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OnPOINT

Four Principles for Real Permitting Reform

Why Congress needs to adopt broad-based reforms

By Daren Bakst

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Federal legislators continue to focus on permitting reform. For example, the Senate is reportedly[1] working on more ambitious reform than those recently enacted in the debt ceiling bill, the Fiscal Responsibility Act.[2] As Congress works through permitting issues, there are important principles that should guide their work. This *OnPoint* highlights four of these principles that would help to ensure genuine and effective reform to the federal permitting system.

Principle 1: Permitting reform should go beyond NEPA reform

Most permitting reform focuses on reforming the National Environmental Policy Act (NEPA). However, proper permitting reform should go beyond NEPA and address the permitting requirements in numerous statutes, such as the Clean Water Act (CWA) and Endangered Species Act (ESA).

These statutes, independent of NEPA, impose major obstacles for property owners and the development of infrastructure projects. For example, the Environmental Protection Agency and the U.S. Army Corps of Engineers have used overbroad and vague definitions of waters to require numerous CWA permits. The Supreme Court's recent decision in *Sackett v. EPA*,[3] which narrows what waters are regulated under the CWA as compared to past federal overreach, will reduce the number of CWA permits that property owners must secure.

Many statutes, including the CWA, also trigger the application of NEPA.[4] The broader the permitting requirements in these federal statutes, the more NEPA comes into play. Therefore, one way to reduce NEPA-imposed obstacles is to narrow the overbroad scope of the triggers in these laws. In general, major projects are going to require multiple federal permits, so this is yet another reason to address the numerous statutes triggering NEPA reviews.

Commercial building site with crane. Source: Adobestock.

Principle 2: Permitting reform should apply across the board

Permitting reform should not be limited to certain sectors. After all, federal permitting creates obstacles that apply across the economy, from transportation to energy. Further, the reforms should not be limited to favored interests within sectors. Picking regulatory winners and losers is akin to providing subsidies to some interests, but not to others. It serves as a central planning scheme that distorts markets and prevents the private sector from best meeting the needs of Americans.

The favoritism problem is especially acute when it comes to energy. Some legislators want to enact permitting reform to benefit renewable energy and to make it easier to advance a Net Zero agenda. They want to use permitting

1 Kelsey Brugger, "Permitting talks to resume as Congress returns," E&E News, July 10, 2023, https://www.eenews.net/articles/permitting-talks-to-resume-as-congress-returns/ (accessed July 19, 2023).

2 Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, https://www.congress.gov/bill/118th-congress/house-bill/3746 (accessed July 19, 2023).

3 Sackett v. EPA, No. 21-454, May 25, 2023, https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf (accessed July 19, 2023).

4 To see a detailed list of statutes triggering NEPA, see "Federal Environmental Review and Authorization Inventory," Permitting Dashboard, https://www.permits.performance.gov/tools/federal-environmental-review-and-authorization-inventory-pdf (accessed July 19, 2023).

reform as a means to unlock the subsidies contained within the Inflation Reduction Act (IRA),[5] a partisan law that did not secure a single Republican vote in either the House or Senate.[6]

Permitting reform should not become a renewable energy-only benefit, but instead it should cover all energy sources. This type of favoritism can be seen in most of the foreign countries highlighted in the study "Global Infrastructure Permitting: Survey of Best Practices"[7] that was recently released by the Competitive Enterprise Institute. These examples show how governments will use permitting reform as a means to favor renewable energy and are a likely preview of what could happen in the United States unless legislators work to prevent this problem.

Finally, just as permitting reform should not be limited to specific sectors or favored interests within sectors, it should also not be limited to projects based on their scope or perceived importance. Americans all over the country, from farmers to homeowners, are affected by federal permitting requirements. Permitting reform should not leave out the "ordinary" property owner.

Principle 3: Permitting reform should ensure Congress defines major projects

Permitting reform certainly should cover major projects, including removing obstacles to building critical infrastructure. There will continue to be some major projects that policymakers will want to favor, such as by easing some of the usual permitting requirements. This is what Congress did in the Fixing America's Surface Transportation Act.[8] In that law, Congress favored projects within certain sectors,[9] which serves as yet another example of picking winners and losers. If legislators provide any special treatment for major projects, consistent with Principle 2, they should avoid favoring a sector or interests within a sector.

Defining when a project is major, such as "in the national interest,"[10] is a subjective exercise that simply means whatever is consistent with the preferences of those making the decisions. Therefore, legislators should avoid giving agencies (or the president) the discretion to determine what projects are more or less important than other projects.

If agencies are going to decide what constitutes a major project, then legislators should codify specific objective criteria that severely limits agency discretion. The point of these criteria would be for Congress to define with specificity as to what projects should receive any favored treatment as opposed to agencies making these critical policy decisions.

