



Statement of the U.S. Chamber of Commerce

ON: HEARING ON “Cutting Through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council”

TO: U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS’ PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

DATE: July 26, 2017

1615 H Street NW | Washington, DC | 20062

The Chamber’s mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

**BEFORE THE U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS' PERMANENT SUBCOMMITTEE ON
INVESTIGATIONS**

**Hearing on “Cutting Through the Red Tape: Oversight of Federal Infrastructure
Permitting and the Federal Permitting Improvement Steering Council”**

Testimony of William L. Kovacs

Senior Vice President, Environment, Technology & Regulatory Affairs

July 26, 2017

Good morning, Chairman Portman, Ranking Member Carper, and distinguished members of the Senate Permanent Subcommittee on Investigations.¹ My name is William L. Kovacs and I am Senior Vice President for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. The Chamber greatly appreciates the Committee’s interest in the vital issue of federal permit streamlining and for the work it did during the 114th Congress that led to passage of very clear, well-structured legislation that was incorporated as Title 41 of the Fixing America’s Surface Transportation Act. It is now referred to as FAST-41.

My statement details the Chamber’s strong support for the federal permit streamlining provisions in FAST-41, which was signed into law in December 2015, and for the speedy and effective implementation of those provisions. FAST-41 had strong leadership from its original co-sponsors Senators Portman and McCaskill and Chairman Johnson, and bipartisan support demonstrated by the prior administration’s immediate implementation of the statute. FAST-41 is increasingly important as the new administration has committed to getting more infrastructure built. FAST-41 is a workable statutory design, it has a structure in place to review and streamline the approval of environmental reviews, and it has 34 projects listed on its Dashboard. If this nation truly wants to improve, in a timely manner, the nation’s infrastructure it needs to immediately utilize the FAST-41 process.

I. BACKGROUND

As you may know the U.S. Chamber’s strong interest in permit streamlining dates back to the 2009 debate over the American Recovery and Reinvestment Act (“The Recovery Act”) when the administration was proposing to fund all “shovel ready projects”. The Chamber called attention to the fact that there were few, if any, such projects due to the nation having a flawed permitting process that operated without time-constraints.

During the debate on the Recovery Act Senators Barrasso and Boxer recognized the flaws in the permitting process and worked together to secure an amendment to the Recovery Act requiring the National Environmental Policy Act (“NEPA”) process be implemented to require that environmental reviews be conducted “on an expeditious basis” (i.e. that the shortest existing applicable process be used). The Barrasso – Boxer amendment was enacted into law and according to Council on Environmental Quality (“CEQ”) data, out of the 192,707 NEPA reviews conducted on Recovery Act projects, 184,733 were satisfied through the use of categorical

¹ FAST-41 adopted most of the provisions of S. 280, the Federal Permitting Improvement Act of 2015.

exclusions. Only 841 required an Environmental Impact Statement (“EIS”), the longest process under NEPA.

After passage of the Recovery Act the U.S. Chamber continued its interest in permit streamlining by undertaking an extensive study of the difficulties inherent in completing the environmental reviews needed to secure federal permits for constructing projects. In 2010 the Chamber published its “Project – No – Project” report which identified 351 energy projects across the nation that were stalled due to the many challenges made under the Federal government’s environmental review process. The stalled projects, if permitted, would have produced a direct investment totaling \$577 billion at a time when the economy desperately needed investment. The report estimated that this \$577 billion direct investment would have generated a \$1.1 trillion short term boost to the economy and created 1.9 million jobs annually during the projected seven years of construction. The report became an important resource used by both houses of Congress to develop legislation to address the long permitting delays.

In 2013, the Senate introduced S. 1397, the “Federal Permitting Improvement Act” and in 2012 the House introduced H.R. 4377, “Responsibly and Professionally Invigorating Development Act” (“RAPID Act”). While the House passed RAPID in both the 113th and 114th Congresses, the Senate did not address the issue until the 114th Congress when it was then able to incorporate its version of permit streamlining, the “Federal Permitting Improvement Act”, as Title 41 of the FAST Act which was signed into law on December 4, 2015 by President Obama.

