



Freight Can't Wait

CAGTC Speaks on Permit Reform



CAGTC

Coalition for America's
Gateways & Trade Corridors

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Coalition for America's Gateways and Trade Corridors

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Project, San Gabriel Valley
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*California Department
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*Cambridge
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Dear Reader,

Vast and transformative transportation infrastructure improvements are needed in the United States to meet the demands of our growing economy and population. Many factors contribute to the shortfall: insufficient funding, planning challenges at various levels of government, understanding private sector needs, and complex project permitting processes. Each of these presents a challenge in isolation – and taken together they can become daunting problems. For example, a lengthy and uncertain project approval process increases project costs and is a disincentive to private capital involvement to aid public funding.

The Coalition for America's Gateways and Trade Corridors (CAGTC) recognizes improving the federal project approval process is not a panacea for addressing our nation's infrastructure deficits. Nevertheless, it is a critical piece of the solution.

The reforms authorized by Congress in the Moving Ahead for Progress in the 21st Century Act (MAP-21) of 2011 represented significant progress toward improving the project approval process while maintaining environmental integrity and protecting the public interest. The Fixing America's Surface Transportation (FAST) Act of 2015 built upon those reforms. However, delay continues to be encountered in the federal permitting process. Additional reforms have been initiated through Executive Orders issued by both President Obama and President Trump. It can be difficult to discern which reforms have been proposed, written into law or regulation, and implemented. To lend clarity, CAGTC developed a permitting reform tracker to chart the proposed changes and areas of implementation from MAP-21 through present day. Find it in the rear of this book.

The enclosed paper presents considerations developed by CAGTC on the most recent permitting reform proposal. It details not only our support but also our clarifications and concerns. The positions contained herein are shared by the majority of CAGTC's membership.* Like all policy matters, this conversation will continue to evolve and we invite you, the reader, to consider our views expressed here and lend your own by engaging with us as advocates for the common good.

Sincerely,



Leslie Blakey
President, CAGTC
Chairman, CAGTC Permit Reform Committee



Paul Hubler
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*A supermajority of CAGTC members voted to approve this paper, a handful abstained, and two voted against supporting the document.

Moffatt & Nichol

*National Railroad
Construction and
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*NASCO – North
American Strategy for
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Background

On February 12, 2018, the White House published their infrastructure plan, titled “*Legislative Outline for Rebuilding Infrastructure in America*.” The document outlined new funding programs to invest in varying types of U.S. infrastructure, including roads, bridges, ports, airports, rail, and non-transportation infrastructure. Beyond proposing funding programs for projects, the Outline also suggested policy changes intended to accelerate project delivery times, including multiple changes to the permitting process. The 15-plus pages of permitting reforms address challenges facing the industry with the goal of creating greater efficiencies in the process and reducing the average amount of time it takes for a project to receive its permits from 10 years to two years.

The Coalition for America’s Gateways and Trade Corridors (CAGTC) is made up of metropolitan planning organizations (MPOs), state departments of transportation, cities, public authorities, short line railroads, chambers of commerce, ports, agriculture producers and others that have joined together to advocate for strong federal policy and funding support for multimodal freight infrastructure. Because our members focus on freight projects, which often cross state and other jurisdictional lines and involve multiple modes of transportation, we are uniquely situated and well-experienced to understand the benefits of simplifying and streamlining the permitting process for large, medium and small projects. Therefore, CAGTC recently created an Ad Hoc working group to consider the permitting reform recommendations set forth in the White House’s infrastructure proposal and propose consensus position recommendations based on the views and expertise of our diverse membership.

We explored 19 of the proposed reforms in detail and reached consensus on the positions outlined below. As the paper details, CAGTC is largely supportive of the 19 reforms listed below, and in particular, we strongly support the Administration’s suggested improvements that: focus the authority of Federal agencies exclusively to their areas of expertise; reduce inefficiencies in the Magnuson Stevens Act and the National Marine Fisheries Services consultation process; call for guidelines for when new studies and data are required in the environmental review process; and create a consistent statute of limitations for Federal infrastructure permits. Several of CAGTC’s positions offer caveats or recommendations that we believe would increase the success of these reforms.

It should be noted that CAGTC has a strong commitment to freight infrastructure investment while balancing environmental protection and our position on all reforms is predicated on maintaining strong environmental protections. In addition, the success of the White House’s proposed permitting reforms will be contingent on adequate staffing levels at Federal and, if applicable by NEPA Assignment, state agencies, to permit timely and thorough reviews of permits and documents. Accordingly, CAGTC’s support for the proposed reforms is also predicated on the provision of sufficient budgetary or other authority to ensure qualified personnel are in place to undertake permitting and environmental reviews.

