CAMPAIGNING FOR REFORM

Drawing the line on regulatory reviews

An interview with Philip K. Howard

BY BARBARA BILLITZER

If we were to ask most Americans why our country continues to struggle with a crumbling infrastructure problem, the likely response would be that it's a funding issue. But in reality, the obstacles have more to do with red tape than with money.

In the United States, the process of getting infrastructure projects approved and permitted can take upward of a decade or longer. Even projects that have little or no environmental impact can take years to get a green light. Enduring these unceasing environmental reviews has been a longstanding source of contention for right of way professionals, who have been left with a sense of powerlessness over the process. Even worse than the waiting is seeing funds that were allocated for specific "shovel-ready" projects get diverted to non-infrastructure needs because, as most of us know, the concept of shovel-ready is really just a myth.

Today, the stakes are higher than ever. Without a first-class infrastructure system in place, the U.S. economy will find it increasingly difficult to compete. Many of our roads and bridges have surpassed their original 50-year lifespan, and without the necessary improvements and maintenance, we can expect another D+ infrastructure rating like the one we received in 2013 by the American Society of Civil Engineers. But there is viable solution.

The Common Good

A crusader against the country's interminable environmental review process, Philip K. Howard has become a leader of governmental and legal reform. As a lawyer and Chairman of

As one of the nation's leading advocates for regulatory simplification, Philip has received major media coverage on national TV programs like the Daily Show with Jon Stewart.

the nonpartisan reform group Common Good, Philip's writings, advocacy initiatives and practical, big ideas have figured prominently in America's national issue debate. In fact, he has been advising national political leaders on legal and regulatory reform since the 1990s.

Common Good, which Philip founded in 2002, offers Americans a new way to look at law and government. The organization's philosophy is based on the simple but powerful idea that people, not rules, make things happen. Its mission is to overhaul governmental and legal systems to allow people to make sensible choices, offering new ways to simplify government that will cut budget deficits and create more jobs. To advance its mission, Common Good provides thought leadership, issue research, advocacy support and policy implementation. Its website says it best. It pledges to "propose practical, bold ideas to restore common sense to all three branches of government–legislative, executive and judicial–based on the principles of individual freedom, responsibility and accountability."

Philip's new book, The Rule of Nobody (April 2014), advocates common-sense proposals to accelerate the environmental review process. In hopes of gaining valuable insight into how we got here, and as an industry what we can do about it, we contacted Philip for an interview.

How did we get here?

In America, official responsibility is a kind of free-for-all among multiple federal, state and local agencies, with courts called upon to sort out matters after everyone else has dropped of exhaustion. The effect is not just delay, but decisions that are skewed toward the squeaky wheels instead of the common good. This is not how democracy is supposed to work.

America is missing a key element of regulatory finality–no one is in charge of deciding when there has been enough review. Because environmental review today is done by a lead agency—usually a proponent of the project— the perception is that it is not to be trusted to draw the line. The review comes under legal scrutiny, and there is pressure for the agency to prove it took a "hard look."

My Covington & Burling colleague Don Elliott, who was General Counsel at the Environmental Protection Agency, estimates that 90 percent of detail in a typical Environmental Impact Statement is prompted by fear of litigation—a kind of "defensive medicine" against the inevitable lawsuit. As a result, the lead agency's approach has mutated into a process of no-pebble-left-unturned, followed by lawsuits that scrutinize the most insignificant details in documents that are often thousands of pages long.

What is the impact on jobs?

Building new infrastructure would enhance U.S. global competitiveness, improve our environmental footprint and, according to a report published by the McKinsey Global Institute, generate almost two million jobs. But, until we modernize our legal infrastructure, it will be impossible to modernize America's physical infrastructure.

How does our process compare to that of other countries?

Other countries have found expeditious ways to get projects through the environmental review process, avoiding years of waiting for a final decision to emerge out of endless red tape. For example, Canada requires full environmental review with state and local input, but it recently put a maximum of two years on major projects. Germany, which gives decision-making authority to a particular state or federal agency, is another example. Approval for its large North Sea electrical platform built in 2013 took only 20 months, and the City Tunnel in Leipzig, scheduled to open in 2014, was approved in only 18 months.

