

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

Memorandum

To: Members, Committee on Small Business
From: Committee Staff
Date: September 1, 2017
Re: Hearing: “Expediting Economic Growth: How Streamlining Federal Permitting Can Cut Red Tape for Small Businesses”

On Wednesday, September 6, 2017 at 11:00 a.m., the Committee on Small Business will meet in Room 2360 of the Rayburn House Office Building for the purpose of examining whether and how federal permitting requirements burden small businesses.

I. Background on Federal Permitting

Before a business can begin a project—whether it is a utility company, a manufacturer, construction company, or other business—it is required to obtain a number of permits from the federal government. The federal permitting system is a complex regulatory network and involves many federal agencies, depending on the project. Below are some of the laws with which small businesses must navigate to comply with federal permitting requirements.

A. National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires all major projects with a federal nexus to submit a comprehensive review of their potential environmental impacts prior to beginning the project.¹ Agencies must evaluate the environmental and related social and economic effects of the proposed actions and provide opportunities for the public to comment on the evaluations. NEPA is “often the largest, costliest, most time-consuming regulatory hurdle” that projects face before construction.² Environmental reviews can take many years to complete, and the length and time of the reviews continues to become longer.

In 2014, the Government Accountability Office (GAO) published a report regarding the administration of NEPA.³ GAO reported that the Administration did not know how much time it

¹ National Environmental Policy Act of 1969, 42 U.S.C. §4321–4370h.

² Nat’l Ass’n of Mfrs., *Comment to Department of Commerce on Notion, Request for Information: Impact of Federal Regulations on Domestic Manufacturing (Docket No. 170302221-7221-01)*, 5 (Mar. 31, 2017), <https://www.regulations.gov/document?D=DOC-2017-0001-0146>.

³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES (Apr. 15, 2014).

spent on environmental reviews, how much a typical environmental review costs, or how long a typical NEPA review takes. GAO also estimated that the average environmental impact statement under NEPA takes about 4.6 years, the highest average preparation time that has been calculated since 1997.⁴

Congress has passed legislation that attempts to streamline the federal permitting process and NEPA for major infrastructure projects. The Fixing America's Surface Transportation (FAST) Act was signed into law on December 4, 2015, and Title 41 (FAST-41) created the Federal Permitting Improvement Steering Council (Council), which includes several federal agencies that are involved in the federal permitting process.⁵ FAST-41 directed the Council to develop a plan to significantly reduce permitting review times and assign a lead agency to cover each project.⁶

B. Other Laws and Regulations

Below are additional examples of laws and regulations that require federal permits:

- Clean Air Act: The Act requires a number of permits that are intended to control air pollution, including operating permits, preconstruction permits, new source review permits, and/or prevention of significant deterioration permits.
- Clean Water Act: The Act requires a number of permits that are intended to protect pollutant discharges into federal waters, including permits for wetlands, National Pollutant Discharge Elimination System permits, construction stormwater permits, water withdrawal permits, water rights permits, and/or drinking water permits.
- Endangered Species Act: The Act prohibits activities that affect protected species and habitats unless it is authorized by a permit from the U.S. Fish and Wildlife Service or the National Oceanic and Atmospheric Administration.

⁴ *Id.* at 14. GAO relied upon the National Association of Environmental Professional's report for this estimation.

⁵ Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 41002, 129 Stat. 1312, 1743-44. The following federal agencies are members of the Federal Permitting Improvement Steering Council: Department of Agriculture, Army Corps of Engineers, Department of Commerce, Department of the Interior, Department of Energy, Department of Transportation, Department of Defense, Environmental Protection Agency, Federal Energy Regulatory Commission, Nuclear Regulatory Commission, Department of Homeland Security, Department of Housing and Urban Development, Advisory Council on Historic Preservation, Office of Management and Budget, and Council on Environmental Quality. Permitting Dashboard, *Federal Permitting Improvement Steering Council (FPISC) Agencies*, <https://www.permits.performance.gov/about/federal-permitting-improvement-steering-council-fpisc-agencies> (last updated Mar. 17, 2017).