White House Proposal: Establish a “one agency, one decision” environmental review structure.

White House Explanation:

Current law results in project sponsors navigating the environmental review process with multiple Federal agencies, all with separate decision-making authority, resulting in delays and cost increases. To help address this, in part, a “one agency, one decision” structure should be created.

CAGTC Position: Support

CAGTC supports this proposal and the Administration’s recent action to advance it through a Memorandum of Understanding (MOU) signed by 12 Federal agencies in April 2018. To facilitate efficient review of all applicable components, a strong working relationship between the review agencies, including advance coordination to establish protocols and timelines, as called for in the MOU, will be essential in selecting an agency to serve as lead for environmental review purposes. Particular consideration should be given to the agency responsible for oversight of the completed infrastructure and, if Federal funds are used, to the agency providing the majority of those funds. We applaud the 12 Federal agencies for becoming signatory to the MOU and urge the Administration to continue seeking participation. Independent Regulatory Agencies (FCC, STB, FERC, etc.) can be critical participants in the permitting process for infrastructure projects. Only FERC has signed on to the Administration’s MOU, and we hope that negotiations will continue to bring more of them on board. The recent delay of the safety-critical Positive Train Control project, caused by a FCC environmental review, shows why participation by regulatory agencies is important.

White House Proposal: Require a single environmental review document and single record of decision (ROD), coordinated by lead agency.

White House Explanation:

Currently, Federal agencies working on the Federal NEPA review process are encouraged to prepare joint analyses but not required to do so, resulting in a duplicative process that can be difficult to navigate. To address this, a single environmental review document and ROD should be used and coordinated by the lead agency.

CAGTC Position: Support with clarification

In its April 2018 MOU, the Administration established the single ROD as Federal policy. CAGTC supports this reform as long as the lead Federal agency has been delegated clear authority, has a working relationship with the other review agencies and can ensure efficient review of all applicable components. We caution that capturing all views in a single ROD could lead to delays as multiple agencies work to coordinate on the single document. Therefore, there must be sufficient staff at Federal agencies to ensure the document can be completed in a timely manner and that it adequately addresses the impact of Federal action on the environment.

White House Proposal: Establish a firm 21-month deadline for lead agencies to complete environmental reviews; establish a 3-month deadline from when the lead agency makes its record of decision for other Federal agencies to make decisions with respect to necessary permits. Appropriate enforcement measures would be established.

White House Explanation:

Current law creates inefficiencies in evaluations and delays in the environmental review structure. To help address this, a firm deadline of 21 months for lead agencies to complete their environmental reviews should be established. Additionally, Federal agencies should be required to issue decisions with respect to necessary permits within 3 months of the lead agency's issuance of a finding of no significant impact (FONSI) or ROD.

CAGTC Position: Support with clarification

CAGTC supports this provision as long as regulations clarify proper enforcement mechanisms are in place to ensure deadlines are met and there are adequate resources to properly complete reviews. The April 2018 MOU directs the lead Federal agency in the permitting process to establish a Permitting Timetable to identify actions and associated milestones. Timelines should be consistent and we applaud the MOU's call for the Permitting Timetable to establish a schedule of no more than two years from the publication of the Notice of Intent (NOI) to prepare an environmental impact statement (EIS). This corresponds with the White House's proposal of 21 months to complete the EIS and three months for the ROD, combined to make 24 months. The deadlines should also take into account the time needed for public comment as well as delays that may be caused by local or state agencies, as called for in the MOU. It should be noted that existing regulations require specific public and agency review periods and would therefore also need to be addressed – at a minimum, any new deadlines should not be less restrictive than those already in existence. Along with setting deadlines, the Administration should continue to encourage and incentivize early and timely involvement by all parties. The success of this is dependent upon appropriate and transparent enforcement measures that, among other things, inform stakeholders where to escalate concerns if necessary.

White House Proposal: Broaden the NEPA assignment program to include other determinations, such as those regarding flood plain protection, noise policies, and air quality conformity determinations.