The enactment of FAST-41 was the first time since the passage of a 1969 federal law requiring environmental reviews of major infrastructure projects having federal involvement, that a structure was established for the management, coordination, timing and transparency of the environmental review process for such projects.

FAST-41 establishes the multi-agency Federal Permitting Improvement Steering Council (“FPISC”), chaired by an Executive Director, and establishes a process which involves designation of a lead agency; schedules for projects; coordination between agencies and states when applicable; dispute resolution mechanisms; and judicial review. Project sponsors must seek authorization as a “covered project” to gain access to the process and the Executive Director makes the final determination that a project meets the criteria of a “covered project.”²

A significant part of the text of FAST-41 originated in the Senate as S. 280; the 2015 version of the Federal Permitting Improvement Act which was developed by this Committee. The permit streamlining provisions of FAST-41 bring greater efficiency, transparency, and accountability to the federal permitting review process. Its coverage is very broad including renewable energy production, conventional energy production, electricity transmission, aviation, surface transportation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, or any other sector as determined by a majority vote of the FPISC.³ Bringing better coordination and predictability to the permitting process should translate into job creation, economic growth, and new development. Some of the key provisions of FAST-41 include:

² See 42 U.S.C. § 4370m. The definition of “covered project” permits FPISC by majority vote to expand the list of covered projects if it determines that other sectors meet the stated criteria.

³ *Id.* at § 4370m(6)(A).

- Establishing a permitting timetable, including intermediate and final completion dates for covered projects, i.e. those over \$200 million or subject to federal permitting review requirements so they will benefit from enhanced coordination;
- Designation of a Lead Agency to coordinate responsibilities among multiple agencies involved in project reviews to ensure that “the trains run on time;”
- Providing for concurrent reviews by agencies, rather than sequential reviews;
- Allowing state-level environmental reviews to be used where the state has done a competent job, thereby avoiding needless duplication of state work by federal reviewers;
- Requiring that agencies involve themselves in the process early and comment early, avoiding eleventh-hour objections that can restart the entire review timetable;
- Establishing a reasonable process for determining the scope of project alternatives, so that the environmental review does not devolve into an endless quest to evaluate infeasible alternatives;
- Creating a searchable, online “dashboard” to track the status of projects during the environmental review and permitting process;
- Reducing the statute of limitations to challenge a project review from six years to two years; and
- Requiring courts, when addressing requests for injunctions to stop covered projects, to consider the potential negative impacts on job creation if the injunction is granted.

While there have been permit streamlining provisions for specific activities, this is the first time there has been any type of comprehensive structure that coordinates the environmental review process for large infrastructure projects throughout the nation, both public and private.

II. PERMIT STREAMLINING UNDER FAST-41

Building upon the cornerstones of coordination, transparency, and accountability, FAST-41 provides a framework for a more streamlined and effective review and permitting process for major infrastructure projects. A “**covered project**” under FAST-41 is defined as “any activity in the United States that requires authorization or environmental review by a Federal agency involving construction of infrastructure.”⁴ In order to qualify for FAST-41, a project must be subject to the NEPA. A covered project must either be:

- likely to require a “total investment” of more than \$200 million, and not qualify for any abbreviated authorization or environmental review under other laws; or

⁴ *Id.*

- of a size or complexity in the view of the FPISC that makes the project likely to benefit from enhanced oversight and coordination, including an authorization for an environmental review likely to require multiple federal agencies or the preparation of an EIS under NEPA.