⁶ The lead agency must develop a plan for coordinating public and agency participation within 60 days of the project's posting on the Federal Infrastructure Permitting Dashboard website. The Council is also required to report to Congress on its progress under FAST-41 and provide recommended best practices for infrastructure permitting and recommended performance schedules. The Council released its most recent report for FY 2016 in April 2017. Federal Permitting Improvement Steering Council, *FAST-41 FY 2016 Annual Report to Congress* (Apr. 2017), <https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/FAST-41%20FY%202016%20Annual%20Report%20to%20Congress%204.15.17.pdf>.

- Regulations for National Forest System Land: A number of federal laws allow businesses to apply for special-use permits to use public land.

II. The Federal Permitting Process Burdens Small Businesses

Small businesses across industries must overcome a number of hurdles—including wading through regulatory overlap, enduring lengthy delays, and bearing increased costs—as they try to obtain all of the appropriate federal permits before launching projects or initiatives.

A. Small Businesses Frequently Encounter Regulatory Overlap

Several federal government agencies and departments have statutory authority to regulate similar or the same industries, which often forces small businesses to obtain permits from several agencies before beginning a project. For example, small manufacturers can be subject to various permits regarding air emissions, storm water pollution prevention, waste generation and disposal, and hazardous materials transportation.⁷ Similarly, a refinery may be required to obtain four permits for air, five permits for wetlands, and five permits for water.⁸ The pipeline industry must navigate all the following agencies, which have overlapping jurisdictions: the Environmental Protection Agency (EPA) and the Pipeline and Hazardous Materials Safety Administration (PHMSA), both regulating storage tanks and spill response; the Transportation Security Administration and the U.S. Coast Guard, both regulating security requirements; EPA and the Occupational Safety and Health Administration (OSHA), both regulating worker safety; PHMSA and OSHA, both regulating safety within plants and labeling; and EPA and the United States Army Corps of Engineers (Corps), both regulating water and wetlands.⁹ With so much regulatory overlap, it is almost impossible for small businesses to be sure they have all the proper permits to begin a project.

B. Small Businesses Endure Lengthy Delays Waiting for Permitting Decisions

Small businesses must endure lengthy delays waiting for permitting decisions. Long wait times can lead to increased costs and force businesses to delay or even abandon their projects. For example, the Title V permitting under the Clean Air Act can be slow and cumbersome, often taking over a year for permit approval, renewal, or modification.¹⁰ The lack of certainty regarding when a permit will be issued can create a significant burden that many operators cannot afford to challenge because of the significant delay of the project.¹¹ For example, the Corps requires multiple agencies to concur in a permitting decision before it can issue the permit, which can impose significant time delays. Similarly, the Corps' permitting process for steel mills for impacts on wetlands can take over three years to complete and may require several

⁷ Am. Coatings Ass'n, *Comment to Department of Commerce on Docket Number: 170302221-7221-01 – Impact of Federal Regulations on Domestic Manufacturing*, 2 (Mar. 31, 2017), <https://www.regulations.gov/document?D=DOC-2017-0001-0100>.

⁸ Am. Petroleum Inst., *Comment to Department of Commerce on the Request for Information on the “Impact of Federal Regulations on Domestic Manufacturing:” 82 Fed. Reg. 12,786; March 7, 2017*, 3 (Apr. 1, 2017), <https://www.regulations.gov/document?D=DOC-2017-0001-0126>.

⁹ Nat'l Ass'n of Mfrs., *supra* note 2, at 6.

¹⁰ Am. Coatings Ass'n, *supra* note 7, at 2.

