NEPA are primarily responsible for the federal government’s chronic inability to complete the permitting of large projects in a timely and cost-effective way. While few object to NEPA’s important mandate that potential environmental impacts of major projects be evaluated and alternatives considered before federal officials approve such projects, many critics assert that NEPA has spawned a contractor-driven, overly expensive, and time-consuming EIS process that has become distressingly rote in its application and non-impactful in terms of influencing agency decisions.

As explained in a July 2014 Stanford Law School NEPA Recommendations Report, there is some basis for this claim, and for the view that NEPA and its EIS process are overdue for reform and modernization.¹¹ Nonetheless, when a single agency is in charge of a permitting decision—as the U.S. Congress anticipated when it passed NEPA in 1970, before the proliferation of regulatory authorities across multiple agencies—the EIS process works relatively well. When a single agency has responsibility for both the environmental analysis and the decision, it typically can develop procedures and time lines that are geared to the nature and scope of the project in question. Also, because the analysis is being undertaken for a project that the agency itself has a major stake in reviewing, the analysis in the EIS is likely to be on point and relevant to the decisionmaker.¹²

In contrast to the single-agency model, when multiple agencies are involved in reviewing major projects, the permitting process can easily go off the rails as agencies pro-

7. See generally Steering Committee Report, *supra* note 5, at 12-52. In recent months, the potential to direct more meaningful analysis of mitigation opportunities has received much-deserved attention. See generally David J. Hayes, *Addressing the Environmental Impacts of Large Infrastructure Projects: Making “Mitigation” Matter*, 44 ELR 10016 (Jan. 2014).

8. DOI, working closely with a number of federal agencies and states, completed the permitting of more than 13,000 megawatts of renewable energy projects on public lands in less than four years. Early outreach and coordination among affected agencies and stakeholders was the key to the success of the program. See Comments and Recommendations on NEPA Reform for the White House Council on Environmental Quality, Stanford Law School Policy Lab Class 413P (hereinafter Stanford NEPA Recommendations Report), July 15, 2014, at 9, available at <http://www.law.stanford.edu/publications/comments-and-recommendations-on-nepa-reform-for-the-white-house-council-on-environmental-quality>.

Early outreach and coordination among agencies was one of the highly praised features of the approach that the Interior Department and its land management agency, BLM, have taken to the siting of renewable energy projects on public lands since 2009. Interior has facilitated early reviews of potential utility-scale projects by inviting interested federal and state agencies, along with key stakeholders, into the process early to spot project conflicts that might be addressed through siting or other adjustments. This type of approach enabled the completion of NEPA reviews on dozens of large, complex renewable energy projects that implicated the equities of a number of agencies in record time and with a minimum of litigation. It stands in contrast to the default path—which is taken all too frequently under current NEPA practice—in which serious flaws are identified late in the NEPA process, long after the project proponent can easily make project modifications.

9. See Exec. Order No. 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18887 (Mar. 12, 2012).

10. See Steering Committee Report, *supra* note 5, at 12-15 & 51-52.

11. See generally Stanford NEPA Recommendations Report, *supra* note 8.

12. Some commentators have suggested that all environmental reviews for all projects should be undertaken by a single agency, such as the U.S. Environmental Protection Agency (EPA). Based on my experience in the government, this approach would likely have the opposite of the intended result. Putting EPA or some other agency in charge of all environmental analyses for all federal permits would result in a significant duplication of effort (because at least two different teams from two different agencies would now need to be involved in the permitting process), while opening up inter-agency disputes and potential litigation risk regarding the adequacy of the nature and scope of the environmental analysis that the nonjurisdictional agency (e.g., EPA) is undertaking for the agency that is invested by law to make the permitting decision.

ceed one after another, in a linear fashion, to undertake their review and permitting obligations. As noted above, the president's infrastructure permitting review team correctly has identified this coordination problem as a root cause of much of the permitting dysfunctionality that surrounds reviews of major infrastructure projects. The multiple-agency problem also has spawned legislative proposals, including an important bill introduced by Sen. Claire McCaskill (D-Mo.) and Sen. Rob Portman (R-Ohio), to mandate better permitting coordination among agencies.¹³

The traditional way in which NEPA applies to today's multiple-agency permitting reviews manifests the same type of coordination problems that bedevil the broader permitting context. While one agency may be designated under NEPA as the "lead" agency that takes on the responsibility to prepare an EIS for a project, other "cooperating" agencies typically are only passive participants in the EIS process. They wait to turn their attention to both their NEPA and their general permitting responsibilities until later in the process.

The result is predictable: The EIS process suffers from the same multiple-agency syndrome that fouls up the overall permitting process. For example, the lead agency/cooperating agency dichotomy typically plays out in these suboptimal ways:

- The EIS process does not adequately cover the issues that are important to nonlead permitting or reviewing agencies. Indeed, it is not uncommon for nonlead agencies to file comments that are critical of the lead agency's EIS, either because the EIS gave short shrift to issues of special concern to the commenting agency or otherwise failed to reflect that agency's experience, data, and/or perspective in the EIS.
- There is no meaningful engagement among interested agencies (other than the lead agency) to identify potentially serious issues early in the process so that adjustments can be made to the project.
- There is no mechanism for avoiding duplication or overlap for EISs that are being prepared by multiple agencies in parallel, and without coordination, either in the same region and/or for similar types of projects.¹⁴

These are serious flaws in how NEPA is being applied in a multiple-agency review context. Indeed, they strike at the heart of NEPA's purpose: ensuring that key environmental issues are adequately analyzed before important permitting decisions are made.

