

A Smarter Approach to Federal Regulation and Permitting

America Needs Regulatory Improvement Now

46,000

The number of new regulations published in the Federal Register since 2000.

Source: Government Accountability Office, 2014

41st

U.S. rank out of 189 countries in terms of ease of construction permitting.

Source: World Bank, 2014 World Development Indicators

48%

Percentage of Americans who think there is “too much regulation,” up from 28 percent in 2002.

Source: Gallup Poll, 2014

A Smarter Approach Can Deliver Increased Benefits at Lower Cost

“Regulations can help ensure that businesses retain the capacity to innovate and simultaneously promote the health and welfare of our employees, customers and communities. But overlapping, conflicting and poorly executed regulations can—and do—impose substantial costs on the U.S. economy, sometimes with only theoretical benefits.”

- Andrew N. Liveris, Chairman and CEO of The Dow Chemical Company,
and Chair of the Business Roundtable Committee on Smart Regulation

The Burden of Regulation on Productive Economic Activity

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An Innovation Challenge

- Business works when companies can experiment and try new things. Agencies, however, often impose rigid one-size-fits-all requirements that cut off promising opportunities, or they impose overly prescriptive rules that prevent new solutions.
- Resources spent complying with poorly designed regulations are, by definition, not spent on developing the products of tomorrow.

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An Investment Challenge

- The regulatory process creates uncertainty that undermines investment, growth and job creation. If companies do not know what regulators will do, they understandably are reluctant to undertake costly investment. Likewise, agencies often take too long to give permission for regulated parties to act — in part because they are focused on broad rulemaking objectives.

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A Compliance Challenge

- Regulating is easier than complying with regulations. Because rules can never be drafted to address every foreseeable circumstance, much less unforeseeable ones, their application will always be uncertain and will typically lead to unintended consequences. Some regulations are “technology forcing,” meaning that they can be met only by solutions that do not yet exist.
- Moreover, the volume and complexity of regulations can make for a bureaucratic nightmare, especially as different agencies with overlapping jurisdiction all regulate the same subject matter.

The Cumulative Burden of Federal Regulation Grows Unabated

- **Regulations represent the top cost pressure for business.** The overall regulatory burden on business continues to grow. For example, Business Roundtable member companies have cited regulatory costs as their top cost pressure for each of the last three years.
- **Increased regulatory compliance costs divert funds from investment and hiring.** Cumulative regulatory costs exact a heavy toll on businesses, workers and consumers – one that is not accounted for in standard cost-benefit analyses of individual regulations.

Furthermore, regulatory inertia acts as a drag on innovation and makes it difficult to build or expand major industrial facilities and infrastructure projects in the United States.

Obtaining a Federal Permit for a Major Infrastructure Project Takes Too Long and Costs Too Much

- **Permitting agencies lack firm deadlines.** Regulators typically do not face time constraints or operate with any sense of urgency, as most statutes do not require prompt processing.
- **Agencies lack expertise and training.** Agencies often do not have well-trained personnel to review permit applications in a timely, predictable manner.
- **Inefficient sequencing and overlapping jurisdiction causes delay.** Permits may be required from a large number of different agencies, but if just one agency is delayed, an entire project cannot go forward, even if every other agency has issued its respective permits.
- **Agencies fail to prioritize.** Agencies do not prioritize their permitting efforts, despite the fact that projects that will create a large number of new jobs or stimulate a high level of capital investment should receive expedited attention.
- **There are too many avenues to review proposed permits.** Review can occur at the local, state and federal levels. Every instance when review is sought, however, can add months and even years to the time that it takes to complete the permitting process. This duplicative review is unnecessary, and courts are typically lenient in allowing third parties to seek review.

Lawsuits and Injunctions Often Delay Major Projects

- **Citizen suits are too plentiful.** Many statutes contain citizen suit provisions that allow third parties to sue agencies after permits are issued. For example:
 - The *Clean Air Act*;
 - The *Clean Water Act*;
 - The *Endangered Species Act*;
 - The *National Historic Preservation Act*;
 - The *Religious Freedom Restoration Act*; and
 - The *National Environmental Policy Act (NEPA)*.

These suit provisions often have very lax standing requirements, allowing plaintiffs with no meaningful connection to the permitting process to file suit. Suits under NEPA can be brought a full six years after issuance.

- **Preliminary injunctions are too readily issued.** A preliminary injunction will freeze a project in its tracks, even if a business has already obtained all the necessary permits. The problem is exacerbated by courts' tendency to assume that job losses and other economic harms can never be "irreparable."

Case Studies

Avenal Power Center, LLC

- Avenal waited more than three years for the U.S. Environmental Protection Agency (EPA) to issue an air emissions permit to build an efficient, state-of-the-art, natural gas-powered electric generating plant in Central California.
- EPA was required by law to act on Avenal's permit application within one year and, ultimately, a federal court ordered the agency to act after EPA had failed to do so within the required review period.
- As a result of EPA's delay, the Avenal project became subject to more stringent regulations promulgated after its original permit application was filed and after EPA was required to act on that application.
- The Avenal project is now on indefinite hold, more than seven years after the initial application for approval was filed and six years after EPA was required to act on the application.

TransWest Express

- The \$3 billion TransWest Express multistate power line would transmit approximately 3,000 megawatts of wind-generated electricity from Wyoming to nearly 2 million homes and businesses from Las Vegas to San Diego.
- In October 2011, the Administration named TransWest Express as one of seven transmission projects designated to quickly advance through the federal permitting process.
- Nonetheless, the project has languished under federal review since 2007. In April 2015, the Bureau of Land Management announced it had finished a voluminous environmental impact statement, but construction is not expected to begin for almost another year due to problems obtaining permits from EPA, the Federal Highway Administration, the U.S. Army Corps of Engineers, the Bureau of Indian Affairs, the National Park Service, the U.S. Fish and Wildlife Service, the U.S. Forest Service and the Bureau of Reclamation.

Recommendations

Recommendations to Improve the Federal Regulatory System

Business Roundtable CEOs have identified the top four actions Congress and the Administration can take to improve the federal regulatory process:

Consistent Use of Cost-Benefit Analysis

The government should objectively analyze costs and benefits of proposed and final major rules from all agencies, including independent regulatory commissions.

Greater Public Engagement

Agencies should publicly disclose information about planned regulatory actions on a monthly basis and engage stakeholders early in the regulatory process.

Institutionalized Retrospective Review

Every major rule should include a plan for how the agency will evaluate its effectiveness over time.

Better Judicial Review

Congress should consider other changes to the *Administrative Procedure Act*, particularly relating to the content of the rulemaking record and greater judicial scrutiny of that record.

Recommendations for Modernizing the Federal Permitting System

Improve Accountability	Designate a single agency to have primary responsibility for coordinating reviews of a project.
Improve Efficiency	Ensure that permits are processed by multiple agencies in parallel and according to a firm schedule.
Prioritize Permit Processing	Provide adequate resources for permit processing.
Require Timely Action	Require that final decisions on permit issues be issued in 180 days.
Require Better Judicial Review	Place more reasonable limitations on judicial review of federal permits, including a 150 day statute of limitations.
Improve Transparency and Public Engagement	Create an inventory of pending permits by agency and program, and expand the online federal permitting dashboard to track the status of permits for all major projects and provide links to relevant documents.