Do we need to declare our aging infrastructure a national emergency in order to overcome regulatory delays in permitting repairs?

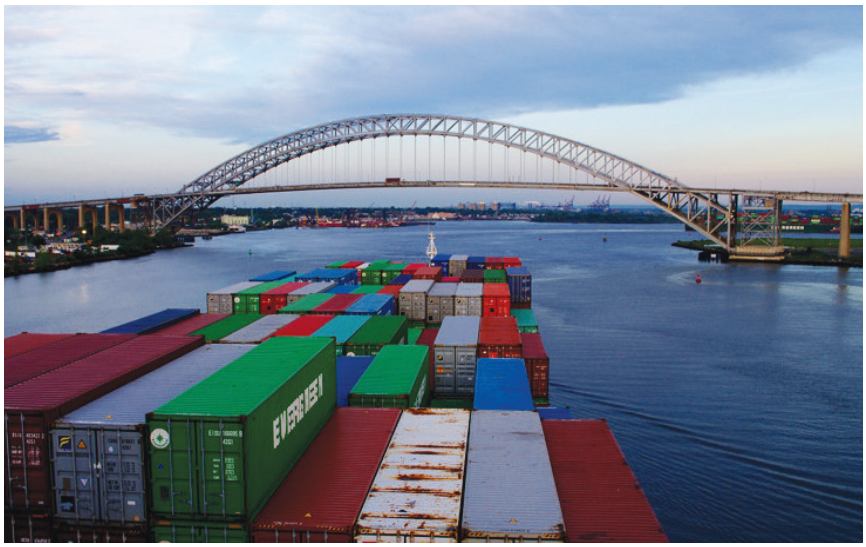
It *is* an emergency! Declining competitiveness, loss of jobs, wasted energy and higher pollution are all caused by paralytic legal infrastructure that prevents America from rebuilding its decrepit physical infrastructure. But just calling it an emergency does nothing.

Raising the Bayonne Bridge road deck that connects New Jersey with New York, a project with virtually no environmental impact, was "fast-tracked" by the Obama administration in 2009, and the review alone still took four years and spanned thousands of pages, and litigation is still pending.

What's needed is fundamental structural overhaul, not meaningless labels or temporary loopholes. One interim idea I've discussed with officials is a statute that lays out a long list of projects that are undeniably good for the environment, like water treatment plants and modern power lines, and then giving them a special fast-track process.

How do we ensure that the loudest people are not the ones that have a disproportionate amount of influence?

Any "process model" always favors the squeaky wheel - unless there's a person with authority to cut through the endless bickering and say enough is enough. In America, there's a decision-maker who can ultimately approve a project, but no decision-maker to assess how much review is required before that decision is made. Every step,



Despite being "fast-tracked" by the Obama administration, getting approval to raise the height of the Bayonne Bridge in New Jersey still required four years of environmental assessment (see sidebar).

The BAYONNE BRIDGE Project

A Case of Red Tape

As discussed in Philip Howard's new book, The Rule of Nobody, the approval process for the Bayonne Bridge reconstruction demonstrates the obstacles imposed by decades-old federal environmental regulations. The entire project, from concept to completion, is expected to take about a decade — with the environmental review accounting for nearly half that time. The only reason a federal review was required was that the bridge spans a navigable waterway.

THE PROJECT: Elevate the deck of the existing bridge to accommodate large cargo ships that will begin passing through the Panama Canal in 2015, after the project to widen and deepen it is scheduled to be finished. The estimated cost is $1.3 billion. A new bridge or a tunnel would have cost about $4 billion.

THE LEAD: The law is vague about which agency is responsible, so the Port Authority of New York and New Jersey spent six months seeking a federal office to serve as the lead agency for an environmental review. The Coast Guard finally agreed.