Ideally, Congress would be required to pass specific legislation to approve favored treatment for each individual project. This could be done through an expedited process requiring majority votes not unlike the processes contained within the Congressional Review Act.[11] The need for this congressional approval is especially critical if a project would undermine genuine state concerns[12] or trample on private property rights. Given the importance of private property rights, Congress should also ensure that the interests of affected property owners are adequately heard and considered when agencies and Congress are considering whether a project should receive any favored treatment.

Principle 4: Permitting reform should eliminate or significantly reduce the scope of the IRA energy subsidies

Legislators need to push back against the IRA's energy-related subsidies, which could cost over $1 trillion,[13] and the overall governmental effort to radically change the energy sector by favoring renewable energy over conventional energy sources. Permitting reform is critical, but unfortunately it could also help to advance this harmful governmental effort that would place more unreliable and costly energy on the grid.

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5 Inflation Reduction Act of 2022, Pub. L. No. 117-169, https://www.congress.gov/bill/117th-congress/house-bill/5376/text (accessed July 19, 2023).

6 The Senate vote can be found at https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00325.htm (accessed July 19, 2023). The House vote can be found at https://clerk.house.gov/Votes/2022420 (accessed July 19, 2023).

7 "Global Infrastructure Permitting: Survey of Best Practices," Mario Loyola, Prepared by Loyola Associates Research & Consulting for the Competitive Enterprise Institute and The Permitting Institute, June 2023, https://cei.org/studies/global-infrastructure-permitting/ (accessed July 19, 2023).

8 Fixing America's Surface Transportation Act, Pub. L. No. 114-94, https://www.congress.gov/114/plaws/publ94/PLAW-114publ94.htm (accessed July 19, 2023).

9 *Ibid.* The law, and specifically Title 41 of the law known as FAST-41, identifies numerous different sectors. It allows for more sectors to be added upon a majority vote of the Federal Permitting Improvement Steering Council. See also "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects," M-17-14, Office of Management and Budget, January 13, 2017, https://www.permits.performance.gov/sites/permits.dot.gov/files/2019-10/Official%20Signed%20FAST-41%20Guidance%20M-17-14%202017-01-13.pdf (accessed July 19, 2023).

10 As an example, this language and comparable language is included in Senator Joe Manchin's (D-WV) new permitting legislation, "Building American Energy Security Act of 2023," S. 1399, https://www.congress.gov/bill/118th-congress/senate-bill/1399?s=1&r=6 (accessed July 19, 2023).

11 Congressional Review Act codified at 5 U.S.C. §§801-808, https://www.law.cornell.edu/uscode/text/5/801 (accessed July 19, 2023).

12 Recent state abuse of Section 401 of the Clean Water Act provides an example of when state concerns are not genuine. See *e.g.* Daren Bakst, "EPA's Section 401 Rule Respects Federalism While Addressing State Abuses," The Heritage Foundation, Commentary, June 4, 2020, https://www.heritage.org/environment/commentary/epas-section-401-rule-respects-federalism-while-addressing-state-abuses (accessed July 19, 2023).

13 See *e.g.* "The Real Cost of the Inflation Reduction Act Subsidies: $1.2 Trillion," The Editorial Board, *The Wall Street Journal*, March 24, 2023, https://www.wsj.com/articles/inflation-reduction-act-subsidies-cost-goldman-sachs-report-5623cd29 (accessed July 19, 2023).

Lawmakers cannot realistically be expected to eliminate every trace of energy favoritism and subsidies before they advance permitting reform. Such a principle would make genuine permitting reform very unlikely. However, the current level of government favoritism and intervention is unprecedented and should not be ignored as legislators work on permitting reform.

Therefore, to the greatest extent possible, legislators need to ensure they are not inadvertently helping to advance the IRA's partisan energy agenda. They should make eliminating IRA subsidies and combatting this energy central planning a major part of permitting reform efforts. This does not mean that permitting reform should be delayed if some IRA energy subsidies remain, but any permitting reform package should make real and tangible progress towards combatting the effect of the IRA.

Conclusion

Policymakers need to make it easier to build projects throughout the country and across the economy. The right kind of permitting reform can make this happen. Proper reform will make it easier to build projects that help to meet the basic needs of Americans, increase American competitiveness, and improve the quality of life. Permitting reform though is far more than just about building projects. It is also about removing unreasonable government obstacles that do not allow (*i.e.* permit) Americans to use their property as they deem fit.

There are not many policy reforms that can make sweeping improvements in the lives of Americans, from defending private property rights to building critical infrastructure. Permitting reform has this potential, but it just as easily can become a way to advance narrow interests. Congress should adopt reforms consistent with the principles outlined, which do not favor special interests over the interests of the American people.

About the Author

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