

May 19, 2023

FEDERAL INFRASTRUCTURE PERMITTING REFORM UPDATE – SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE: “WE NEED TO FINISH THE JOB” ON INFRASTRUCTURE

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 May 17, 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 May 17, 2023, the U.S. Senate Committee on Environment and Public Works (“EPW” or the “Committee”) held a hearing to hear testimony from administration officials regarding the need for federal infrastructure permitting reform. Committee Chairman Tom Carper (D-DE) started the hearing by echoing President Biden’s campaign slogan, saying, “We need to finish the job” on infrastructure reform.” He emphasized the importance of connecting clean energy power to the grid.

Witnesses included:

- **The Honorable Brenda Mallory**, Chair, Council on Environmental Quality;
- **Christine Harada**, Executive Director, Federal Permitting Improvement Steering Council; and
- **The Honorable Jason Miller**, Deputy Director for Management, Office of Management and Budget.

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

- The divides between Democratic and Republican permitting reform goals were stark. Chairman Carper re-emphasized the three points he said must be included in any permitting reform proposal that he raised during the last EPW hearing: (1) it must reduce greenhouse gas emissions, including addressing transmission barriers that make it harder to connect to the grid, without undermining bedrock environmental laws; (2) it must support early and meaningful community engagement; and (3) it must provide businesses with certainty and predictability to make long term decisions. He said that the House Republicans’ proposals would undermine NEPA and in

some cases eliminate judicial review, which is not acceptable to him. He endorsed the idea of expanding programmatic environmental impact statements for certain offshore wind projects.

- Ranking Member Shelley Moore Capito (R-WV) argued that regulators need firm deadlines for environmental reviews and constant oversight. She urged that Congress not pit renewable energy against conventional energy or various projects against each other. She endorsed judicial reform to prevent projects from being held in limbo during litigation. She called for a transparent committee process in Congress and compromise on a bipartisan solution.
- Ms. Mallory said that CEQ soon would be proposing rules to update National Environmental Policy Act (“NEPA”) regulations and promote more community engagement in the NEPA environmental review process.
- When asked for specific permitting process improvements, the administration witnesses broke little new ground. All three relied heavily on the administration’s May 2022 Permitting Action Plan and the President’s permitting priorities released on May 10, 2023.

Key substantive issues surrounding permitting reform raised in the hearing included: (1) the effectiveness of the FAST-41 permitting reforms; (2) community engagement; (3) the scope of permitting reform; (4) enforceable timelines, regulatory clarity, and judicial review; and (5) resources.

1. Effectiveness of FAST-41 Permitting Reforms

At every recent hearing on permitting reform, witnesses and members have coalesced around the effectiveness of the FAST-41 reforms.^[1] It continues to be likely that any permitting reform package will expand FAST-41 reforms such as identifying a lead agency for each project, increasing communication between permitting agencies, and allowing the public more transparency into the permitting process to more projects.

Ms. Harada touted FAST-41’s success, noting that the Federal Permitting Improvement Steering Council (“Permitting Council”) has helped permit 31 projects involving direct capital investments with a value of \$160 billion. The Permitting Council is currently working on projects valued at \$100 billion.

Ms. Mallory praised Congress for making FAST-41 permanent and credited its work for helping to reduce permitting timelines. She explained that the administration has applied many of the FAST-41 principles to projects beyond those covered by the FAST-41 program, including assigning lead agencies to projects, setting a clear and publicly available timeline, and monitoring performance throughout.

Senator Ben Cardin (D-MD) urged the Permitting Council to include more water supply projects as part of FAST-41.

2. Community Engagement

In his first line of questions, Chairman Carper focused on the importance of community engagement. All of the witnesses agreed that community engagement, “early and often,” is key to project success. He

asked the witnesses to comment on coordination with state and local government, which Ms. Mallory acknowledged is incredibly important. She cited efforts on projects in Georgia and New York to coordinate with state governments and said no balls had been dropped in those processes. Senator Ed Markey (D-MA) noted the importance of including environmental justice communities early in the process.

Ranking Member Capito said she had no objection to increasing engagement, but expressed frustration that early and frequent community engagement was one of the only ideas being discussed.

3. Scope of Permitting Reform

A frequent point of contention between the Republicans and Democrats in the recent series of permitting hearings has been whether to reform permitting only for clean energy projects or for all energy projects. Senator Jeff Merkley (D-OR) argued that the administration should not be approving any new fossil fuel projects, while Ranking Member Capito argued that permitting reform needs to apply to all energy projects.

4. Enforceable Timelines, Regulatory Clarity, and Judicial Review

Ranking Member Capito expressed concern about regulators changing permitting standards through guidance rather than official notice-and-comment rulemaking. She also voiced support for clear and enforceable timelines. Mr. Miller explained that the administration had set timeline goals, but Ranking Member Capito pointed out that agencies “blow by them.” Mr. Miller suggested one remedy was to ensure that the administration understood the cause of each delay and was requiring agencies to provide remediation plans. Ranking Member Capito, however, was not satisfied with the lack of enforceability.

Senator Markey, on the other hand, expressed skepticism that setting strict timelines or page counts for NEPA filings would improve the permitting process. Ms. Harada agreed that targets should not “rigidly constrain” agencies from coming to the best solution.

Mr. Miller noted that, while it’s important to have a mechanism to resolve conflicts, it’s important for those conflicts not to drag out, and FAST-41 does include time limits associated with judicial review (FAST-41 projects are subject to a two-year statute of limitations under NEPA, instead of six).

5. Resources

Several senators, including Senator Markey and all of the witnesses commented on the importance of ensuring that federal agencies are sufficiently funded to handle the permitting process. Ms. Harada and Mr. Miller both pointed out the need for the Permitting Council also to be well resourced to facilitate project reviews, and they also discussed the need for improved technology to enhance the permitting process—some of which still takes place on paper forms.

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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.

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.

[1] The FAST-41 program was created in Title 41 of the Fixing America’s Surface Transportation (“FAST”) Act of 2015, Pub. L. No. 114–94. It created the Federal Permitting Improvement Steering Council and established a process under which sponsors of some of the largest infrastructure projects could apply to become “covered projects.” Once covered, a project receives certain benefits, including coordination of all participating agencies by a lead agency; a two-year statute of limitations under NEPA; and the opportunity for the Permitting Council executive director to resolve disputes between agencies. The permitting process for each covered project is tracked publicly at www.permits.performance.gov.



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:

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