

April 27, 2023

FEDERAL INFRASTRUCTURE PERMITTING REFORM UPDATE: SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE PROMOTES BIPARTISANSHIP

To Our Clients and Friends:

Gibson Dunn's Public Policy Practice Group is closely monitoring developments regarding the infrastructure permitting debate in Congress. We offer this alert summarizing and analyzing the U.S. Senate Environment and Public Works Committee's hearing on April 26, 2023 to help our clients prepare for potential changes in infrastructure permitting and environmental authorization laws. We are also available to help our clients arrange meetings on Capitol Hill to discuss permitting reform proposals or to share real-world examples of how the permitting process has affected them.

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On April 26, 2023, the U.S. Senate Committee on Environment and Public Works (the "Committee") held a hearing addressing the need to improve the federal infrastructure permitting process. During the hearing, witnesses testified on the necessity of various changes to the current permitting process, focusing on energy projects. Witnesses included:

Christy Goldfuss, Chief Policy Impact Officer, National Resource Defense Council ("NRDC")
Dana Johnson, Senior Director of Strategy and Federal Policy, WE ACT
Christina Hayes, Executive Director, Americans for a Clean Energy Grid
Jay Timmons, President & CEO, National Association of Manufacturers
Marty Durbin, Senior Vice President of Policy, U.S. Chamber of Commerce

The majority of senators who spoke at the hearing expressed interest in finding a bipartisan compromise on permitting reform. Chairman Tom Carper (D-DE) highlighted recent legislation that has increased the need for permitting reform—especially the Infrastructure Investment and Jobs Act (also known as the Bipartisan Infrastructure Law); the Inflation Reduction Act; and the CHIPS and Science for America Act. Those three laws directed billions of taxpayer dollars to developing infrastructure projects across the United States, many of which must obtain federal permits.

We provide a full hearing summary and analysis below. Of particular interest to clients, however:

- Chairman Carper set out three main goals he said any bipartisan permitting reform package must meet. It must (1) result in lower emissions and protect bedrock environmental laws; (2) support early and meaningful community engagement, especially for projects that affect historically disadvantaged communities; and (3) provide businesses—in particular, clean energy businesses—with certainty and unlock economic growth across the country.

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- Ranking Member Shelley Moore Capito (R-WV) emphasized the need for permitting reform to proceed through regular order (i.e., for it to go through the committee process rather than developed by an informal “gang”).
- Both Chairman Carper and Ranking Member Capito commented on the importance of real-world examples to convey the need for permitting reform to the American public.
- All members agreed that improving front-end community engagement is crucial for any permitting reform package.

Key substantive issues surrounding permitting reform raised in the hearing include: (1) the effectiveness of the FAST-41 permitting reforms; (2) the need for early planning and community engagement; (3) the scope of permitting reform; (4) enforceable timelines and regulatory clarity; (5) litigation; (6) critical minerals and microchip manufacturing; and (7) agency funding.

1. Effectiveness of FAST-41 Permitting Reforms

In his opening statement, Chairman Carper praised the effectiveness of the FAST-41 program, which created the Federal Permitting Improvement Steering Council (“FPISC” or “Permitting Council”) and provides an agency coordination process for facilitating the permitting process for some of the largest infrastructure projects. He noted that from 2010 to 2018, on average, it took 4.5 years to create a project’s environmental impact statement, but for FAST-41 projects, it took only 2.5 years. Chairman Carper’s support for the FAST-41 framework suggests he may be open to permitting reforms that rely on a similar framework that provide for increased agency communication, coordination, and transparency. Note, too, that Senator Manchin’s 2022 permitting bill heavily drew from the FAST-41 framework.

Similarly, Senator Pete Ricketts (R-NE) suggested that the federal permitting agencies should employ the Lean Six Sigma managerial process, which aims to reduce waste and inefficiencies. He observed that the Lean Six Sigma process cut the timeline for one type of permit in Nebraska from 190 days to 65 days over the course of one year without loosening environmental restrictions. Ms. Goldfuss observed that the FAST-41 process includes some of those same principles, such as the designation of a lead agency to engage with a project proponent and a public, online dashboard that offers transparency into the permitting process for individual projects.

2. Need for Early Planning and Community Engagement

Senators and witnesses alike agreed that early planning and community engagement is crucial for improving the permitting process. For example, Ms. Goldfuss commented that project sponsors and the government should work together to plan and site development in ways that minimize impact before permitting begins. She also encouraged the federal government to partner with state agencies to share data, mitigation options, and guidance, and she advocated for the federal government to use Inflation Reduction Act funds to help states with planning and permitting.

Likewise, Ms. Johnson advocated for early and ongoing communication during the project planning process. She suggested undertaking community engagement with a neutral party facilitating the conversation and making the comment process more accessible for people who do not have access to computers or who cannot attend public hearings.

Ms. Hayes also endorsed early and meaningful communication with communities and suggested that project sponsors should provide community benefits and revenue sharing. In his opening, Chairman Carper commended a West Virginia project for providing grants for communities surrounding a turbine wind farm and ensuring that construction jobs went to the local labor force.

Senator Ben Cardin (D-MD) expressed concern that rushing permitting processes will prevent community participation. Ms. Johnson responded that Congress cannot prioritize speed over quality and suggested frontloading the engagement process before work on an environmental impact statement or environmental assessment begins.

