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United States Senate Committee on the Budget

*Beyond the Breaking Point: The Fiscal Consequences of Climate Change on Infrastructure*

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Chairman Whitehouse and Ranking Member Grassley, my name is Alex Herrgott, and I am president of The Permitting Institute (“TPI”). TPI is a federal and state-focused non-partisan 501(c)6 nonprofit serving as the authoritative voice on permitting reform to rebuild, expand, and modernize America’s aging infrastructure, and a trusted expert resource and education partner for federal and state policymakers and regulators. Collectively, our members and partners support the common goal of accelerating infrastructure improvement across all sectors, including conventional and renewable energy, transportation, water, pipelines, mining, manufacturing, ports, waterways, and broadband.

TPI focuses on facts and transparency. Our mission is to rise above the rhetoric, political posturing, and gamesmanship to help drive compromise on legislative solutions that truly modernize the permitting process and to shape effective implementation of guidance and agency processes so everyone wins. We are working across the aisle and across the permitting reform landscape to reduce delays, uncertainty, and costs, while preserving our environmental and cultural resources.

The inconvenient truth is that coordination and process efficiencies alone will not be enough to make a meaningful dent in the 7 to 10 years on average from project concept, design, and the completion of all required permitting reviews. Every project that turns dirt, encounters habitat, or alters landscape, creates unavoidable interactions with nature, triggering reviews under the hundreds of laws and regulations governing infrastructure permits at the federal, state and local level. Over the last decade Congress has agreed on various process reforms to achieve greater coordination and efficiency but has left untouched the statutory provisions – some over 100 years old – creating the redundancy, overlapping agency requirements and standards that are incompatible with our modern world. As a

result, these band aid fixes are not stemming the bleeding. Despite process reform implementation, overall delay times are getting worse, not better. Interagency coordination, transparency, dashboards, executive orders, permitting action plans and a permitting council are very much needed, but they are not going to solve the problem.

I appreciate the opportunity to discuss targeted actions Congress can take to increase the efficiency and certainty of the permitting process, while enabling construction of affordable, reliable, and resilient energy infrastructure. The Energy Act of 2020, Bipartisan Infrastructure Law of 2021, Creating Helpful Incentives to Produce Semiconductors (CHIPS), and Science Act of 2022, and the Inflation Reduction Act of 2022 (IRA) provide unprecedented new funding for our nation's critical infrastructure. The omission of significant permitting reforms in this composite of federal authorizing legislation, is undermining this funding's potential to successfully rebuild, modernize and expand infrastructure improvement across all sectors.

While the subset of reforms in the Fiscal Responsibility Act (FRA) of 2023 represent the most significant legislative changes to the National Environmental Policy Act (NEPA) in 40 years, in practice, developers will still experience most of the same obstacles and avoidable process delays that have plagued the system for decades. Truly impactful legislative reform will have to move beyond macro-level National Environmental Policy Act (NEPA) changes and untangle the web of confusion and uncertainty caused by conflicting statutes and requirements across dozens of federal and state agencies, not to mention the case law that governs, and in many cases complicates, infrastructure development.

The long project permitting process subjects projects to changing rules and funding priorities that can vary across election cycles. TPI urges this Committee to focus future comprehensive permitting reform efforts broadly and dispassionately on sources of bureaucratic obstacles delaying deployment of all new infrastructure – including clean energy projects.

Absent such an approach, even with nearly \$5 trillion in funding Congress has provided for federal grants, loans, and tax incentives, project developers will be hesitant to invest, knowing large scale projects initiated today will not be able to commence operations and realize their investment cost recovery for nearly a decade at the earliest.

As the illustrative summary timeline below articulates, our nation's permitting system adds unnecessary delay and risk.

- **2-to-3 years** of project design, engineering, permitting, planning, and financing
- **1-to 2 years** of required permit identification and assessment of the appropriate agencies involved, initiation of the biological, cultural, and historic surveys required to support analysis of project impacts, and then the development of agency specific applications which includes informal pre application coordination with federal and state officials
- **2-to-6 years** of formal permitting process submission and review –lengthy pauses driven by agency requests of applicant for additional information, which often includes requests for additional surveys and analysis– a timeline that pushes orders for equipment, steel, concrete, and labor contracts years into the future
- **2-to-3 years** of construction – this assumes permitting approvals are granted, legal challenges are resolved, and supply chain orders are aligned

By identifying where in the bureaucratic process projects are held up, we can work to identify solutions. TPI members, and members of this committee, know all too well that energy projects are routinely stymied at various phases of project development by disconnected and fragmented federal and state review processes. Permitting is often marred by contradictory and redundant rules, timelines, and policies that cause delays, cost overruns, and in some cases, project abandonment.

