

May 12, 2023

FEDERAL INFRASTRUCTURE PERMITTING REFORM UPDATE: SENATE ENERGY & NATURAL RESOURCES COMMITTEE MEMBERS BULLISH ON REFORM

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 Energy and Natural Resources Committee's hearing on May 11, 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.

On May 11, 2023, the U.S. Senate Committee on Energy and Natural Resources ("ENR" or the "Committee") held a hearing addressing the need to improve the federal infrastructure permitting process. Committee Chairman Joe Manchin (D-WV) repeatedly emphasized the importance of Congress passing a bipartisan permitting reform bill and promised, "We're going to make something happen." Other senators and witnesses alike concurred on the need for permitting reform to strengthen national security, address climate change, and support economic growth.

Witnesses included:

- **Jason Grumet**, Chief Executive Officer, American Clean Power Association;
- **Rich Nolan**, President and Chief Executive Officer, National Mining Association;
- **Elizabeth Shuler**, President, American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"); and
- **Paul Ulrich**, Vice President, Jonah Energy.

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

- Chairman Manchin expressed his commitment to bipartisan permitting reform. He acknowledged the main proposals to date: his own bill, S. 1399, the Building American Energy Security Act of 2023; Committee Ranking Member John Barrasso's S. 1456, the Spur Permitting of Under Developed Resources ("SPUR") Act; Environment and Public Works Committee Ranking Member Shelley Moore Capito's S. 1499, the Revitalizing the Economy by Simplifying

GIBSON DUNN

Timelines and Assuring Regulatory Transparency (“RESTART”) Act; and H.R. 1, the Lower Energy Costs Act, which has passed the House. He also noted that Environment and Public Works (“EPW”) Committee Chairman Tom Carper will be offering his own proposal soon. Chairman Manchin argued that bipartisan reform will draw from all of these proposals.

- This hearing featured more comity than the EPW Committee’s hearing two weeks ago. Although the EPW members mostly agreed permitting reform is necessary, the Committee Democrats and several witnesses seemed concerned that permitting reforms may reduce community input. The ENR Committee members, however, all seemed to agree that permitting reform does not mean losing community participation or reducing environmental standards.
- Like the EPW Committee, ENR Chairman Manchin and Ranking Member Barrasso support developing permitting reform through regular order (meaning through the committee process, rather than a “gang”).
- Ranking Member Barrasso (R-WY) specified four requirements for any permitting bill that passes Congress. The bill: (1) must benefit the entire country, not a narrow range of special interests, limited projects, or specific technology. It must apply to all energy sources, including traditional and alternative energy; (2) include enforceable timelines for environmental authorizations; (3) limit legal challenges; and (4) stop the executive branch from “hijacking the permitting process to advance its own narrow and frequently extreme agenda.”
- Senator Angus King (I-ME) noted that when he was governor of Maine, he prioritized high environmental standards and a timely and predictable permitting process, arguing those two things are not inconsistent. As an Independent with practical experience from his time as governor, Senator King may well become a key player in the permitting reform effort.

Key substantive issues surrounding permitting reform raised in the hearing included: (1) the effectiveness of the FAST-41 permitting reforms; (2) the scope of permitting reform; (3) enforceable timelines and regulatory clarity; (4) litigation; (5) mining and critical minerals; (6) jobs and workforce; and (7) national security.

1. Effectiveness of FAST-41 Permitting Reforms

Several senators and witnesses commented on the effectiveness of the FAST-41 permitting reforms at reducing permitting timelines without harming environmental standards. Based on positive comments from both Republican and Democratic senators on the ENR and EPW committees, it seems likely that any bipartisan permitting reform proposal either will expand the FAST-41 program itself or apply FAST-41 principles, such as the designation of a lead agency for each project, deadline transparency and accountability, and expedited litigation timelines to more projects.

