Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington DC 20515

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March 3, 2017

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Water Resources and Environment
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Subcommittee Hearing on "Building a 21st Century Infrastructure for America: The Role of Federal Agencies in Water Infrastructure"

PURPOSE

The Subcommittee on Water Resources and Environment will meet on Thursday, March 9, 2017, at 10:00 a.m. in 2167 Rayburn House Office Building to receive testimony from witnesses representing academic institutions, non-governmental organizations, states, regional governments, and local governments.

BACKGROUND

The Subcommittee on Water Resources and Environment has several agencies, including the United States Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), under its jurisdiction. These agencies are responsible for implementing permitting and other regulatory programs that may apply to the development and implementation of water infrastructure projects. Because of the importance of these regulatory programs in developing and implementing projects, the Subcommittee conducts oversight of these programs' federal and non-federal activities.

United States Army Corps of Engineers.

The Corps has regulatory authority from §404 of the Federal Water Pollution Control Act (commonly known as the Clean Water Act or CWA). Section 404 provides that any person who discharges dredged or fill material into a water of the United States must have a permit from the Secretary of the Army or an approved state authority. Waters of the United States include certain wetlands, including some swamps, marshes, bogs, and similar areas (which may often appear as dry land for part of the year). Characteristics of wetlands are established through regulation and §404 is the primary federal law regulating activities in wetlands. The EPA, in conjunction with the Corps, develops guidelines for the issuance of §404 permits and has authority to review and deny permits where the discharge will have an unacceptable adverse effect on municipal water supplies, fish and wildlife areas, or recreational areas.

There are two types of permits issued by the Corps: general and individual. A general permit is issued for activities that will result in only minimal adverse effects. There are three types of general permits – Nationwide Permits, Regional General Permits, and Programmatic General Permits. Nationwide Permits are issued by the Corps on a national basis and are designed to accelerate authorization of projects such as commercial developments, utility lines, or road improvements that produce minimal impact on the Nation's aquatic environment. An individual permit is issued when projects have more than minimal individual or cumulative impacts, and are evaluated using additional environmental criteria and involve a more comprehensive public interest review.

The Corps recently reissued 50 existing Nationwide Permits and added two new permits. These will take effect March 19, 2017, and will be in effect for five years. A Regional General Permit is issued for a specific geographic area by an individual Corps District. Each Regional General Permit has specific terms and conditions, all of which must be met for project-specific actions to be verified. Programmatic General Permits are based on an existing state, local, or other federal program and designed to avoid duplication of that program. A State Programmatic General Permit (SPGP) is a type of permit that is issued by the Corps and designed to eliminate duplication of effort between Corps districts and state regulatory programs that provide similar protection to aquatic resources. In some states, the SPGP replaces some or all of the Corps' nationwide permits, which results in greater efficiency in the overall permitting process.

The Corps also issues permits for the alteration of existing Corps projects and alterations to navigable waterways under Section 14 of the Rivers and Harbors Act of 1899, as amended, codified in 33 U.S.C. §408 (commonly called "Section 408"). The Corps provides certification authority for proposed alterations to existing Corps projects. The Corps ensures that any proposed alteration will not be injurious to the public interest and will not affect a project's authorized purposes.

Further, Section 10 of the Rivers and Harbors Act of 1899 (March 3, 1899), requires a permit from the Secretary of the Army for any alteration of a navigable waterway, dredging of a navigable waterway, or erection of any structure such as a wharf, pier, or dock in a navigable waterway.

In total, the Corps carried out approximately 80,000 final regulatory actions in fiscal year 2015. Over 90 percent of all regulatory actions are authorized by nationwide and other general permits.

Environmental Protection Agency.

The CWA provides the structure for the federal-state program to protect, restore, and maintain the quality of the Nation's waters. The EPA has the major responsibility for carrying out the CWA, but significant parts of the program may be administered by the states if approved by EPA.

The CWA generally has two major areas of emphasis: regulatory provisions that restrict the discharge of pollutants into navigable waters; and funding provisions that provide federal financial assistance for the construction of treatment works.

To protect the Nation's waters, the CWA imposes technology-based discharge control requirements for categories of industries. These industries must meet established requirements using the "best available technology economically achievable." For municipalities, secondary treatment (defined in regulation as an 85 percent reduction in certain conventional pollutant concentrations) must be achieved. EPA is responsible for defining what the required level of treatment is for municipalities and for each type of industry to meet their standards. However, where a technology-based standard is insufficient to meet state water quality standards, the CWA also requires the implementation of water quality-based permit limits to ensure that these state standards are achieved. EPA also must develop water quality criteria, specifying the maximum concentrations of pollutants allowable for different designated uses of waters. The states, with the review of EPA, establish water quality standards that designate uses of their waters and assign appropriate water criteria to attain and maintain those uses.