The first step in fixing a problem is fully understanding it. Chronic permitting problems are exacerbated by the lack of transparency and bureaucratic accountability.

Our broken system allows agencies to sit on applications for years, even decades in some cases, with no certainty of eventual project approval or an answer at all. TPI does not maintain that federal agencies owe project developers a *yes*, but we believe federal agencies owe project developers an answer—yes or no— in a reasonable timeframe.

To be fully effective, the tracking and timelines need to start when projects first interact with the permitting process – application submission. Under the current system, the official “clock” does not start on the two-year timelines until the lead Agency reviewing the project deems the initial application complete AND publishes a Notice of Intent (NOI). Unfortunately, TPIs informal surveys of many of the largest new projects in the U.S., find this informal initial negotiation with agencies before an application is deemed sufficient is now approaching 6 -14 months on average.

Agreeing on the “start” is necessary but not sufficient. We must also make changes to enable coordination and conflict resolution across agencies and statutory requirements throughout the entire permitting approval pipeline. While National Environmental Policy Act (“NEPA”) reform has become synonymous with “permitting reform”, the reality is NEPA is just one statute among many that collectively account for more than 30-50 possible interim and final federally required permits spread across 13 federal agencies.

Many otherwise “shovel-ready” infrastructure projects spend years in bureaucratic gridlock. Developers routinely find themselves struggling through the informal pre-permitting, planning, and application process – again, often for years – with extensive ongoing submission and review cycles before NEPA reviews formally commence. Once in the process, developers often find themselves in the dark, uncertain where the projects sit along the concurrent permitting pathways within the various federal agencies. Consider these examples:

- Proposed energy projects on federal lands continue to face constantly evolving rules governing

species and wetlands protections. An issue that is exacerbated for renewable energy projects on federal lands that continue to face delays, causing in some cases cancellations, citing numerous obstacles beyond the maze of permitting steps, including the decision to discontinue the national project manager program at the Department of the Interior(DOI), and its “prioritization” policy that forces development in remote areas, with very limited interconnection to the grid, rendering the project economically inviable.

- Some federal agencies have identified new formal or informal policies over the past several years, in part due to new policies requiring two-year average timelines to complete NEPA, to frontload biological, cultural, and historical survey requirements prior to formally starting the review process—pushing the official starting point even further into the future. In some cases, project pre-planning increases efficiency and substantial discussion early in the process, but in others it can conceal the full duration of the permitting review process and leave developers with no final federal action to challenge. There is no transparency for this black box— there is no central repository for tracking this informal pre-application process across agencies. There should be transparency in all phases of an applicant’s interaction with federal permitting officials.
- Over the last 40 years Senate Committees have legislated new rules for the agencies under their exclusive jurisdiction with little coordination across the six committees with jurisdiction over resource agencies—Agriculture over Rural Utility Service and Forest Service, Environment and Public Works over NEPA, Army Corps, Nuclear Regulatory Commission, Fish and Wildlife Service, and Federal Highway Administration, Energy and Natural Resources over Bureau of Reclamation, Oceans and Land Management, Federal Energy Regulatory Commission, Commerce over pipelines and National Marine Fisheries. One egregious example of the consequence of a project that fell victim to this siloed approach to government-wide permitting reform is a \$3 billion investment in a clean energy transmission line that began the permitting process more than a decade ago. The project endured seven years of review and was finally deemed “complete” by the federal government four years ago. It is now entangled in court proceedings because one hand did not know what the other was doing – within the same federal agency.

