



## **DELAYS IN INFRASTRUCTURE PERMITTING: COMMON GOOD RESPONSE TO CRS AND DEFazio CRITIQUES**

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The Congressional Research Service (CRS), at the behest of House Transportation and Infrastructure Committee Ranking Member Peter DeFazio, recently released [a memorandum](#) (CRS memo)<sup>i</sup> critiquing Common Good's white paper, "[Two Years, Not Ten Years: Redesigning Infrastructure Approvals](#)," that was published in 2015.<sup>ii</sup> Separately, Congressman DeFazio published [a memorandum](#) (DeFazio memo)<sup>iii</sup> criticizing both the Common Good paper and various Trump Administration claims related to infrastructure approvals.

The Common Good paper, which has been widely reviewed and accepted by experts and practitioners, concluded that delays associated with environmental review and multiple permits dramatically increased the costs of those projects, and also caused environmental and economic harm by prolonging current bottlenecks.

The thrust of the CRS memo is not that the Common Good findings are incorrect, but that the methodology is deficient: "CRS identified a number of factors that make it difficult to support statements and assumptions in the [paper] related to the effect that permitting and environmental review may have on infrastructure projects." The DeFazio memo, meanwhile, reiterates many of the CRS memo's critiques while also claiming outright that the Common Good paper rests on faulty assumptions.

The Center for American Progress (CAP) took a similar approach in another recent critique of the paper, aimed at undermining the new administration's call for permitting reform.<sup>iv</sup> Before the election, the author of the CAP report had called for "expedited environmental review and permitting for infrastructure projects of regional or national significance."<sup>v</sup> In its recent report, CAP characterized proponents of a streamlined infrastructure approval as "hardcore opponents of environmental review." (Common Good's response to CAP is available [here](#).<sup>vi</sup>)

There is no serious disagreement that America's infrastructure approval process is broken and requires streamlining. In October 2010, President Obama explained the lack of progress in infrastructure projects promised by the 2008 stimulus by declaring that "there's no such thing as shovel-ready projects."<sup>vii</sup> The need to expedite the process has been advocated for in reports and policy papers by leaders of both parties, including Hillary Clinton in her 2016 presidential campaign,<sup>viii</sup> by expert observers from all sides, including the Regional Plan Association,<sup>ix</sup> the Bipartisan Policy Center,<sup>x</sup> the Progressive Policy Institute,<sup>xi</sup> a Stanford colloquium of experts (including former top DOT officials from both parties),<sup>xii</sup> and by a broad range of industry and environmental experts brought together by Common Good in six public forums.

Since the publication of the Common Good paper, and at the request of the Obama Administration, Common Good has developed model legislative language that creates clear lines of authority for environmental review and permitting decisions, encourages early public participation, and tightens the timeframe for judicial review.<sup>xiii</sup> (Common Good's legislative

proposal is available [here](#).)

Here are our specific responses to the CRS and DeFazio memos:

**1. According to the CRS memo, the Common Good paper provides “no evidence” that lengthy permitting delays have “a *greater* impact than funding on the infrastructure project categories identified in that [paper].”**

The paper never claims that permitting delays have a *greater* impact than funding on the infrastructure project categories we identify. CRS reached the above conclusion by taking out of context our statement that “[t]he main barrier to an infrastructure initiative is not financing, but an absurdly complex and lengthy permitting system.” This statement is specifically referring to the fact that ample funding was provided by the 2008 stimulus bill, which failed to deliver major infrastructure investment due in major part to the lack of “shovel-ready projects.”

The CRS memo then asserts that the certain sources cited in the paper contradict the claim that permitting is a major concern because said sources focus on funding, not permitting. But we cited those sources for the costs associated with not building new infrastructure—not the cause of the delay. The point of the Common Good paper was to highlight the need to streamline red tape as well as provide funding. With a few exceptions, there had been little focus in the infrastructure literature on bureaucratic delays.<sup>xiv</sup>

**2. The CRS memo claims (and the DeFazio memo reiterates) that it is “not clear how the assumption of a six-year delay was determined” in the Common Good paper.**

The Common Good paper calculates the cost of delay using an assumption of a six-year delay. As noted in the paper, the costs can be readily adjusted by changing the assumption. Our decision to use six years was based upon the following evidence: i) the DOT’s finding that the average time to complete the NEPA process had risen from two years to eight years;<sup>xv</sup> ii) ample anecdotal evidence of longer delays in large projects, detailed in the paper; and iii) the fact that other developed countries are able to complete environmental review and permitting in one to two years, and that CEQ guidance suggests that environmental reviews should not take longer than one year.<sup>xvi</sup> As noted in the paper, the numbers can be adjusted up or down by years; the overall result is still stupendous waste, inefficiency, and environmental harm.

