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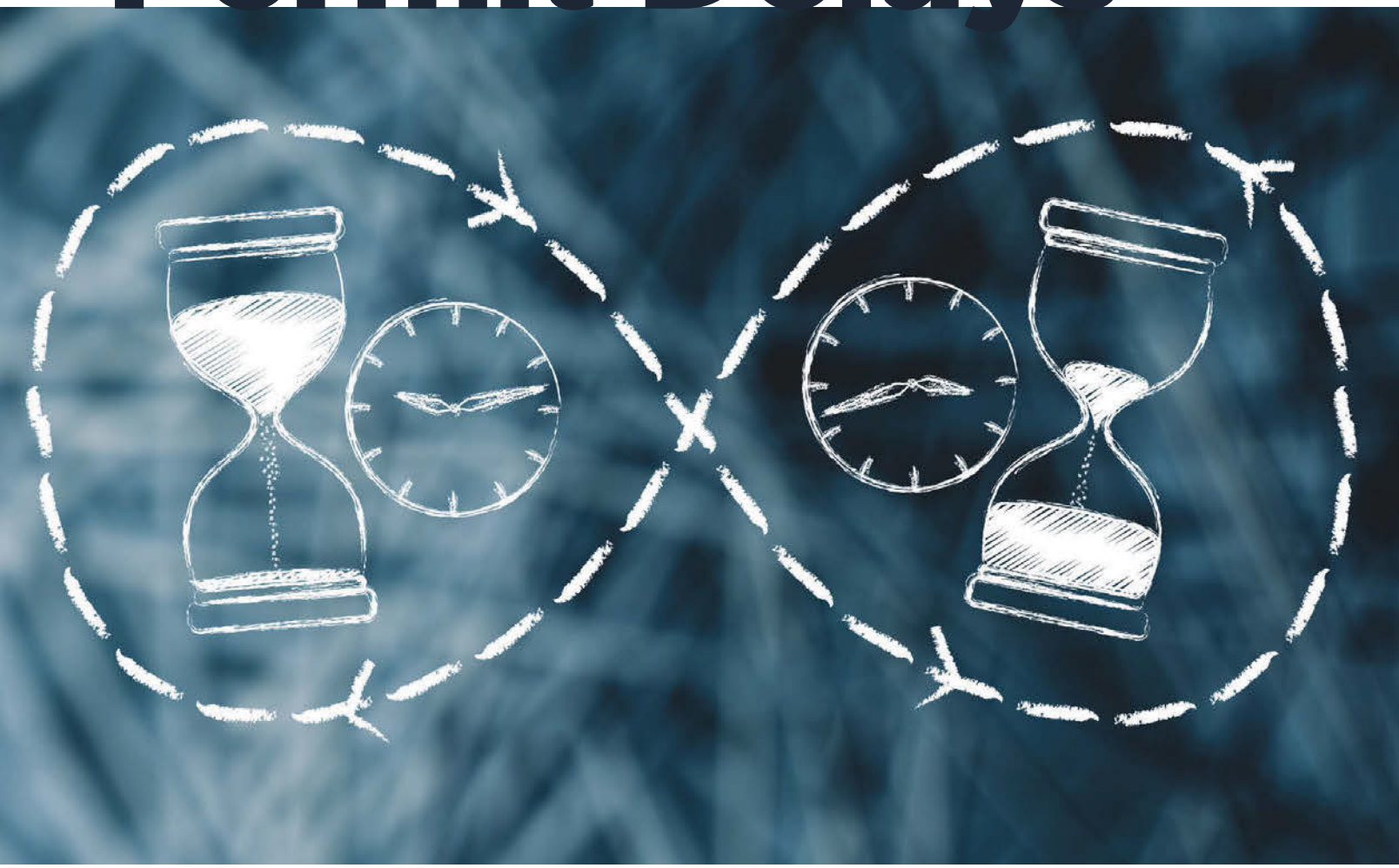
2018 SERVICE & SUPPLY BUYERS' GUIDE

# Overcoming Permit Delays



## STRATEGIES TO SPEED PROJECT APPROVAL

BY GEN. (RET) BOB FLOWERS &
GEN. (RET) CHARLES WILLIAMS

**FROM REPEAL OF THE** 2015 Waters of the U.S. (WOTUS) rules to greater emphasis on public-private partnerships (PPPs), Congress and the Trump administration have begun laying out their strategy to rebuild the nation's infrastructure.

Given federal budget realities, it is increasingly clear that private sector funding, and especially new partnerships, will be crucial to the success of this key part of the Trump campaign platform. It is also apparent that capable contractors will have major opportunities in new infrastructure partnerships.

Congressional leaders and administration officials know that for their strategy to work, they must overcome private sector concerns about federal permitting delays. That's why the president and senior officials have gone out of their way to stress that this administration's permit approvals will come faster compared to previous years. Expedited approvals, the administration hopes, will jump start private sector partnerships and make progress on one of the president's most visible campaign themes.