White House Explanation:

States are currently allowed to fully assume Federal responsibilities under the National Environmental Policy Act (NEPA) for highway and transit projects. However, the U.S. Department of Transportation (USDOT) is currently prohibited from assigning, and states from assuming responsibility for, any project-level conformity determinations required under the Clean Air Act. States are also not authorized to assume responsibilities for determinations regarding flood plain protection and noise policies. To help address this, USDOT should be allowed to assign these other determinations to states.

CAGTC Position: Support with clarification

CAGTC supports this reform. NEPA assignment allows Federal and state agencies to work together and could work well for other determinations. Any delegations must eliminate duplicative reviews and should not require new reviews to be made. Furthermore, any delegation of reviews must take into account the state's technical capacity and expertise.

White House Proposal: Expand the USDOT NEPA assignment program to other agencies beyond FHWA and FTA.

White House Explanation:

The authorization to assign NEPA responsibilities to states is currently limited to the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA). To help address this, in part, USDOT should be allowed to expand NEPA assignment to other agencies, thus extending benefits to other types of infrastructure.

CAGTC Position: Support with clarification

CAGTC supports the expansion of this program where resources and technical capacity exist. An expanded use of NEPA assignment can increase efficiency but only if states have the necessary funding, modal expertise, and staff to complete the reviews. A significant example in which another Federal agency needs expanded authority is for port and all waterway projects, which also involve landside project elements and their respective NEPA analyses (such as traffic and air quality). More specifically, the U.S. Army Corps of Engineers (USACE) prepares NEPA documents jointly with port authorities, but the USACE currently only issues a ROD for those waterside project elements that require USACE permits. For example, although these port NEPA documents contain all of the necessary analyses and findings to justify issuance of a ROD for the entire project, the USACE currently will not issue a ROD to cover a railyard or roadway component, nor will FHWA, the Federal Railroad Administration (FRA), or the Maritime Administration (MARAD) use the NEPA document to issue a ROD for the landside elements. Of note, in addition to FHWA and FTA, FRA may also assign its NEPA responsibilities under current law.

White House Proposal: Allow states to assume FHWA responsibility for right-of-way (ROW) acquisition approvals.

White House Explanation:

Waiting for FHWA's approval of ROW acquisitions can delay the project delivery process (even though the Federal funding may be a much smaller portion of overall project funding). ROW approval has become a routine activity for states and therefore they should be allowed to assume the authority of FHWA's responsibility for approval of ROW acquisitions (thereby lowering project costs for all funding partners).

CAGTC Position: Support

CAGTC supports this proposal in instances where the resources and technical capacity exist to complete such approvals. Allowing states to assume this authority will save time and costs, especially for megaprojects that can require significant property acquisition.

White House Proposal: Apply Fixing America's Surface Transportation (FAST) Act Streamlining Provisions to Rail Projects including those under the authority of non-USDOT agencies.

White House Explanation:

The FAST Act directed USDOT to apply all previously enacted highway permit reforms to railroad projects but this created a discrepancy between those projects administered by USDOT and those rail projects administered by other agencies, like the Army Corps or the U.S. Coast Guard. To address this issue, it should be clarified that all rail projects can take advantage of FAST Act streamlining provisions, regardless of lead Federal agency.

CAGTC Position: Support

CAGTC supports this proposal, noting that rail projects already comply with NEPA and property acquisition requirements. By making the approvals consistent, this reform will save time.

White House Proposal: Allow any Federal agency to use a categorical exclusion (CE) that has been established by another Federal agency.

White House Explanation:

Each Federal agency currently establishes its own CEs, all of which are reviewed and approved by the Council on Environmental Quality (CEQ). However, even if a CE has been approved, “it may not be used by another Federal agency without a separate substantiation and approval process.” In order to address this duplicative process, any Federal agency should be authorized to use a CE that has been established by another Federal agency.

CAGTC Position: Support with clarification

CAGTC supports this proposal provided that agencies sufficiently document their findings when applying the CE and that agencies certify that no unusual circumstances are present.

White House Proposal: Allow all Federal agencies for infrastructure projects to opt into highway and transit streamlining procedures.

White House Explanation:

Current statutory authorities that promote efficiencies in the environmental review process are limited to only highway and transit projects. In order to address this, other lead Federal agencies should be allowed to opt into these provisions. Projects that fall under FAST-41 authority would not be eligible because “they already have separate streamlining provisions.”

CAGTC Position: Neutral

CAGTC supports this proposal in concept but maintains a neutral position until additional details are provided by the Administration. Highway and transit streamlining procedures may not be applicable to other types of infrastructure. Clear guidance would be essential to ensure the streamlining procedures properly transfer between infrastructure types.

