

STATEMENT OF
JOHN D. PORCARI

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
U.S. SENATE

HEARING ON

INFRASTRUCTURE PROJECT STREAMLINING AND EFFICIENCY: ACHIEVING FASTER,
BETTER, AND CHEAPER RESULTS
MAY 03, 2017

Good morning Chairman Barrasso, Ranking Member Carper and members of the Committee. Thank you for the opportunity to testify before you today. I have had the opportunity to testify in front of this Committee regarding environmental streamlining on several previous occasions and welcome the chance to share my perspectives and project-specific experiences again as you consider legislative remedies to build projects better, faster and cheaper.

Our nation's infrastructure is crumbling, in need of repair and replacement. Modernizing our transportation network, energy grid, water and sewer systems, and the other connective tissue that moves our economy is an opportunity to literally build the foundation for America's future prosperity for generations to come. However, to capitalize on this, we have to commit to ways to develop and deliver these projects more efficiently and predictably. In my experiences as Secretary of Transportation for Maryland, Deputy Secretary at the US Department of Transportation (USDOT), and most recently as President of the US Advisory Services at WSP | Parsons Brinckerhoff, I have been involved in both policy development and implementation – continually seeking ways to plan, design and construct infrastructure projects that are started and completed faster and that deliver better outcomes. I have also had the responsibility of delivering large, complex infrastructure projects, and have experienced the challenges this committee has identified first-hand. It has been a near-constant refrain from Administrations of both parties and Congress to consider strategies to “fix” the environmental permitting and review process, removing barriers to investment and eliminating redundancies in the environmental reviews. It is truly a bipartisan issue. Our common task is to work together to ensure that any additional reforms to the federal permitting and review process encourage greater coordination while maintaining critical protections of our valuable natural resources and producing positive outcomes for our communities.

It is important to point out that the National Environmental Policy Act (NEPA) is not the only, or even the primary, impediment to delivering faster, better and cheaper infrastructure projects. According to the General Accountability Office and the Congressional Research Service, almost all (over 90%) of Federally assisted highway projects proceed under a Categorical Exclusion

TESTIMONY OF JOHN D. PORCARI
BEFORE THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
U.S. SENATE
MAY 03, 2017

(CE), the simplest, most straight-forward review under NEPA.¹ Only four percent of projects require the preparation of an Environmental Impact Statement, the most detailed review document.² This relatively small percentage of projects, however, constitute the most visible cohort of projects. The overwhelming evidence shows that the causes of delay for these major projects are more often tied to local/state and project-specific factors, agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope.

Thoughtful consideration of how we can improve the process while delivering measurably better outcomes for communities and the environment should be our goal. Making significant changes to environmental protections without fully implementing the process improvements included in our most recent surface transportation authorizations, the Moving Ahead for Progress in the 21st Century (MAP-21)³ and the Fixing America's Surface Transportation Act (FAST Act)⁴, may be counter-productive. The agencies, companies, and stakeholders involved in delivering our country's infrastructure need, above all, a consistent and predictable process.

The single most important action Congress can undertake to accelerate project delivery is to provide steady, long-term, and predictable funding. With greater certainty in project funding, project sponsors can more effectively plan their projects and will be incentivized to complete the planning and approvals process as quickly as possible and get to construction, enabling greater coordination among stakeholders to develop and design a project that avoids, minimizes or mitigates negative environmental impacts. Conversely, short-term authorizations and uncertainty in the appropriations process often stretches out the up-front work in the environmental review and approval process that is key to large, complex projects moving forward on a timely basis.

The environmental process as it stands today, if done right, can result in high-quality projects, informed by substantive public engagement and reflecting the needs and desires of the people the projects serve. Early and meaningful coordination among stakeholders, including federal and state regulatory agencies, can unlock innovative solutions and uncover hidden pitfalls at the beginning of a project. Front-loading such stakeholder collaboration and communication helps to identify and understand issues early enough in the environmental permitting and review process to yield a shorter, more consistent process that has a better chance of withstanding litigation.

Real, substantive changes to the process have already been made to encourage better coordination and to legislate improved alignment of federal responsibilities to execute the environmental review process more efficiently. It is worth considering some of those recent

¹ Government Accountability Office Report GAO-14-370: "National Environmental Policy Act: Little Information Exists on NEPA Analysis, April 2014.