The CRS memo argues that questions of changing funding, shifting political priorities, and local opposition complicate the discussion of “delay” too much to render the paper’s conclusions meaningful. However, as noted in the paper, funding changes and shifting political winds often delay or kill projects *precisely because the process takes so long that it outlasts political and budget cycles*. The paper specifically flags local opposition as a key part of the current permitting process that produces delay and requires preemption for projects of regional or national significance. Common Good’s model legislative language addresses this issue explicitly.

**3. According to the CRS memo, there is “no basis” for the Common Good paper’s figures on the costs of delay in the category of Roads and Bridges.**

The Common Good paper states at the outset that its calculations of cost are imprecise, and are intended to give an idea of “orders of magnitude” of harm caused by unnecessary delay. The CRS memo ignores this disclaimer, and instead dissects the paper’s numbers as if auditing a financial statement. Specifically, CRS critiques our assumptions concerning congestion costs and construction costs.

On congestion costs, the CRS memo first reiterates its critique that reports cited on delay do not specifically refer to permitting delays. Next, citing a 2010 FHWA report, the CRS memo claims that some of the techniques for improving congestion are procedural rather than requiring construction, and thus would not implicate permitting concerns. But *the vast majority* of the funds discussed in the cited reports would go to actual physical upgrades, because most congestion is caused by inadequate capacity and deteriorating conditions rather than procedural issues like “ramp management.” The funding figures cited in the FHWA report are much more likely to apply to expensive physical upgrades rather than largely costless process changes.

The CRS memo critiques the paper’s assumptions concerning road building costs by claiming that “it cannot be assumed that, absent permitting and environmental review, all projects would move forward in that year.” Nowhere does the paper claim that the cost figures assume that all construction would begin in a single year absent permitting and review delays. We merely assume that delays caused by review and permitting processes would postpone construction beyond the normal construction timetable, with commensurate increases in cost due to delay.

**4. The CRS memo claims that the Common Good paper does not clearly articulate a role for Congress in improving the process.**

The CRS memo claims that permitting as a concept is too ill-defined within the report to identify a role for Congress at all. True, the paper does not articulate every possible state and local permitting issue a project could encounter. Instead, it mentions state environmental reviews (including conflicting reviews, in the case of the Savannah River dredging project), local fire department signoffs, and county-level transmission line siting approvals, as well as several others, to illustrate the universe of permitting hurdles major projects often face. While the paper notes the need for state and local reform, it specifically highlights the need for Congress to preempt state and local approvals if they delay projects of interstate significance. The paper points to the Federal Energy Regulatory Commission, which preempts state and local approvals for pipelines in certain situations, for the proposition that Congress has a role in compelling states and localities to issue permits for certain categories of infrastructure. Our proposed legislative language takes this one step further, granting federal authority to issue permits on behalf of states and localities that fail to issue their own permits within a designated time period past the time of federal signoff.

**5. The DeFazio memo discounts the role of permitting in creating delay by pointing to the common use of Categorical Exclusions for federal projects.**

The DeFazio memo discounts the delaying effect of environmental review by citing a 2014

GAO report on NEPA which notes that 95 percent of federal projects require virtually no environmental review at all because they are eligible for categorical exclusions (CEs). While this is technically true, it ignores the fact that the vast majority of projects undertaken by the federal government, and which take advantage of CEs, have no meaningful connection to infrastructure issues at all. The report cited by the DeFazio memo, which analyzed CEs government-wide, lists Bureau of Land Management activities like bird nest platform construction as examples of CE-eligible projects, but thousands of others are eligible across all federal agencies, including international research agreements pursued by the Department of Energy,<sup>xvii</sup> classroom-based training activities at the Department of Commerce,<sup>xviii</sup> and bookkeeping at Homeland Security,<sup>xix</sup> to name just a few.

Within the actual infrastructure arena, CEs are also widespread. A 2012 GAO report found that 96 percent of FHWA highway projects in 2009 had been processed as CEs.<sup>xx</sup> But here too, this number has very little to do with actually improving infrastructure. A 2012 FHWA survey of the most common CEs utilized since 2005 lists bike lane construction, training grants, and landscaping among the top CEs pursued by state departments of transportation using federal funds.<sup>xxi</sup>

The only highway project CEs that actually substantially impact road infrastructure are those granted for activities like resurfacing, bridge rehabilitation, and other primarily maintenance-oriented projects. The majority of actual new construction-related activities do not qualify for CEs. These types of projects consume a substantial portion of FHWA's yearly budget; while current figures are difficult to obtain, from 2008—2012 approximately 33 percent of the total capital outlay from all sources on Federal-Aid Highways was spent on “system expansion,” or new infrastructure<sup>xxii</sup> (around \$13 billion of an approximately \$40 billion FHWA budget in 2010).<sup>xxiii</sup>

All that spending is a drop in the bucket compared to what's needed. In order to bring our national highway and bridge infrastructure up to a passing grade, the American Society of Civil Engineers estimates the United States needs to spend \$167 billion on system expansion and capacity upgrades.<sup>xxiv</sup> Virtually none of these projects would be eligible for a CE.