- Many offshore wind projects have yet to receive a preliminary permitting timetable from federal agencies, even for those projects statutorily required to have a permitting timetable. Offshore wind projects are also among those that have been subject to federal agency delays. In the last two years, FPISC Executive Director has received and approved more than 17 requests from lead permitting agencies to extend interim and final completion dates for multiple Federal actions on the permitting timetable for at least 10 projects on the Dashboard adding approximately 10 years in cumulative permitting delays across those projects. Most recently, FPISC’s 17th memo over 24 months establishing the administrative record defending a delay extension request of more than 30 days, was granted on May 12, 2023, for the Kitty Hawk Offshore wind project off the coast of Carolina— an 18-month delay. The common practice that has emerged, as explained in the justification agencies submit to FPISC, is to blame the project sponsor, not FPISC, NEPA, or the federal permitting agencies for the delays. There are other examples of projects that, despite significant support from this Administration, continue to experience avoidable process related delays (Empire Wind (7 months delay as of 3/23/23) & Coastal Virginia Offshore Wind Commercial (6-month delay as of 3/20/23)). It is common for these projects to receive numerous of these delay memo requests over their permitting journey. This is not FPISC’s fault, it is the process that set us up to fail.
- Over the last few years, several cobalt, copper, lithium, molybdenum, nickel, and other mineral projects essential for battery storage and EV deployment have been stalled by conflicts over internal procedures, modeling methodologies and rivaling project impact assessments among federal agencies and litigation.
- Several hydropower permits and operating authorizations have also been challenged in court, citing conflicting statutory and regulatory requirements among as many as 10 federal agencies.

Each of these examples—and there are dozens if not hundreds more—points to the urgent need to repair the outdated and chaotic permitting system that keeps the country from meeting our growing infrastructure needs.

Additional fixes to NEPA are a necessary but not sufficient solution and a common-sense place to start. The declaration that 95% of NEPA reviews result in a Categorical Exclusions (Cat-ex), which is referring to the thousands of reviews for smaller projects and those in existing rights of way (ROW), primarily at the Department of Transportation, is misleading. The beauty of transparency is that facts now drive this debate, not hyperbole and posturing. The reality is that the last significant study of NEPA timelines was completed by the Council on Environmental Quality (CEQ) more than five years ago and reviewed more than 1,000 projects from 2010-2018. At present, outside of FPISC, DOE, FERC and the DOT projects tracked under One Federal Decision, there is no central repository or real time tracking of the inventory and status of projects navigating their way through federal agencies.

Most major U.S. infrastructure investments in energy, including wind, solar, hydrogen, carbon capture, hydro, and geothermal, as well as broadband, electricity transmission, oil and gas pipelines, supply chain port expansion, and export development are entirely supported by U.S companies and investors in the private sector. Energy and infrastructure investors require predictability and prompt decision making when putting capital at risk. Unfortunately, investors are too often treated as adversaries pitted against federal regulators rather than as partners in rebuilding our nation. Congress has the power to reverse this counterproductive reality, starting by requiring transparent reporting that will shine a light on sources of delay and statutory conflict and illuminate the pathway for smart reform.

Despite bipartisan agreement that the country's permitting process is broken, skepticism over the motivations behind new legislative reform proposals and outside stakeholders, each prioritizing their narrow interests, and the fear of what the negotiated result of a compromise may entail at the end, are inhibiting additional reforms. TPI believes the majority Republicans and Democrats in Congress favor a faster, more transparent, predictable, and accountable permitting process but this requires a collective acknowledgement that modernization of what have often been called "bedrock environmental laws" will absolutely be required—many of which were written decades before the internet and are in dire need of an update for 21<sup>st</sup> century projects.

Congress should undertake comprehensive reform efforts now and should have a constructive and iterative permitting reform debate at least every two years. Only through compromise on legislative reforms that keep pace with the evolving mix of projects and technologies can we keep America competitive and prevent the executive branch from having to continually adapt and regulate on their own, introducing legal risk, uncertainty, and shifting political priorities. Without such a systemic shift in how we address permitting in the U.S., the federal and state courts will occupy an increasingly outsized role in interpreting the appropriate application of administrative and procedural rules and rendering science-based decisions on behalf of the agencies.

As Congress focuses efforts on debating the merits and tradeoffs of various litigation reform proposals, TPI urges members of this Committee to consider litigation reforms in concert with the essential changes to the statutes. The already extensive project timeline identified above does not account for permits challenged in court. Congress must address both permitting process reform and litigation reform. While necessary, litigation reform without underlying permitting reform will treat the symptom without addressing the root cause.

It is not all bad news – we have seen glimpses of what sound reform can do and there is opportunity for lawmakers to build on and expand the reforms enacted over the past decade. Perhaps the most notable accomplishment was the creation of the Federal Permitting Improvement Steering Council (FPISC), a voluntary program for project developers charged with identifying best practices and implementing basic project management practices across 13 federal agencies. The extension of this Council in 2021 is appreciated by TPI members.