² CRS Report R42479, "The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress." April 11, 2012. This statistic is based on data from 1998 to 2007.

³ P.L. 112-141.

⁴ P.L. 114-94.

changes and how they have already improved project delivery before we turn towards the challenges that remain.

Lessons Learned from Implemented Improvements

While serving in the Obama Administration, I tried to bring my personal experience and frustrations in delivering major projects to the formulation and implementation of several Executive Actions to increase efficiency in environmental reviews as well as the implementation of MAP-21, which contained a number of effective project delivery provisions. Applying both legislative and administrative remedies, we were able to achieve some specific project successes and learned many important lessons along the way.

MAP-21, enacted in 2012, created a streamlined and performance-based surface transportation program and built on many of the programs and policies established by previous transportation legislation. MAP-21 promoted accelerated project delivery and encouraged innovation through the increased use of CEs, programmatic approaches, and planning and environmental linkages. We have seen successes and process improvements under these changes in the transportation sector.

For example, MAP-21 included a CE for emergency repairs, allowing for critical rebuilding and replacement of failed transportation structures. Not long after finalizing the rulemaking for that CE, the Federal Highway Administration (FHWA) applied it to the Skagit Bridge collapse in Washington, allowing for the accelerated repair and replacement of this critical segment of the Interstate system. MAP-21 also directed USDOT to survey grantees to identify any additional actions that should be covered by CEs, resulting in the FHWA creating four new CEs, further reducing the need to conduct lengthy environmental analysis on routine projects that do not have significant impacts on the environment.

The Illiana Expressway, a span of Interstate 55 connecting Indiana and Illinois, was the first to leverage the combined Final Environmental Impact Statement/Record of Decision (FEIS/ROD), authorized by Section 1319 of MAP-21. This approach is now standard practice for USDOT, eliminating at least 30 days from project schedules, and often more.

In addition to creating new CEs and authorizing the combined FEIS/ROD, MAP-21 made significant changes to the environmental review process for FHWA and the Federal Transit Administration (FTA). The “Efficient Environmental Reviews and Project Decisionmaking”⁵ process, first authorized in the Safe Accountable Flexible Efficient Transportation Equity Act, a Legacy for Users (SAFTEA-LU),⁶ has put transportation projects at the leading edge of project delivery reform, providing a simplified but structured process aligning environmental reviews and improving coordination. Following nearly seven years of advancing projects through that process, MAP-21 made substantive changes, adding concurrence points for other federal

⁵ 23 U.S.C. § 139.

⁶ P.L. 109-59.

agencies and also strengthening the role of the USDOT in setting the parameters of the project study.

MAP-21 also made permanent a pilot program known as the “Surface Transportation Project Delivery Pilot Program,”⁷ first introduced under SAFETEA-LU. This pilot program authorized up to five (5) states to request assignment of responsibilities under NEPA for highway projects. MAP-21 also expanded the program to allow states that have assumed responsibility for highway projects to seek assignment for railroad, public transportation, and multimodal projects. Only California participated in that pilot program, with Caltrans receiving NEPA Assignment in 2007. Since the enactment of MAP-21, Texas, Ohio, Utah, and Florida have leveraged NEPA Assignment to expedite environmental reviews for highway projects in their states, and Caltrans has renewed its Assignment agreement. As a result of Assignment, Texas has seen a 25% reduction in time on major projects and Ohio has claimed approximately 20% time savings in delivering their overall program.⁸ Nebraska and Alaska have also expressed interest in assuming NEPA responsibilities under this statutory program.

Prior to and concurrent with the implementation of MAP-21, President Obama also pushed for broader reform across the Federal government, taking lessons learned from the transportation sector and the project delivery reforms enacted by Congress, and applying best practices across all infrastructure sectors. This work resulted in the Federal Infrastructure Project Permitting Dashboard,⁹ identifying “Projects of National or Regional Significance” and updated procedures across multiple agencies that have led to better coordination and improved alignment of Federal interests.

There are two projects targeted during this administrative reform effort worth highlighting. They could not have had more different outcomes, but each was valuable in the lessons we learned.