THE REVIEW: A "fast-track" review began in 2009, and the environmental assessment was issued in May 2013, four years later. The 5,000-page report considered comments from 307 stakeholders and input from 55 federal, state and local agencies and 50 Indian Tribes across multiple states. The agencies required 47 permits.

COST OF REVIEW: The federally mandated archaeological, traffic, fish habitat, soil, pollution and economic reports cost over $2 million. A historical survey of every building within two miles of each end of the bridge alone cost $600,000 — even though none would be impacted.

OPPOSITION: Even as construction began in June 2013, environmental and civic groups challenged the review process in a federal lawsuit. They argued that bigger containers being unloaded in the ports would result in more traffic and pollution in areas already plagued by congestion.

As the Chairman of Common Good, Philip is a frequent speaker at conferences like "Infrastructure Now: Reforming America's Broken Infrastructure Approval Process," which was held in Washington, DC in November 2013.

from designating a lead agency, to deciding the scope of review, to judging whether the review is adequate, can turn into nearly interminable discussion and disagreement. A dock-expansion project in Washington State just finished deciding on scope of review - after more than two years of argument. Now the review starts. This is madness.

How can we segregate NIMBY objections from legitimate environmental concerns?

What's important and what's not always requires human judgment. That's why an official needs to be empowered to draw the line.

Who is qualified to draw the line?

What's needed is an independent official—say, an Assistant Secretary at the Environmental Protection Agency—who can draw the line at any and all stages. Someone with the authority to say, "Oh, I don't think you need to do a study of the effects of a rail line if it already exists; just study the immediate effects of the dock expansion at the rail terminus." Or, "Yes, these 50 pages of analysis seem adequate to address the material impacts of this project."

The authority of this official would be similar to the Office of Information and Regulatory Affairs—not an adversarial proceeding, but a judgment on what's appropriate. To solve the perpetual problem of distrust, let there be an "appeal" to a higher official, perhaps at the Council on Environmental Quality. Yet the appeal too should not be resolved in a legal proceeding, but rather by the judgment of that official.

What's the best way to revamp the process?

There are two ways of cutting out this incentive for detail. First, the aforementioned decision of how much review is needed should be given deference by courts under the Chevron doctrine, which requires courts to defer to interpretations of statutes made by those government agencies charged with enforcing them, unless such interpretations are unreasonable. Named after a 1984 Supreme Court case involving Chevron USA, the case involved a dispute over the EPA's interpretation of a provision of the Clean Air Act Amendment. The Supreme Court ruled that a judge should not interfere if the agency took appropriate action, such as announcing its proposed action, receiving comments from interested parties and fully considering all the public comments. Even if the agency's decision doesn't make sense, the doctrine says that a judge should still not interfere.

Today, judicial review is de novo, meaning the appeals court holds a trial as if no prior trial had been held. This is a startling usurpation of executive authority by the judiciary, since the National Environmental Protection Act (NEPA) itself doesn't provide for judicial review at all.

Second, an even more effective way to remove "defensive review" would be to limit judicial review to substantive violations of law, not over the quality of review (unless it is so inadequate that it amounts to no review). In this way, the judgment by the independent official would have the same authority as, say, a judgment by the Office of Information and Regulatory Affairs.

What type of independent agency can determine how much environmental review is needed?

Decisions on the scope of review should reside in one agency for a given project, not multiple overlapping state and federal agencies. It doesn't need to be a new agency, just a designated official who is "independent" of the particular project—i.e., not the lead agency doing the review. As noted, I think this responsibility should reside within the EPA, or, for state projects, within a state's environmental agency. I don't see the responsibility as one of independent analysis, but of judging when the lead agency has done enough analysis.

By giving one agency the authority to cut through the knot of multiple agencies—including those at state and local levels—the approval process would be dramatically accelerated. A good example is the process instituted for gas pipeline projects. For all new interstate gas pipeline projects in the U.S., there is a one-stop process in place

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under the exclusive jurisdiction of the Federal Energy Regulatory Commission.