White House Proposal: Require the CEQ to issue regulations to streamline the NEPA process.

White House Explanation:

Current CEQ NEPA regulations were issued in 1978 “before the advent of the Internet and have been subject to only one revision since then,” making them outdated and inefficient. To help address this issue, the CEQ should revise its existing regulations to “increase efficiency, predictability, and transparency in environmental reviews.”

CAGTC Position: Support

CAGTC supports this provision, noting that regulations and processes should be reviewed every two years and CEQ should be encouraged to take advantage of technology changes as often as appropriate.

White House Proposal: Clarify that MPOs need only conform to the most recent National Ambient Air Quality Standard.

White House Explanation:

The EPA is periodically required to review and update National Ambient Air Quality Standards (NAAQS). Each time this happens “State DOTs and metropolitan planning organizations (MPOs) may be required to demonstrate conformity to both the old and new standards...creating redundancy and uncertainty.” To address this, the Clean Air Act should be amended to clarify that conformity requirements apply only to the latest NAAQS.

CAGTC Position: Support with clarification

CAGTC supports this provision as long as air quality standards are maintained and EPA’s anti-backsliding provisions are addressed (anti-backsliding is defined by EPA as “a provision in the Federal Regulations that requires a reissued permit to be as stringent as the previous permit with some exceptions”). Because most MPOs already update their process and projects for conformity every four years with a costly and long public outreach process, this revision would be particularly beneficial to them and would reduce public agency costs. However, CAGTC is concerned that if a new standard is passed that differs greatly from the existing, it would require reanalysis late in the project development or approval process. Therefore, CAGTC recommends that projects are subject to the NAAQS in place at the time the application is submitted to the lead agency. The revised standard should be applied to new projects in the next conformity update. However, a project sponsor may elect to use the new standard if it is conducive to a more efficient and expedited review.

White House Proposal: Focus Federal resource agencies' authority to comment on portions of the NEPA analysis to areas relevant to their special expertise or jurisdiction.

White House Explanation:

During the current NEPA review process, Federal agencies “sometimes provide comments or raise objections to issues beyond the scope of their areas of special expertise or jurisdiction.” This causes confusion for the public and results in delays and additional public costs. To address this, a Federal agency should be limited to commenting on portions of the NEPA analysis relevant to their areas of expertise or jurisdiction.

CAGTC Position: Support

CAGTC supports this reform, noting that permit review time is extended when agencies overstep their jurisdiction to comment on other aspects of the permitting process. As long as there is proper delineation of responsibility, this reform could save both time and money for project sponsors. Shared comments should be allowed when there is crossover of information or expertise and where they can improve the outcome.

White House Proposal: Reducing inefficiencies in the Magnuson Stevens Act/NMFS consultation changes.

White House Explanation:

The Magnuson Stevens Act currently allows for abbreviated and expanded consultation processes from the National Marine Fisheries Service (NMFS) when evaluating effects to Essential Fish Habitat. However, “even with these relatively short time frames, consultations tend to take much longer to complete.” To help address this, NMFS should be required to respond to all consultations within 30 days.

CAGTC Position: Support

CAGTC supports this proposal, noting that creating clear deadlines would benefit port and marine projects that are otherwise subject to significant delay.

White House Proposal: Allow design-build contractors for highway projects to conduct final design activities before NEPA is complete.

White House Explanation:

Current law does not authorize final design activities to begin until after the conclusion of the NEPA process, diminishing the flexibility afforded with the design-build procurement method. To help address this, design-build contractors should be allowed to conduct their final design activities before NEPA is complete.

CAGTC Position: Support with Clarification

CAGTC is a strong supporter of the design-build process and believes that the proposal could save agencies significant time and money in delivering the transportation projects necessary to modernize our nation's infrastructure. However, there is a risk that allowing the final design activity of design-build to be completed before conclusion of NEPA compliance could require change orders resulting in delays and additional costs. Therefore, CAGTC recommends that design-build contractors for highway projects be allowed to begin, but not complete, their final design activities prior to the completion of NEPA. The allowance of concurrent activities could also be expanded to more traditional design-bid-build projects.

White House Proposal: Allow advance acquisition and preservation of rail ROW before NEPA is complete.