President Obama identified the Tappan Zee Bridge Replacement Project (now known as the New New York Bridge) as a High Priority Project in 2011. Following that designation, the project was able to start and complete the NEPA process in 13 months, and the project secured all other Federal approvals within two months of completing NEPA. This was a significant accomplishment, bringing no less than eight federal agencies with decision-making authority together to deliver a critical, high-priority project. With attention from the Governor, the President, and Cabinet Secretaries, federal staff formed a rapid response team for the project, meeting weekly to discuss and solve known and anticipated problems. This level of focused attention is not scalable to every project in the nation, but it does show what is possible when the federal partners coordinate effectively with the goal of delivering a project.

⁷ 23 U.S.C. § 327.

⁸ [http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25\(99\)_FR.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25(99)_FR.pdf).

⁹ www.permits.performance.gov.

In contrast, the Columbia River Crossing (CRC), the Interstate 5 bridge connecting Portland, Oregon, and Vancouver, Washington provided a valuable lesson in how projects can become delayed when coordination and communication among agencies fail. The project was a major bridge replacement project identified as a “Project of National and Regional Significance” after an impasse between the U.S. Coast Guard (USCG) and USDOT resulted in the completion of USDOT’s NEPA process but without a required bridge permit approval from the USCG. This impasse resulted from a breakdown in communication between the agencies and led to significant delays as they resolved the issue. Again, through focused attention by senior leadership, all of the agencies involved were able to resolve the issue, completing the NEPA review process and obtaining the required permits from USCG and other agencies. However, such senior-level intervention cannot be the norm when delivering major projects across the nation.

To address the issues of a failure in coordination encountered on CRC and to help institutionalize the enhanced coordination evident on Tappan Zee, the USDOT, along with its sister federal agencies, undertook a comprehensive update to existing coordination agreements and guidance. First, the FHWA and the USCG developed a Memorandum of Agreement¹⁰, updating a 1977 Memorandum of Understanding intended to improve coordination and avoid unnecessary duplication of effort by the USCG, the FHWA, and the State highway agencies in completing the NEPA review process for bridge projects requiring action by both FHWA and USCG. Additionally, both the FTA and the Federal Railroad Administration joined FHWA and USCG in a Memorandum of Understanding¹¹ to coordinate and improve bridge planning and permitting across the primary surface transportation modes.

A comprehensive effort was also undertaken to update the “Red Book,” a 1988 handbook on *Applying the Section 404 Permit Process to Federal-Aid Highway Projects*. The *2015 Redbook: Synchronizing Environmental Reviews for Transportation and other Infrastructure Projects*¹² focused on conducting **concurrent** reviews instead of **sequential** reviews to the greatest extent possible and provided practitioners and stakeholders alike the tools and resources necessary to align the many federal environmental and resource laws typically encountered on infrastructure projects. The FHWA and its state partners had, for years, been using “merger agreements,” formalized agreements between the Army Corps of Engineers, FHWA, State DOTs, the Environmental Protection Agency and others to align the Clean Water Act wetland permit requirements with NEPA to ensure a selected project can be permitted. These agreements ensure that permit requirements are considered in the NEPA analysis, ensuring that agencies are aligned as the project advanced.

¹⁰ https://www.environment.fhwa.dot.gov/strmlng/MOA_USCG_bridge_permits.asp.

¹¹ https://www.environment.fhwa.dot.gov/strmlng/MOU_multimodal_bridge_permits.asp.

¹² https://www.environment.fhwa.dot.gov/strmlng/Redbook_2015.asp.

The FAST Act

Accelerating project delivery is a major theme of the FAST Act, with 18 separate provisions in the Highway title alone that are designed to increase innovation and improve efficiency, effectiveness, and accountability in the planning, environmental review, design, engineering, construction, and financing of transportation projects. Most notably though, Title XLI of the FAST Act established new permit streamlining provisions that are intended “to create a smarter, more transparent, better-managed process for government review and approval of major capital projects.”