Could it distinguish between a project with significant environmental impact and one with a minimal impact?

Drawing these types of scoping boundaries is exactly what an independent official is designed to do. If the agency feels that a project only implicates a certain slice of potential environmental impact, then review is cabined to only that area. If the official determines that a project is unlikely to create any significant environmental impact, then it can recommend a Finding of No Significant Impact.

With an independent agency that possesses the power to say when enough is enough, there would be a deliberate decision, not a multi-year ooze of irrelevant facts. Its decision on the scope of review can still be legally challenged as not complying with the basic principles of environmental law, but the challenge should come after, say, one year of review, not ten.

If a project has significant impact, do you envision enforcing strict deadlines?

The review and permitting processes should be subject to meaningful deadlines, but deadlines are easily (indeed typically) circumvented unless there's someone with authority to make decisions. A rigid one-size-fits-all approach to timeframes does not make sense. Deadlines should be a guideline, interpreted and applied by the official overseeing the scope of review.

What about limits on appeals?

In these cases, an appeal should not be a legal proceeding, but an executive decision by another official. There should definitely be a timeframe for all these choices, but one that can be measured in days and months, not years.

Are there ways to discourage frivolous appeals, such as making the losing party pay the legal fees of the other party?

There are plenty of other ways to discourage frivolous lawsuits, including fee-shifting, but it's my opinion that the reforms I've outlined would do a much better job of nipping this problem in the bud. Plus, fee-shifting might over-discourage legitimate challenges to faulty agency actions, especially if the challenger risked paying the legal fees of whatever government body it was fighting.

Which projects would be subject to federal preemption and which should be handled at the local level?

Interstate projects should always be under federal jurisdiction. Projects that implicate federal land or waterways, federal money, or federal agency action, already fall under NEPA.

The Cape Wind project off the coast of Massachusetts, now in its 12th year of scrutiny, required review by 17 different agencies. By dint of both its offshore location and potential federal financing, the Cape Wind project falls squarely within NEPA's domain. In these projects, state and local concerns should be included within the federal mandate rather than duplicated separately.

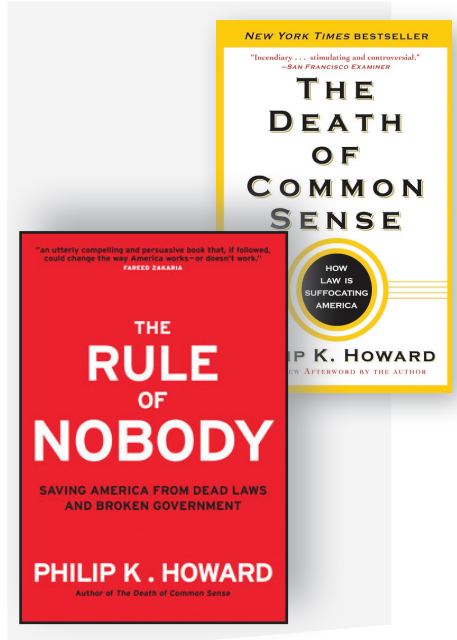
Do you envision a scenario in which a state agency would act as the lead?

In my view, intrastate projects should be overseen by a state agency, which can coordinate with federal agencies over federal concerns. The goal should be one permit that covers all levels of government. This is the "whole of government" approach that other countries are adopting.

What kind of progress do you foresee in the near future, and what can right of way professionals do to support your efforts?

There is a lot of interest, including from the White House, in exploring ways to streamline approval. For starters, most projects on existing rights of way should receive only minimal review. Fixing this broken system requires every interest, including industry professionals, to loosen their grip on the status quo.

There's no magic formula to make things work better. Getting rid of environmental oversight is neither politically feasible nor a good idea. The only alternative to endless bureaucracy is to give accountable officials the flexibility to start making decisions. ✪



A practicing lawyer and author, Philip's new book, The Rule of Nobody (April 2014), outlines ways to fix the outmoded laws that are paralyzing our progress.