Although NEPA's flaws in the multiple-agency permitting context are serious, they are fixable. As noted above, the current regulatory structure was developed early in NEPA's life, long before the multiple-agency review scenario was anticipated, much less recognized as a special

challenge for NEPA. It should come as no surprise, therefore, that the stale and vague regulations that govern the preparation of EISs should be updated to ensure that EISs prepared for large projects that trigger reviews by multiple agencies are responsive to all of the relevant environmental impacts within the purview of the reviewing agencies. This is particularly true given the recent recognition that multiple-agency input is needed to take full advantage of evaluating infrastructure projects in the context of broader planning activities, including consideration of landscape-scale compensatory mitigation opportunities.¹⁵ That type of input can only occur with more disciplined, early coordination of the permitting and review function, overseen by a legally mandated and accountable institutional mechanism that keeps all agencies in line.

Now for the key point: The Rx for addressing NEPA's shortcomings in the multiple-agency context will simultaneously address the broader problem of ensuring that all agencies with a stake in reviewing major projects come to the table early, and in a meaningful way. That is, by making long overdue regulatory improvements in how NEPA is administered, the environmental review and permitting processes for large projects that involve multiple agencies can be greatly improved, without legislative intervention. Specific NEPA regulatory changes that would accomplish this transformation are outlined in the Stanford NEPA Recommendations Report. They fall into three major categories of regulatory revisions:

1. Updated regulations that provide more clarity regarding NEPA lead agency responsibilities in reaching out to all agencies that have permitting and review responsibilities for the project and ensuring that: (a) the EIS covers other agencies' interests, in addition to their own; and (b) key stakeholders, including other agencies, have an opportunity to identify key issues and potential flaws in proposed projects.
2. Updated regulations that require use of the formal scoping process to identify the key environmental issues that should be addressed in an EIS.
3. Updated regulations that create an institutional mechanism—the Interagency Permitting and Review Council—to facilitate meaningful cross-agency cooperation at early stages of the EIS process.¹⁶

The final recommendation—creating an institutional mechanism that will facilitate cooperation across multiple agencies—deserves special attention here because it addresses the structural problem of how to ensure that coequal agencies coordinate project reviews when they have different priorities, capabilities, and stakes in a particular matter. As discussed above, the need to address the issue has been acknowledged by the Steering Committee under the president's Infrastructure Permitting Executive Order, but the Committee has proposed to move forward

13. See S. 1397, Federal Permitting Improvement Act of 2013, available at <https://www.govtrack.us/congress/bills/113/s1397/text>.

14. See Stanford NEPA Recommendations Report, *supra* note 8, at 8-9.

15. See generally Hayes, *supra* note 7.

16. Stanford NEPA Recommendations Report, *supra* note 8, at 12-16.

with pilot projects rather than recommending an enforceable, systemic mandate for agency cooperation in permitting matters.

Revising NEPA's regulations to establish an institutionalized mechanism to improve the multiple-agency permitting process would create much-needed NEPA oversight accountability and capability. The specific proposal set forth in the Stanford NEPA Recommendations document includes many of the features that appear in the McCaskill/Portman bill, The Federal Permitting Improvement Act of 2013,¹⁷ but they can be implemented under current law and do not need to await additional congressional action.

More specifically, the Stanford NEPA Recommendations would create a permanent, high-level Interagency Permitting and Review Council that addresses NEPA and permitting issues that arise across the board, for all types of projects, permits, and reviews. Each represented agency would select a chief permitting and NEPA officer to sit on the Council. As described in the report:

- The Interagency Council would complete its mission of facilitating productive, early stage EIS agency interactions by engaging in the following types of activities:
- [L]ead agencies preparing EISs should be required to develop a list of relevant agencies, stakeholders, and potentially related EISs, and then to contact the agencies and solicit their early involvement before the scoping process begins. The Interagency Council would provide a clearinghouse and support function to facilitate these early cross-agency interactions. The Interagency Council also would be in a position to identify other EISs in the region, or for similar types of projects, and provide that information to the lead agency.
- During the formal scoping process, the Interagency Council will help ensure that lead agencies adequately identify and distinguish significant and less important issues for further analysis. To that end, the Interagency Council will offer technical assistance in identifying critical issues and provide

valuable NEPA expertise to assist with the identification process.

- [T]he Council [also] will serve more general NEPA purposes, including:
 - Assisting agencies to regularize their use of new tools to improve the process for preparing EISs, including the development of common data bases, more effective use of GIS [geographic information system] mapping tools, and the like.
 - Overseeing and developing training programs for agency reviewers and NEPA applicants.
 - Regularizing the use of EAs [environmental assessments], categorical exclusions and other NEPA tools across the key NEPA implementing agencies.¹⁸

V. Conclusion

There is a developing consensus that multiple agencies need to work together on a common timetable, reflective of a common prioritization of attention and resources, to complete review and permitting activities for major projects on an efficient and timely basis. While there have been some successful efforts to facilitate coordination among agencies for specific permitting initiatives, such as renewable energy permitting on DOI lands and energy development and permitting in Alaska, across-the-board reform will require legal and institutional muscle.

Long-overdue updating and modernization of NEPA's regulations has the potential to provide that needed muscle. More specifically, by laying out exact requirements for interagency cooperation in reviewing and permitting projects, and by establishing a new, accountable Interagency Review and Permitting Council to enforce such requirements, revised NEPA regulations can ensure that agencies with different missions, priorities, and resources will work together cooperatively, both in preparing EISs and in completing their related review and permitting responsibilities in an efficient and timely manner.

17. See *supra* note 13.

18. Stanford NEPA Recommendations Report, *supra* note 8, at 14-16.