For example, the FAST Act added new flexibilities to increase efficiencies and refine existing authorities by allowing States with stringent environmental laws and regulations to use state requirements in lieu of federal requirements. A critical, but largely unused, provision of the FAST Act authorizes USDOT grantees to flex a portion of their project funds toward funding dedicated staff at reviewing and permitting agencies to accelerate environmental reviews. The FAST Act also encourages greater use of the collaborative planning processes and adds new tools to accelerate project delivery by requiring a schedule and checklist as part of a project coordination plan. Recognizing that effective interagency coordination and consensus regarding project schedules can be a primary driver for a faster, more consistent process, the FAST Act prescribes specific new timeframes for environmental notices and reviews. Throughout the new provisions, transparency and public access are emphasized, including additional requirements for online access and status updates of the NEPA process. In many ways, Title XLI of the FAST Act took lessons learned from the transportation sector’s experience and created a similar structure for other infrastructure sectors.

The provisions of Title XLI are intended to improve the permitting process for major infrastructure projects in three ways: 1) better coordination and deadline-setting for permitting decisions, 2) enhanced transparency, and 3) reduced litigation delays. Section 41002 of the FAST Act establishes a Federal Permitting Improvement Council (Council), composed of an Executive Director appointed by the President, the Chairman of the Council on Environmental Quality, the Director of the Office of Management and Budget, and Council Members designated by 13 major federal agencies. The FAST Act requires the Council to develop a categorized inventory of covered projects that are pending environmental review and to develop recommended performance schedules for environmental review. These schedules must include a mandatory completion date of not more than 180 days after the permitting agency receives all information necessary to make a decision on the application. The Council must also issue best practices annually and create training materials for permitting officials. In addition to these provisions, Section 41003 of the FAST Act contains various provisions aimed at improving inter-agency coordination through the creation of a Coordinated Project Plan and a Permitting Dashboard which will serve as a centralized, one-stop information page for pending projects. Title XLI also reiterates existing regulatory practices to share information with states to avoid duplicative reviews.

These ambitious accelerated delivery provisions may, however, have had the unintended effect of delaying other, earlier sound legislative improvements to the process. In fact, the USDOT Inspector General (IG) found that the USDOT has completed work on more than half of the 42 streamlining provisions directed by Congress under MAP-21, but now has delayed implementing a significant number of MAP-21's reforms because they must be revised to comply with additional streamlining provisions mandated in the FAST Act.¹³ According to the IG audit report, USDOT is altering 19 of its planned actions, which include 10 of the 27 actions already completed under MAP-21.¹⁴ The IG found that the delays caused by additional FAST Act streamlining might in fact impede USDOT's progress toward achieving all of the intended benefits under MAP-21, such as accelerating project delivery, reducing costs, and ensuring that the planning, design, engineering, construction, and financing of transportation projects are more efficient and effective. Thus, enacting additional provisions for streamlining, before allowing full implementation of the FAST Act, could result in greater uncertainty and longer delays as project proponents await agency implementation of the changes and would likely lead to wasted time and effort for agencies and project sponsors.

Next Steps

Although enacting additional changes to the process at this time could add to the cumulative delay of implementation, there are still opportunities to make the process work better. Creating incentives to increase the use of existing but underutilized statutory and regulatory tools as well as institutionalizing some of the lessons we have learned can result in targeted improvements that improve the process and retain fundamental environmental protections.

Liaison Program

FHWA and FTA have had the authority to allow statewide agencies to use a portion of their federal dollars to fund dedicated staff at reviewing and resource agencies since SAFETEA-LU. FHWA has, in that time, developed an extensive community of practice.¹⁵ This authority was expanded under the FAST Act to allow for the funding of dedicated positions to any recipient of grant or formula funds from USDOT including rail, aviation, and local transit agencies. To date, no grantee from other transportation modes has leveraged this authority. Considering that permitting and regulatory agencies often cite resource constraints as the reason they cannot accelerate their reviews, grantees must fully leverage this authority. Congress could consider what impediments exist to the broader use of this streamlining tool and look for incentives to encourage wider adoption.

¹³ U.S. Department of Transportation, Office of the Inspector General. "Vulnerabilities Exist in Implementing Initiatives Under MAP-21 Subtitle C to Accelerate Project Delivery." March 6, 2017.

¹⁴ Page 2, "Results in Brief", U.S. Department of Transportation, Office of the Inspector General. "Vulnerabilities Exist in Implementing Initiatives Under MAP-21 Subtitle C to Accelerate Project Delivery." March 6, 2017.