High utilization of categorical exclusions has little bearing on whether or not the NEPA process actually delays infrastructure project delivery. Improving America's decrepit infrastructure will require a wide array of projects, most of which will be required to undergo substantial environmental review. In 2011, the most recent year of complete available data, FHWA projects required a median of over 6.5 years to complete the EIS process.<sup>xxv</sup> Contrary to the DeFazio memo's portrayal, any effort to rebuild our highway infrastructure will encounter substantial delays (and associated costs) under our current system of environmental review.

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<sup>i</sup> Congressional Research Service, memorandum to House Committee on Transportation and Infrastructure, Subcommittee on Highways and Transit, “[Questions Regarding the Report \*Two Years Not Ten Years: Redesigning Infrastructure Approvals\*](#),” June 7, 2017.

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- ii Philip K. Howard, "[Two Years, Not Ten Years: Redesigning Infrastructure Approvals](#)," Common Good, September 2015.
- iii Committee on Transportation and Infrastructure Democratic Staff, "[Fact-Checking Trump Administration Claims Regarding Infrastructure Environmental Review and Permitting](#)," August 16, 2017.
- iv Kevin DeGood, "[Debunking the False Claims of Environmental Review Opponents](#)," Center for American Progress, May 3, 2017.
- v Kevin DeGood, et al., "[An Infrastructure Plan for America](#)," Center for American Progress, July 2016, p. 2.
- vi Common Good, "[Red Tape, Not Progress: The Center for American Progress Defends Bureaucratic Paralysis](#)," June 2017.
- vii Michael D. Shear, "[Obama Lesson: 'Shovel Ready' Not So Ready](#)," *New York Times*, October 15, 2010.
- viii Hillary for America, "[Hillary Clinton's Infrastructure Plan: Building Tomorrow's Economy Today](#)," p. 4, last accessed September 2017.
- ix Petra Todorovich and Daniel Schned, "[Getting Infrastructure Going: Expediting the Environmental Review Process](#)," Regional Plan Association, June 2012.
- x Andy Winkler, "[Accelerate the Permitting Process](#)," Bipartisan Policy Center, February 2, 2017.
- xi Progressive Policy Institute, "[Unleashing Innovation and Growth: A Progressive Alternative to Populism](#)," March 2016, pp. 11-12.
- xii Stanford University, Center on Democracy, Development, and the Rule of Law, "[Renewing American Infrastructure](#)," March 1, 2017.
- xiii Common Good, "[Accelerate Infrastructure Permitting](#)," March 2017.
- xiv See, e.g., Petra Todorovich and Daniel Schned, *supra* note viii.
- xv *Ibid.* at p. 6.
- xvi *Ibid.*
- xvii Department of Energy, Office of NEPA Policy and Compliance, "[Categorical Exclusion \(CX\) Determinations by CX](#)," last accessed September 2017.
- xviii "[National Environmental Policy Act—Categorical Exclusions](#)," 74 Fed. Reg. 131, July 10, 2009.

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- <sup>xix</sup> Department of Homeland Security, "[Administrative Record for Categorical Exclusions \(CATEX\)](#)," p. 3, last accessed September 2017.
- <sup>xx</sup> Government Accountability Office, "[Highway Projects: Some Federal and State Practices to Expedite Completion Show Promise](#)," GAO-12-593, June 2012, p. 3.
- <sup>xxi</sup> Department of Transportation, Federal Highway Administration, "[National Environmental Policy Act Categorical Exclusion Survey Review](#)," November 27, 2012, pp. 4-8.
- <sup>xxii</sup> Department of Transportation, Federal Highway Administration, "[2015 Status of the Nation's Highways, Bridges, and Transit: Conditions & Performance](#)," Exhibit 6-15.
- <sup>xxiii</sup> Department of Transportation, Office of the Secretary of Transportation, "[Fiscal Year 2012 Budget Highlights](#)," p. 13.
- <sup>xxiv</sup> American Society of Civil Engineers, "[2017 Infrastructure Report Card 2017: Roads](#)."
- <sup>xxv</sup> Department of Transportation, Federal Highway Administration, "[Estimated Time Required to Complete the NEPA Process](#)," last accessed September 2017.