¹¹ Am. Petroleum Inst., *supra* note 8, at 7.

rounds of review and multiple submissions.¹² Further, obtaining a new air permit can take over three years and includes many public hearings and rounds of application reviews across multiple EPA offices.¹³

C. Small Businesses Face Steep Costs Complying with Federal Permitting Requirements

Federal permitting requirements are especially costly for small businesses. For example, the Department of Energy (DOE) reported that the average payment to a contractor to prepare an environmental impact statement from 2003 to 2012 was \$6.8 million, ranging from \$60,000 to \$85 million.¹⁴ In DOE's 2014 NEPA quarterly report, the median cost for preparing four environmental impact statements was \$1.7 million and the average cost was \$2.9 million.¹⁵

Small businesses are concerned with the steady rising costs stemming from an increasingly complex permitting system.¹⁶ Simple modifications or capacity increase projects often require complex data requirements and technical analyses, which force small businesses to hire consultants and lawyers to handle the permitting process, costing them thousands or more dollars.¹⁷ Small businesses also face additional costs that are associated with monitoring, recordkeeping, and reporting requirements.¹⁸

III. The Administration Has Taken Steps to Address the Federal Permitting Process

A. January 24, 2017 Presidential Memorandum

The Administration has taken steps to address the federal permitting process. On January 24, 2017, President Trump issued a Presidential Memorandum, "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing," which directed executive departments and agencies to expedite reviews of and approvals for construction and manufacturing facilities and to reduce regulatory burdens affecting domestic manufacturing.¹⁹ The memorandum also directed the Secretary of Commerce to conduct outreach to stakeholders on the impact of federal regulations on domestic manufacturing.²⁰

Pursuant to the January 24 Presidential Memorandum, the Department of Commerce issued a request for information on March 7, 2017, soliciting comments from the public concerning federal actions to streamline permitting for the construction and expansion of

¹² Steel Mfrs. Ass'n & Specialty Steel Indus. of North Am., *Comment to Department of Commerce on Request for Information: Impact of Federal Regulation on Domestic Manufacturing* (82 Fed. Reg. 12,787 (March 7, 2017), 7 (Mar. 31, 2017), <https://www.regulations.gov/document?D=DOC-2017-0001-0112>).

¹³ *Id.*

¹⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES, 13 (Apr. 2014).

¹⁵ *Id.*

¹⁶ Steel Mfrs. Ass'n & Specialty Steel Indus. of North Am., *supra* note 12, at 7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, 2017 DAILY COMP. PRES. DOC. 69 (Jan. 24, 2017).

²⁰ *Id.*

domestic manufacturing and ways to reduce regulatory burdens on domestic manufacturers.²¹ Comments closed on March 31, 2017, but the report has not yet been published.²² The Department of Commerce received 171 comments from various trade associations, business owners, and other interested stakeholders during the comment period.²³

B. Executive Orders

The President has also issued Executive Orders addressing federal permitting. Executive Order 13766 entitled, “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects,” ordered executive agencies to expedite environmental reviews and approvals for all infrastructure projects and granted preference to high priority infrastructure projects.²⁴ It requires the Chairman of the Council on Environmental Quality (CEQ) to decide whether an infrastructure project qualifies as a “high priority” infrastructure project within 30 days after a request was made.

On August 15, 2017, the President issued Executive Order 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure,” which requires agencies to track the costs of conducting environmental reviews and making permitting decisions.²⁵ It also aims to streamline the environmental permitting process for major infrastructure projects by implementing a One Federal Decision policy, where one lead federal agency will work with other relevant agencies to complete the environmental reviews and permitting decisions needed for major infrastructure projects.²⁶

IV. Conclusion

The current federal permitting process disproportionately burdens small businesses. They must endure long delays and significant costs to obtain all the proper permits before beginning a project, while navigating the vast and complex federal regulatory state to obtain the proper permits. The federal government needs to continue to seek solutions to streamline the permitting process to ease the regulatory burden on small businesses.

²¹ Impact of Federal Regulations on Domestic Manufacturing, 82 Fed. Reg. 12,786 (Mar. 7, 2017).

²² According to the Presidential Memorandum, a report was supposed to be published 60 days after the comment period closed.

²³ See *Impact of Federal Regulations on Domestic Manufacturing*, <https://www.regulations.gov/docket?D=DOC-2017-0001> (last visited Aug. 28, 2017).

²⁴ Exec. Order No. 13766, 82 Fed. Reg. 8,567, 8,567 (Jan. 30, 2017).

²⁵ Exec. Order No. 13807, 82 Fed. Reg. 40,463 (Aug. 24, 2017).

²⁶ *Id.* at 40,465, 40,466.