We must now make this accessible to more projects and properly support the federal staff and infrastructure needed to execute the permitting process. The FPISC dashboard currently hosts only 25 active multiyear projects of the largest and most complicated efforts in the country – a number that will continue to grow under FPISC’s newly appointed Executive Director Eric Beightel. TPI urges Congress to match the commitment demonstrated in the \$10m to \$350 increase in FPISC’s funding in the IRA with new legislation that empowers the role of the Executive Director and the authority of FPISC.



TPI commends Congress and President Biden for including some permitting reform in The Fiscal Responsibility Act of 2023. However, all the Administration's actions must be consistent with the intent and purpose of the permitting provisions in that Act. Among this Administration's first actions in the White House was the rescinding of permitting executive orders that were working effectively to address much needed permitting efficiencies, such as One Federal Decision (which was later codified in the BIL in 2021), only to support nearly identical process reforms in the 2022 White House Permitting Action Plan. This regulatory and process whiplash, combined with the more than 80 new planned and final rules governing infrastructure over the last 24 months, across 13 federal agencies is keeping trillions in new investment on the sidelines. The Administration must reverse course on this flawed approach. These changes are resulting in extended delays and creating a chilling effect on new infrastructure investment and will continue to diminish the economic impact of recent and new federal funding for infrastructure.

Mixed messages and impending regulatory burden make it difficult to find the win for new transmission lines and pipelines, solar installation, on and offshore wind buildout, broadband deployment, new hydrogen, battery storage and the expansion of critical minerals production to provide domestic sourcing for the manufacturing supply chain for these projects.

Congress also needs to do more.

The negative consequences of only addressing parts of the statutory and regulatory process in separate, mutually exclusive, reform exercises are easy to see. On average, project developers report that 20 to 30 percent of total project funding is wasted by delays. Cost overruns caused by delay means fewer of the dollars Congress provides and private sector investments go toward the ultimate delivery of the infrastructure America needs.

The cost of these pauses and restarts are rarely considered by lawmakers but estimates of the financial impact for major energy infrastructure projects begin at \$50 million per month in lost revenue. Add \$32 million per month in lost retainers on heavy machinery, architects, engineers, and

construction crews who either sit stagnant or are reassigned to active jobs. Finally, tack on another \$50 million in annual costs as project sponsors adapt to shifting permitting goal posts which require additional studies and mid-project redesigns, broken contract penalties, interest on purchased materials along with financial consequences of delays. That cost is ultimately passed down to citizens, either through taxes, tolls, or increased rates and usage fees.

Faster DOES NOT mean fewer environmental protections. TPI is building a large coalition of diverse entities committed to a balance that respects the environment while increasing efficiency. We are working with developers in every affected industry sector, officials at all levels of government, Tribes, non-government organizations, and community leaders to identify permitting “wins”.

To address infrastructure challenges, a multi-faceted approach is needed to modernize more than 60 federal laws, many of which were crafted over 40 years ago. We also need a bipartisan consensus to speed up energy projects without compromising environmental protections or stakeholder involvement. All of which is possible.

To be clear, opportunities for progress are directly in front of us. The creation of FPISC and improvements offered in the “One Federal Decision” framework, and the inclusion of NEPA reforms in the Fiscal Responsibility Act of 2023 (FRA) are the first steps. Meaningful next steps to modernize and expand our energy infrastructure require that Congress legislate comprehensive reforms that extend beyond NEPA to eliminate avoidable delays at all phases of a project.

Despite a bipartisan desire to fix these existential problems, pressure from vocal stakeholders on both flanks and a political propensity to avoid risk perpetuates the status quo and leaves lawmakers looking for superficial fixes.

Both Republicans and Democrats champion large-scale energy projects, including transmission, wind, natural gas pipelines, solar, critical minerals, hydro, carbon capture, and hydrogen. Energy shortages, price instability, supply constraints, and increased construction costs number among the human, environmental and financial costs of these delays. With each passing month, the

window for solutions continues to shrink, and the clock continues to tick on the availability of funds from CHIPS, BIL and IRA.

Despite all these challenges, I am optimistic that we can make progress this year, next year and the year after that. There are glimmers of hope as the proverbial “strange bedfellows” find common cause. Renewable and traditional energy advocates recognize that their fates are intertwined, and their collective influence may yield results.

A project development cycle of 7-to-10 years is simply too long. Working together, we can advance permitting reforms to build 21<sup>st</sup> Century infrastructure that safeguards communities, protects the environment and cultural resources, creates jobs, and brings prosperity to every corner of America.