Certain highway and multimodal surface transportation projects are excluded under FAST-41⁵, as well certain water resources projects⁶ under the Water Resources Development Act (“WRDA”).⁷

A. Current Covered Projects

As of July 2017, thirty-four “covered projects” have undergone or are currently under FAST-41 review. This first tranche of projects was taken from existing pending projects, which had an environmental review or authorization pending before a Federal agency ninety days after the enactment of FAST-41. Unless those projects already had a draft environmental assessment (EA) or a draft EIS released, they must develop a “coordinated project plan”, including a permitting timetable. The current “covered projects” include among other things interstate natural gas pipelines (7), electricity transmission lines (7), solar energy projects (2), and liquefied natural gas terminals (2).⁸ They are located throughout the country, from New York to Florida to Oklahoma to Oregon.⁹

Figure 1 shows the breakdown of FAST-41 projects by project type. Figure 2 shows the breakdown of FAST-41 projects by identifying the lead agency. Figure 3 shows the status of the 34 projects subject to FAST-41. Figure 4 is a map from the federal permitting dashboard showing where the projects are located:

⁵ See Pub. L. 112-141. These transportation projects have their own streamlined environmental review framework under the Moving Ahead for Progress in the 21st Century Act (“MAP-21”).

⁶ See 33 U.S.C. § 2348. These are water resource projects such as harbor, flood mitigation, and navigation development authorized by Congress under the jurisdiction of the U.S. Army Corps of Engineers. WRDA also has a project acceleration provision.

⁷ OFFICE OF MGMT. & BUDGET & COUNCIL ON ENVTL. QUALITY, OFFICE OF THE PRESIDENT, GUIDANCE TO FEDERAL AGENCIES REGARDING THE ENVIRONMENTAL REVIEW AND AUTHORIZATION PROCESS FOR INFRASTRUCTURE PROJECTS, § 3.7 (Jan. 13, 2017) (“Implementation Guidance”), available at

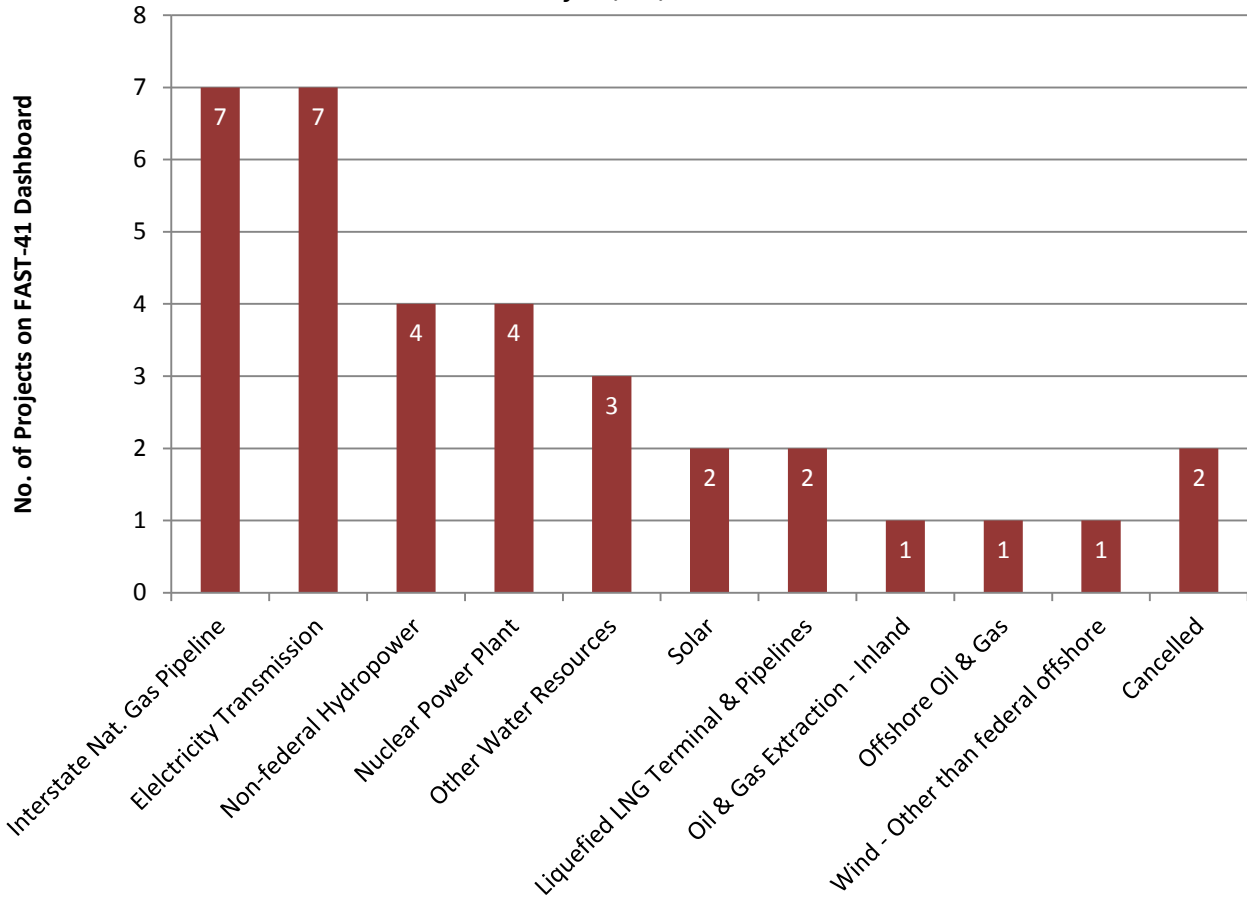
<https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/Official%20Signed%20FAST-41%20Guidance%20M-17-14%202017-01-13.pdf>. Other types of actions also may be excluded from FAST-41, including (1) programmatic plans or EISs that do not authorize individual project reviews; (2) any project that does not involve the construction of infrastructure, i.e. natural resource exploration activities, geological exploration, and offshore renewable site assessments; and (3) any Federally-sponsored project in which the Federal Government is the main beneficiary of the project.