These requirements are implemented and enforced through permits. All point source dischargers that discharge pollutants directly into navigable waters are regulated through National Pollutant Discharge Elimination System (NPDES) permits. NPDES permits are issued by the EPA, or a state with an EPA-approved permitting program. Currently, 46 states have approved permitting programs. Permits are based on both technology requirements and water quality impacts, and they set the concentration of pollutants allowed to be discharged. Nonpoint sources of pollution are not directly regulated under the CWA; however, states are to prepare management programs for controlling nonpoint source pollution.

Indirect dischargers—industries that discharge to publicly owned treatment works (POTWs) rather than directly to navigable waters—must meet treatment standards similar to those established for direct industrial discharges since POTWs traditionally are designed primarily for the treatment of domestic sewage.

Title VI of the CWA provides grants to states and territories for the establishment of Clean Water State Revolving Loan Funds (SRFs) to assist in the financing the construction of treatment works. States contribute matching funds to their revolving fund. The SRFs are available to, among other things, make low-interest loans, make loan guarantees, buy or refinance local debt, and subsidize or insure local bonds. All projects financed through the SRFs must meet all enforceable requirements and maintenance of progress towards the goals of the CWA. The authorization for the SRFs expired in 1994 and the program has not been reauthorized.

National Environmental Policy Act.

Though not under the jurisdiction of the Committee on Transportation and Infrastructure, transportation and other infrastructure projects require multiple federal permits and reviews, including environmental reviews under the National Environmental Policy Act of 1969 (NEPA). This ensures that projects are built in a safe and responsible manner and that adverse impacts to

the environment and communities are avoided, minimized, and mitigated, and that public input is obtained on the development of a project.

The NEPA review analyzes the potential impacts of the proposed action and investigates reasonable alternatives. It also provides a framework for meeting other environmental review requirements, such as those under the Endangered Species Act of 1973 (ESA), the National Historic Preservation Act of 1966 (NHPA), the Clean Water Act (CWA), the General Bridge Act of 1946 (General Bridge Act), the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and the Marine Mammal Protection Act of 1972 (MMPA).

NEPA requires federal agencies to assess the environmental effects of proposed actions prior to making decisions on projects that are not categorical exclusions. NEPA also ensures the public is informed of, and may participate in, the decision-making process of any proposed major federal action. If the project clearly does not affect the environment, the review process does not require further assessment. All federal agencies comply with NEPA by preparing an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The EA is a brief document that provides evidence and analysis to determine whether an EIS is necessary. If the EA determines that an EIS is not necessary, the agencies issue a Finding of No Significant Impact (FONSI). An EIS is a full disclosure document that details the range of reasonable alternatives, analyzes the potential impacts, and demonstrates compliance with applicable environmental laws and executive orders. A notice of intent (NOI) begins the EIS process and a record of decision (ROD) completes it.

Effective and early coordination among the diverse sets of participants in the NEPA review process, as well as funding for participating review agencies, are critical to completing NEPA reviews in a timely manner. The Water Resources Reform and Development Act of 2014 (Public Law 113-121) contained several NEPA process changes, and the Committee is working with the agencies on implementing these changes.

Regulation.

To carry out their authorities and implement the requirements of the statutes under their jurisdiction, agencies like the Corps and EPA will often prepare and release regulations, guidance, and other documents to help guide decision-making by the agency and help affected stakeholders comply with the applicable statutory requirements. These regulations, guidance, and other documents are sometimes required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.

This regulatory system is intended to protect public health, welfare, safety, and the environment while promoting economic growth, innovation, competitiveness, and job creation. In addition, this process is intended to be based on the best available science and allow for public participation. Further, this regulatory process is intended to promote predictability and reduce uncertainty. Moreover, this regulatory process is intended to identify and use the best, most

innovative, and least burdensome tools for achieving regulatory ends, and is to take into account benefits and costs, both quantitative and qualitative.

Within the Administration, regulations and other guidance may not be released until reviewed by other Executive Branch Agencies. These include the Office of Management and Budget, the Council of Economic Advisors, and various other staff offices within the White House. The Regulatory Flexibility Act (5 USC 601 et seq.) requires federal agencies to take steps to collect input from small entities on regulations and to determine whether a rule is expected to have a significant economic impact on a substantial number of small entities. When a covered agency proposal is expected to have a significant impact on a substantial number of small entities, the agency must convene a panel to review the draft proposed rule and related agency analyses under the Regulatory Flexibility Act. In multiple instances, Presidents have issued Executive Orders in attempts to accelerate and improve the regulatory process, most notably Executive Order 12866 issued by President William J. Clinton on September 30, 1993, and most recently Executive Order 13777 by President Donald J. Trump.

CONCLUSION

This hearing is intended to provide Members with an opportunity to review solutions and opportunities to:

1. reduce inefficiencies and delays in project delivery,
2. include affordability considerations in the rulemaking process,
3. enhance state and local roles, and public participation,
4. use better data and better technology,
5. maximize benefits from existing resources, and
6. provide certainty for non-federal interests.

WITNESSES

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On Behalf of The U.S. Conference of Mayors

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