3. Scope of Permitting Reform

One of the clear divides between Republicans and Democrats is the scope of permitting reform—both regarding the types of projects such reforms will help and the reforms themselves.

Regarding the types of projects, throughout the hearing, Democrats focused on the need for increased energy transmission and green energy infrastructure. Ranking Member Capito, however, emphasized permitting reform needs to help all infrastructure projects, “not just a small subset that are politically favorable to one group or another.” Other Republicans echoed this sentiment. Mr. Durbin expressed the need for permitting reform to support natural gas development, including interstate pipelines, as well as critical mineral mining and broadband expansion.

Regarding reforms themselves, Ranking Member Capito argued that to make substantive change, Congress will have to amend the underlying environmental statutes, including the Clean Water Act, Clean Air Act, and the National Environment Policy Act (“NEPA”). Senator Kevin Cramer (R-ND) also endorsed amending the environmental statutes.

On the other hand, Ms. Goldfuss contended that “NEPA is not the problem.” She said that instead of focusing on NEPA reforms, agencies should be encouraged to make greater use of programmatic environmental impact statements using a “design one, build many” model. Regarding transmission lines, she argued that the Federal Energy Regulatory Commission and the Department of Energy should move quickly to designate national interest corridors.

4. Enforceable Timelines and Regulatory Clarity

Ranking Member Capito stated that there need to be “enforceable timelines with clear time limits and predictable schedules for environmental reviews and consequences for when agencies fail to act in a timely fashion.” Mr. Timmons echoed her concern for enforceable timetables in his opening statement, particularly for hydrogen, natural gas, and nuclear infrastructure.

Mr. Timmons also argued that the Environmental Protection Agency and other agencies should refrain from issuing new or shifting regulations and that Congress should hold the federal government accountable for implementing the congressional intent of the One Federal Decision effort, enacted as part of the IJA.

5. **Litigation**

Senator Dan Sullivan (R-AK) expressed concern that litigation is unnecessarily hampering energy projects. Mr. Durbin responded that litigation against natural gas pipelines increases costs for manufacturers and consumers. He emphasized that natural gas is part of the clean energy economy, but litigation affects its reliability and affordability. Mr. Timmons argued that judicial review should be “meaningful and timely.”

In response to questioning from Senator Jeff Merkley (D-OR), Ms. Goldfuss acknowledged that the NRDC opposed Senator Manchin’s permitting proposal last Congress, in part because of the limited timeline for judicial review for certain projects.

6. **Critical Minerals and Microchip Manufacturing**

Several senators and witnesses discussed the need to improve the permitting process for mining critical minerals given the national security concerns associated with China manufacturing and processing 80 percent of the critical minerals used in modern technology.

Senator Mark Kelly (D-AZ) expressed his interest in permitting reform to help accelerate microchip manufacturing in the United States. He noted that application of the NEPA process to CHIPS Act funding recipients may unnecessarily delay meeting the national security goal of onshoring chips manufacturing. Mr. Durbin argued that all projects need to have environmental review and community input, but Congress needs to make sure the process is functional and that decisions can be made quickly to advance the CHIPS Act goals.

7. **Agency Funding**

Senators Merkley and Ed Markey (D-MA) argued that the real cause of permitting delays is underfunding of federal agencies. Senator Markey suggested that Congress should wait to see the impact of the recently passed Inflation Reduction Act’s allocation of \$1 billion to agencies before making any further reforms to the permitting process.

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Senior members of Gibson Dunn’s Public Policy Practice Group have more than 40 years of combined experience on Capitol Hill. Our team includes former congressional staff and Administration officials who have significant experience tracking, developing, and implementing infrastructure permitting reform legislation and regulations. We also have strong working relationships with key members of Congress and Biden administration officials focused on federal permitting reform.

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Our team is available to assist clients through strategic counseling; real-time intelligence gathering on federal permitting reform legislation; developing and advancing policy positions; drafting legislative text; shaping messaging; and lobbying Congress. We also work with clients to craft regulatory comment letters; advocate before executive branch agencies; and navigate legislative and regulatory changes to federal infrastructure permitting laws.



*The following Gibson Dunn lawyers assisted in preparing this alert: Michael D. Bopp, Roscoe Jones Jr., David Fotouhi, Amanda Neely, Daniel P. Smith, and Miguel Mauricio.**

Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Public Policy or Environmental Litigation and Mass Tort practice groups, or the following authors:

Michael D. Bopp – Co-Chair, Public Policy Group, Washington, D.C. (+1 202-955-8256, mbopp@gibsondunn.com)

Roscoe Jones, Jr. – Co-Chair, Public Policy Group, Washington, D.C. (+1 202-887-3530, rjones@gibsondunn.com)

David Fotouhi – Washington, D.C. (+1 202-955-8502, dfotouhi@gibsondunn.com)

Amanda H. Neely – Washington, D.C. (+1 202-777-9566, aneely@gibsondunn.com)

Daniel P. Smith – Washington, D.C. (+1 202-777-9549, dpsmith@gibsondunn.com)

**Miguel Mauricio is a recent law graduate working in the firm's San Francisco office who is not admitted to practice law.*

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