¹⁵ <https://www.environment.fhwa.dot.gov/liaisonCOP/>.

Surface Transportation Project Delivery Program – NEPA Assignment

The NEPA Assignment program is also underutilized, with only five states participating and only highway projects covered under those Assignment agreements despite Congress's clear intent to expand its application by making rail, transit and multimodal projects eligible for Assignment as well. With the time and cost savings experienced by the states participating in the program, it is worth considering why more states have not applied for the program and why states in the program have not included more project types. Congressional action to eliminate barriers to participation or otherwise incentivizing NEPA Assignment is another area that could yield benefits simply by fully utilizing existing authority through targeted remedies.

Getting Back to Basics

The ultimate goal of the NEPA process is to foster the most appropriate federal action that protects, restores, and enhances our environment by providing clear, concise and transparent information. NEPA does not dictate a particular outcome or even the most environmentally preferable outcome. Rather, the purpose of NEPA is to provide federal agencies and the public with accurate and accessible information to make better decisions. Notwithstanding regulatory page limits established by the Council on Environmental Quality,¹⁶ over the years, it has become the practice to produce NEPA documents that are several volumes and thousands of pages long. Such dense, cryptic information undermines the purpose of NEPA, serves neither the public nor the project, and ultimately does little to protect against litigation. Congress could consider better enforcement of such existing provisions to re-establish the fundamental purpose of NEPA.

National Prioritization

Finally, recognizing that the most complex and controversial infrastructure projects require direct engagement by senior leadership, and benefit greatly from passionate advocacy, Congress could consider identifying the critical infrastructure priorities for the nation, for example working with the States to identify the top 3 projects in each state. Congress could then ensure that these projects receive the statutory and fiscal resources needed to produce timely and efficient delivery.

Conclusion

As we embark on building and maintaining an infrastructure that supports and grows our economy and way of life, we need to implement innovative and collaborative approaches to environmental review and permitting. There are many types of critical infrastructure projects that must move through the permitting and review process, and these projects do not all face the same hurdles and challenges. One size does not fit all in project delivery, and solutions must consider project context, complexity, and impacts.

While much work remains, there have been real strides in reforming and improving the environmental review and permitting process through legislative and administrative

¹⁶ 40 C.F.R. 1502.7. The regulations limit the text of final environmental impact statements to normally be less than 150 pages and for proposals of unusual scope or complexity to normally be less than 300 pages.

efforts. When agencies and sponsors fully leverage existing authorities and the process is applied as intended, most significant delays in the environmental process can be avoided. A challenge that we cannot necessarily legislate a remedy for is the lack of awareness or unfamiliarity with the flexibilities already on the books. As noted above, the NEPA Assignment program only has 5 participants, despite Congress's expressed intent to broaden the program. Funding dedicated staff at reviewing or permitting agencies is still only executed by FHWA, despite being available for all recipients of USDOT funds. Until we fully explore the tools we have, we cannot know how to take the next steps for further improvement.

We have learned that we need a large toolbox to address the various issues that arise during project planning and delivery. Moving the most critical projects forward quickly in a way that ensures better community and environmental outcomes requires upfront coordination and collaboration among the Federal agencies, project sponsors, and community stakeholders. Legislating efficiencies in project delivery is only one piece of a larger challenge facing project sponsors as they try to build and repair our nation's infrastructure. One consistent lesson that legislation cannot address is that any successful project requires a passionate project advocate to overcome the inevitable issues that arise even in a streamlined process. In addition, focusing solely on environmental permitting and review ignores the larger issue of sustainable and sufficient funding for the critical infrastructure needs of this country. Ultimately, broad and repeated attempts to legislatively streamline the process may result in a process that is more complicated than it needs to be and may not produce better outcomes.

We all have to find the right balance of reforming the permitting and review process while maintaining critical environmental and community protections. The environmental review process is a contributor, but usually is not the primary cause of delay for most major infrastructure projects. I look forward to providing this Committee with any support or further information needed to bring infrastructure improvements to the American people in a faster, better and smarter way.

Thank you for the opportunity to appear before you today. I look forward to answering any questions you may have.