Will this translate into success? Yes, but only if both the private sector and federal officials approach this issue with a knowledgeable perspective. For the private sector especially, success is a matter of not only a smart approach to federal permitting but also understanding how to use legitimate latitude in current Corps of Engineer rules to speed an approval process.

**The best hope to accelerate permit times involves both the administration and interested private sector groups adopting strategies of what might be called "smart permitting."**

First, everyone involved should recognize that the main delays with federal permitting usually stem from three laws: the National Environmental Protection Act, the Clean Water Act and the Endangered Species Act. All require compliance with regulations created in keeping with the Administrative Procedures Act, which establishes rules on public notice and regulation justification.

Changing the rules for any of these three laws is time-consuming and certain to spark extensive litigation. The administration and Congress are seeing this firsthand with the ongoing WOTUS repeal. Another option involves changing the actual laws, but this appears unlikely.

The best hope to accelerate permit times involves both the administration and interested private sector groups adopting strategies of what might be called "smart permitting."

For example, federal officials should increasingly adopt a process that unifies a project's permit applications under a single "one stop shop" overseen by a designated official. That official becomes the arbiter among agencies and ensures a permit application does not bog down in interagency delays.

This model has worked effectively in Europe for years. A version of it also helped accelerate New Orleans' rebuilding after Katrina. In that instance, the Corps of Engineers had the lead role and was able to coordinate action with all federal agencies to shorten the approval process.

Second, those pushing infrastructure projects – particularly when the project involves private sector funding and partnerships – should take better advantage of what current rules allow in permit applications. The following example involving federal mitigation banking, while somewhat complex, has tripped up many worthwhile projects, often unnecessarily.

Federal law and Corps of Engineer policy have long encouraged a "mitigation banking" system as a better, more efficient option during the review process than the traditional "permitee-responsible" process. Basically, this means that when permit applicants remain responsible for the required mitigation, they must construct, operate and maintain the mitigation in perpetuity, with federal approvals and continuous oversight.

But if the federal permitting agency allows the purchase of credits from a mitigation bank (an area set aside for the appropriate type and amount of mitigation), then the responsibility in perpetuity falls to the bank owner who has financial assurances in place to ensure the success of the bank. This requires much less time, work and resources by both the applicant and the federal government.

A 2015 Corps' study concluded that a mitigation banking system can reduce permit processing times by up to 50 percent. Unfortunately, the full benefits of mitigation banking are being lost due to regulatory confusion. A 2008 federal regulation requires the Corps of Engineers to "reserve a significant share" of credits until after a project's builder has met promised ecological standards.

However, a different part of the same rule states that what constitutes a significant share is "at the discretion of the [Corps of Engineers] district engineer… and may vary depending on the… project and the risks and uncertainty…."

For years, this vague wording has produced confusion, legal uncertainty and delays in federal reviews. This angers builders, construction workers, unions and everyday consumers who lose the benefits of new projects. But equally important, it frustrates Corps professional staff and commanders.

Those seeking environmental permit approvals from the Army Corps of Engineers should offer an option: suggest that the Corps could agree that a "significant share" means a specific defined amount based on the project's unique needs and never more than 20 percent.

Third, project sponsors in a public-private partnership must be smart about post-permitting issues that can bring approved projects to a rapid halt. Specifically, that means anticipating roadblocks and taking action before these cause delays.

One example involves a situation in the Northeast two years ago. After extensive evaluation, the U.S. Fish and Wildlife Service (FW) listed the northern long-eared bat as "threatened" under the Endangered Species Act. That triggered immediate delays on logging, road construction and energy operations in the area, which included the Marcellus Shale area.

But one large infrastructure operation saw this coming and had conducted its own impact study on the bat population. It quickly submitted the report to FWS and as a result, the company avoided at least six months of construction delays.

In 2017, Corps of Engineers Commander Gen. Todd Semonite testified before Congress on the importance of PPPs for the country's water resource infrastructure. "The Corps is exploring alternative financing and funding options, including public-private partnerships … through an assessment of private policy requirements and application of project-specific experience," Semonite told Congress.

He added that the Corps is seeking to demonstrate how public and private sector collaboration can improve the Corps' ability to modernize America's water infrastructure needs.

The direction that Gen. Semonite laid out for Congress on PPPs and waterways enjoys strong support for other types of infrastructure – for example, roadways and bridges. This can translate into a better climate for permit approvals, but only if partnerships approach the task of permit approvals with a complete knowledge of what the rules allow and what they don't.

No one should expect the Corps of Engineers to begin employing a "rubber stamp" approach to permitting. To be clear, neither the law nor federal rules will allow this. However, through a smart approach to permitting strategy, PPPs and the private sector in general have a much larger window now to get things done. ◆

*Gen. (ret) Bob Flowers was commanding general of the Army Corps of Engineers and Gen. (ret) Charles Williams was commander of the Corps' North Atlantic Division. Gen. Williams was also chief operating officer of the Dulles Toll Road partnership which built the nation's first private toll road in more than 150 years, completing it six months ahead of schedule. Both are senior advisors at Dawson & Associates in Washington, D.C., specializing in federal environmental permitting.*