Chairman Manchin discussed the permitting reforms in his bill, which largely draw from FAST-41 principles, including limiting the length of environmental reviews; imposing enforceable timelines on agency reviews; requiring agencies to coordinate with one another and produce one coordinated review

(a process known as “One Federal Decision”) rather than multiple, disparate reviews. He said he was “pleased” to see many of those ideas in Ranking Member Barrasso’s bill.

Senator Mark Kelly (D-AZ) commented that he supported efforts to permanent reauthorize FAST-41 last Congress, calling it a critical tool to help large projects navigate the permitting process. He acknowledged that the South32 Project became the first mining project to be covered by FAST-41 earlier this year.

Mr. Grumet also endorsed those reforms, calling FAST-41 and its Federal Permitting Improvement Steering Council “shockingly effective” at reducing permitting timelines.

2. Scope of Permitting Reform

One of the most significant areas of disagreement to date regarding permitting reform is which types of projects such reform should benefit. Many Democrats are focused on permitting reform for alternative energy projects and transmission lines and infrastructure. Republicans generally urge permitting reform for all infrastructure projects and support an all-of-the-above energy strategy, and they have concerns about taking away authority from state governments to permit transmission lines. Chairman Manchin, however, is trying to bridge that divide. At the hearing, he expressed concern about the substantial reduction in new natural gas infrastructure, as well as transmission infrastructure, as well as manufacturing and mining. He commented that “no matter what you want to build, it takes too long.”

Regarding transmission, Chairman Manchin explained that his bill recognizes that state governments have primary authority to site transmission lines, but offers reasonable improvements that would allow the Federal Energy Regulatory Commission (“FERC”) to step in when states cannot reach agreement after one year so long-distance interstate transmission projects can move forward. He suggested that his bill addresses Republican cost allocation concerns by ensuring that only those who receive electric benefits will pay for those benefits, and those payments will be proportionate. Senators Cindy Hyde-Smith (R-MS) and Josh Hawley (R-MO), though, expressed skepticism about proposals that yield more authority to the federal government over state approvals, and Senator John Hoeven (R-ND) raised opposition to policies that may distribute transmission costs unfairly.

Ranking Member Barrasso argued that Congress “cannot enact anything less than comprehensive reform,” pointing to his SPUR Act, which he said would revitalize the energy sector, hold the Secretary of Interior to her legal obligations regarding leasing on federal lands, and ensure access to minerals for renewable and battery technology. He asserted the bill would provide companies more predictable permitting processes for pipelines, liquid natural gas (“LNG”) facilities, and electric transmission lines. He invited Mr. Ulrich to testify regarding his company’s efforts to produce natural gas in an environmentally responsible manner.

Senators Maria Cantwell (D-WA) and Steve Daines (R-MT) both called for any bipartisan permitting reform proposal to incorporate their bill, S. 1521, to improve the licensing of non-federal hydropower projects. Senator Ron Wyden (D-OR) asked to be added as a co-sponsor during the hearing.

GIBSON DUNN

In his written testimony, Mr. Grumet supplied specific and detailed suggestions for Congress to enact transmission line permitting reform that would ensure regions can supply energy to each other across the country in an emergency. He argued that the current balkanized system leads to inefficient permitting and, ultimately, life-or-death emergencies when one region's grid struggles. He proposed requiring states to conduct their own evaluations against FERC-supplied criteria. He also endorsed many of the FAST-41 principles and certain of the National Environmental Policy Act ("NEPA") reforms contained in Chairman Manchin's bill and Republican proposals, mainly focused on default timelines for steps in the environmental authorization process.

3. Enforceable Timelines and Regulatory Clarity

Ranking Member Barrasso made it clear that any bipartisan permitting bill must impose enforceable timelines on environmental authorizations and provide regulatory clarity regarding authorization requirements. Senator King also discussed the importance of firm deadlines.