White House Explanation:

There is a lack of clear statutory direction regarding when real property can be acquired for rail ROW prior to the completion of the NEPA environmental review process. This impedes preservation of rail ROW in advance of project approval and therefore "advance property acquisition and preservation of rail corridors for rail projects" should be allowed. The Outline says that "the risk of bias in the evaluation of alternatives under these circumstances would be minimal, because project sponsors would be able to recoup the value of property if a different alternative ultimately was selected."

CAGTC Position: Support

CAGTC supports this provision as long as the applicant is willing to assume any risk associated with advanced acquisition of rail ROW. Such a provision has been proposed before and already exists for FHWA and FTA; further expansion of it can result in significant cost savings. However, CAGTC cautions that an unused purchased ROW could result in blight due to temporal distance between the purchase and the final decision. We also request that in instances where the railroad has, and proposes to use, the power of eminent domain to acquire property, advance acquisition and preservation of rail ROW prior to NEPA completion should not be allowed.

White House Proposal: Calls for the establishment of guidelines regarding when new studies and data are required in environmental reviews.

White House Explanation:

Environmental reviews call for in-depth studies that use current data. However, projects can span several years which can lead to sponsors needing to complete multiple studies to generate data on the same issue. To address this, Federal agencies should establish guidelines for when new studies and data should be required in order to provide more certainty in the NEPA process. When agencies' guidelines conflict, the guidance for the lead agency would be used.

CAGTC Position: Support

CAGTC supports this grandfathering proposal, noting that establishing common standards for validity of data would make the process more consistent and reduce confusion.

White House Proposal: Allow Federal agencies to accept funding from non-Federal entities to support the permitting process.

White House Explanation:

Some legal authorities exist for non-Federal contributions to support environmental and permitting reviews. However, there is no universal authority to accept such support, which limits the ability of Federal agencies to collect additional resources and can cause delay. To address this, in part, Federal agencies should have broader authority to accept funds from non-Federal entities to support permit applications and reviews. Any provision “would include appropriate controls for potential conflicts of interest.”

CAGTC Position: Support

CAGTC supports this proposal, noting that it will help to incentivize all stakeholders, including state and local agencies, to make decisions faster and would provide sources of funding in an area that is currently inadequately supported. The additional funding will allow for increased staff and resources to expedite the review process. Procedures should be established to ensure receipt of non-Federal funds has no impact on the impartial permit decision-making process.

White House Proposal: Shorten the statute of limitations for lawsuits on rail projects to 150 days.

White House Explanation:

The FAST Act directed USDOT to apply highway permitting reforms to railroad projects but in doing so created a discrepancy between the statute of limitations for rail projects, currently two years, and that of transit and highway projects, currently 150 days. The 150 day statute of limitations should be applied to rail projects as well.

CAGTC Position: Support

CAGTC supports a consistent statute of limitations across USDOT, noting that making the railroad statute consistent with that of highways and transit would streamline the process.

White House Proposal: Revise the statute of limitations for Federal infrastructure permits or decisions to 150 days.

White House Explanation:

For many infrastructure projects, “the statute of limitations allows plaintiffs to file legal challenges to Federal permitting and authorization decisions for up to six years after the decisions have been issued.” This creates uncertainty well after decisions have been made and further delays the process. To address this, a uniform statute of limitations of 150 days should be established. Currently, this exists only for certain modes of surface transportation projects.

CAGTC Position: Support

CAGTC supports a consistent statute of limitations, noting consistency reduces confusion, costs and time for the public. Recognizing there was extensive public outreach and comment process prior to project approval, this proposed clarification is most welcome and could be further shortened to 90 days. In addition, whatever statute of limitations is established, it should also apply to Section 1309 of the FAST Act (“Program for Eliminating Duplication of Environmental Reviews”), which established a two-year statute of limitations for states choosing to participate in the alternative environmental review process described in that section.

About CAGTC

The Coalition for America's Gateways and Trade Corridors (CAGTC) is a diverse coalition of more than 60 public and private organizations dedicated to increasing federal investment in America's multimodal freight infrastructure. In contrast to single mode interests, CAGTC's primary mission is to promote a seamless goods movement transportation system across all modes to enhance capacity and economic growth.

Special Thanks

CAGTC would like to thank the following CAGTC Member Organizations for donating their time and expertise in the development of this paper:

Alameda Corridor-East Project, San Gabriel Valley Council of Governments

Cascadia Center

Florida Ports Council

Memphis Chamber of Commerce

Northwest Seaport Alliance

Orange County Transportation Authority

Port of Long Beach

Port of Los Angeles

Port of Vancouver, USA

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