Senator Daines contended that any permitting reform bill needs to address the Ninth Circuit's decision in *Cottonwood Environmental Law Center v. U.S. Forest Service* regarding what actions trigger federal agencies' obligation to reinstate consultation with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service. Senator Daines said that the Committee would be taking up his bipartisan legislation, S. 1540, addressing that issue next week.

Mr. Grumet testified that it seems like there is growing agreement that two years is an appropriate general timeline for permitting approval processes. Ms. Nolan argued that regulatory certainty is crucial for suppliers, contractors, and workers to make commitments to projects.

4. Litigation

Chairman Manchin expressed outrage over the eight years of litigation against the Mountain Valley Pipeline in West Virginia, which he noted has involved eight NEPA reviews and nine court cases in the U.S. Court of Appeals for the Fourth Circuit. Senator King said he supports limiting the length of time litigation takes. When he questioned Mr. Grumet about the appropriate length of time for a statute of limitations, however, Mr. Grumet demurred from committing to a specific number. He commented that the current six years is unnecessary; the FAST-41 change for certain projects to two years was "constructive"; and the Manchin legislation (at six months) is better.

Mr. Ulrich testified that the effects of litigation on oil and gas permitting are significant and argued any reform should expedite judicial review, limit venue shopping, and provide a reasonable statute of limitations for bringing an action against a project.

5. Mining and Critical Minerals

There was general consensus among senators and witnesses that the permitting process for mining needs reform. They recognized that critical mineral mining is crucial for U.S. national security and to combatting climate change.

Ranking Member Barrasso argued that it will be impossible to meet President Biden’s 2035 climate goals without a dramatic increase in our dependence on Russia and China for critical minerals unless Congress reforms the permitting process. He specifically focused on the need for miners to have access to federal lands to access critical minerals.

Senator Daines commented that permitting hard rock mining projects usually takes more than ten years, along with \$10 billion in startup capital before producing any revenue—if they get through the permitting process. He commented that the Libby Exploration Project in Montana still has not finalized its permitting process because of litigation after 34 years.

Senator Catherine Cortez-Masto (D-NV) said that “everyone agrees” that we need to “get minerals and protect the environment,” citing the Biden administration’s focus on increasing domestic sources of critical minerals. She urged the mining industry to work harder on environmental issues and pressure bad actors, and also to collaborate with local stakeholders.

Senator Hawley observed that the U.S. labor protections are a “heck of a lot better” than those in China and the Democratic Republic of Congo, which currently provide much of the world’s mineral supply.

6. Jobs and Workforce

The hearing focused heavily on permitting reform’s impact on jobs and the economy. Both Republican and Democratic senators acknowledged that permitting reform is important for job creation.

In keeping with unions’ long support for permitting reform, Ms. Shuler testified that permitting reform is the AFL-CIO’s top priority, noting that every job in the energy and manufacturing sectors depend on permitting and siting. She claimed that permitting reform could “create more than a million good union jobs” while also bringing down emissions. She focused on the need to ramp up training to ensure workforce readiness when projects are approved.

Senator Kelly specifically focused on the importance of a faster permitting process to ensure that new jobs are available when older energy assets close.

Mr. Nolan offered that mining is a source of high-paying, stable, and often unionized jobs. He said mining directly employs 475,000 people in the United States with an average wage of \$85,000.

7. National Security

Almost all of the senators and witnesses discussed the need to reduce reliance on China and Russia for critical minerals and manufacturing as a matter of national security. Chairman Manchin expressed frustration that the Biden administration does not focus on the national security purposes that motivated the Inflation Reduction Act, instead only discussing the climate change effects, and said he had been urging the administration to focus on its national security benefits. Senator King noted that 87 percent of lithium in electric vehicle batteries comes from China, which is a national security issue.

GIBSON DUNN

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.



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

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)*

**Daniel P. Smith is of counsel working in the firm’s Washington, D.C. office who is admitted only in Illinois and practicing under supervision of members of the District of Columbia Bar under D.C. App. R. 49.*

© 2023 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice. Please note, prior results do not guarantee a similar outcome.