⁸ See Federal Infrastructure Projects Permitting Dashboard (“Permitting Dashboard”), <https://www.permits.performance.gov/projects>.

⁹ See Federal Infrastructure Project Map, <https://www.permits.performance.gov/projects/map>.

Figure 1: Project Count by Type for 34 FAST-41 Covered Projects

As of 07/06/2017



Notes on some FAST-41 Project Categories:

- 1) **Electricity Transmission** – Electricity transmission projects are generally permitted by state agencies, as there is no general requirement for federal permitting. The seven projects covered by FAST-41 require transmission lines to cross federal lands, which requires the agencies that manage those lands, such as BLM or the U.S. Forest Service, to issue permits.
- 2) **Nuclear Power Plants** – The four projects covered by FAST-41 are for expansion or replacement of reactors at existing nuclear power plants, which requires permits issued by the Nuclear Regulatory Commission.
- 3) **Other Water Resources** – This is a catch all category of water projects that are not separately classified in other categories, including storm water or wastewater management, flood risk management, reclamation activities, and others.
- 4) **Cancelled** – Two of the 34 FAST-41 projects on the dashboard have officially been cancelled. One is a solar project and one was an oil & gas extraction and pipeline project.

Figure 2:

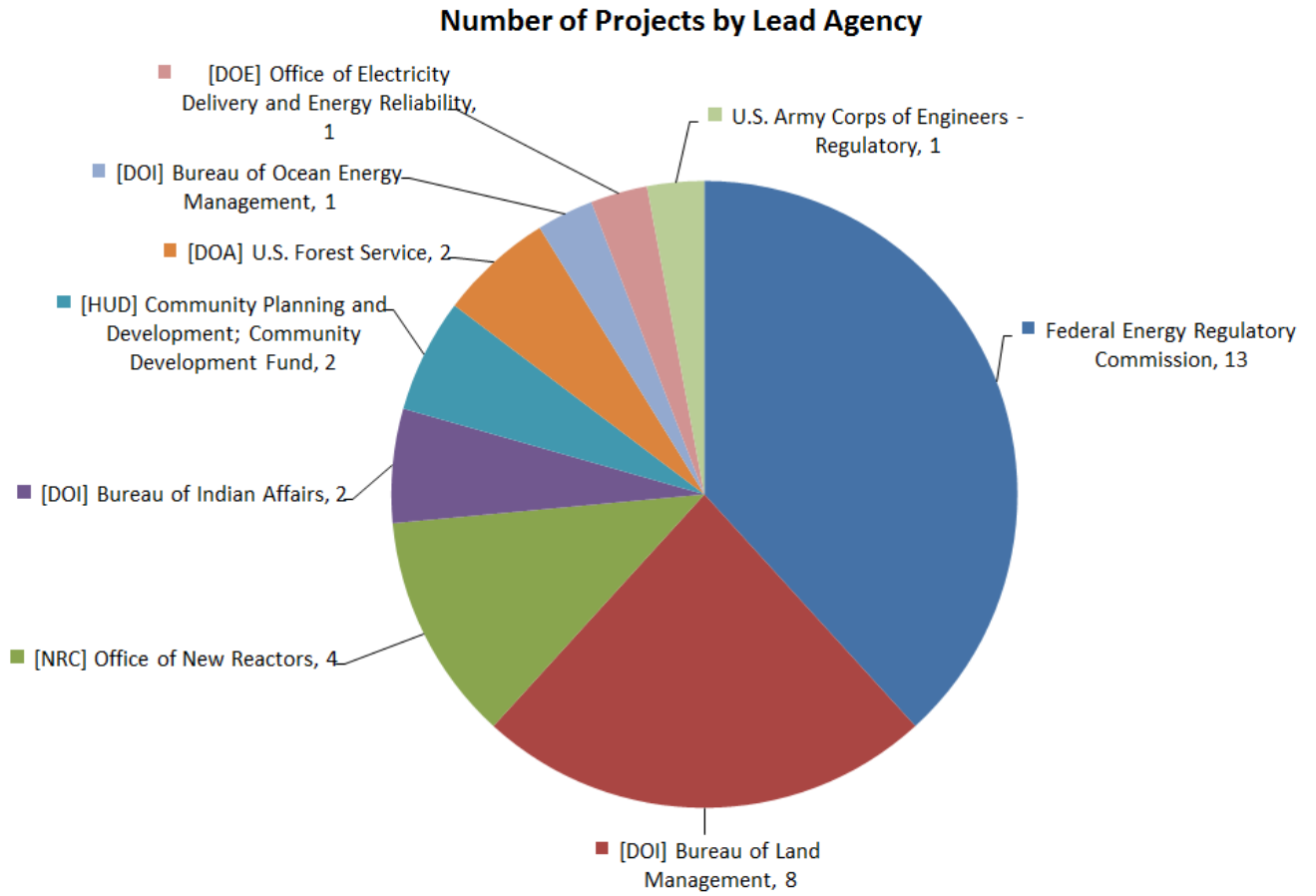


Figure 3:

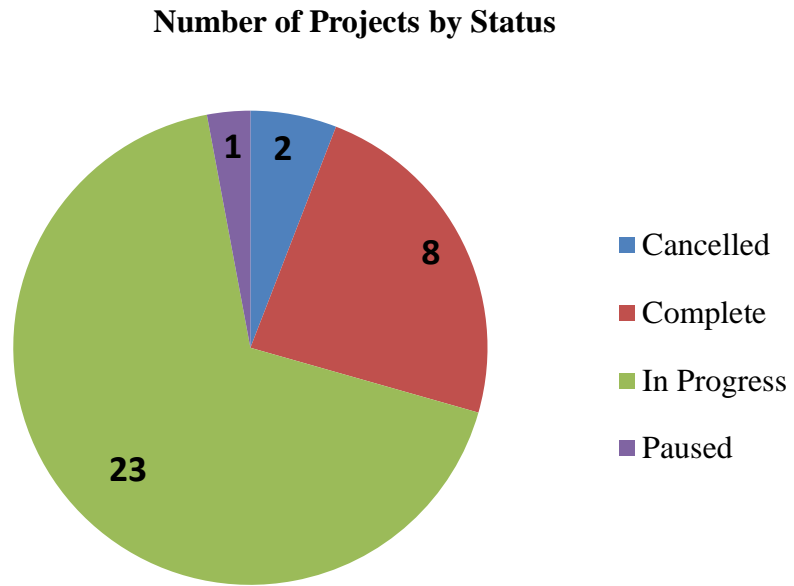
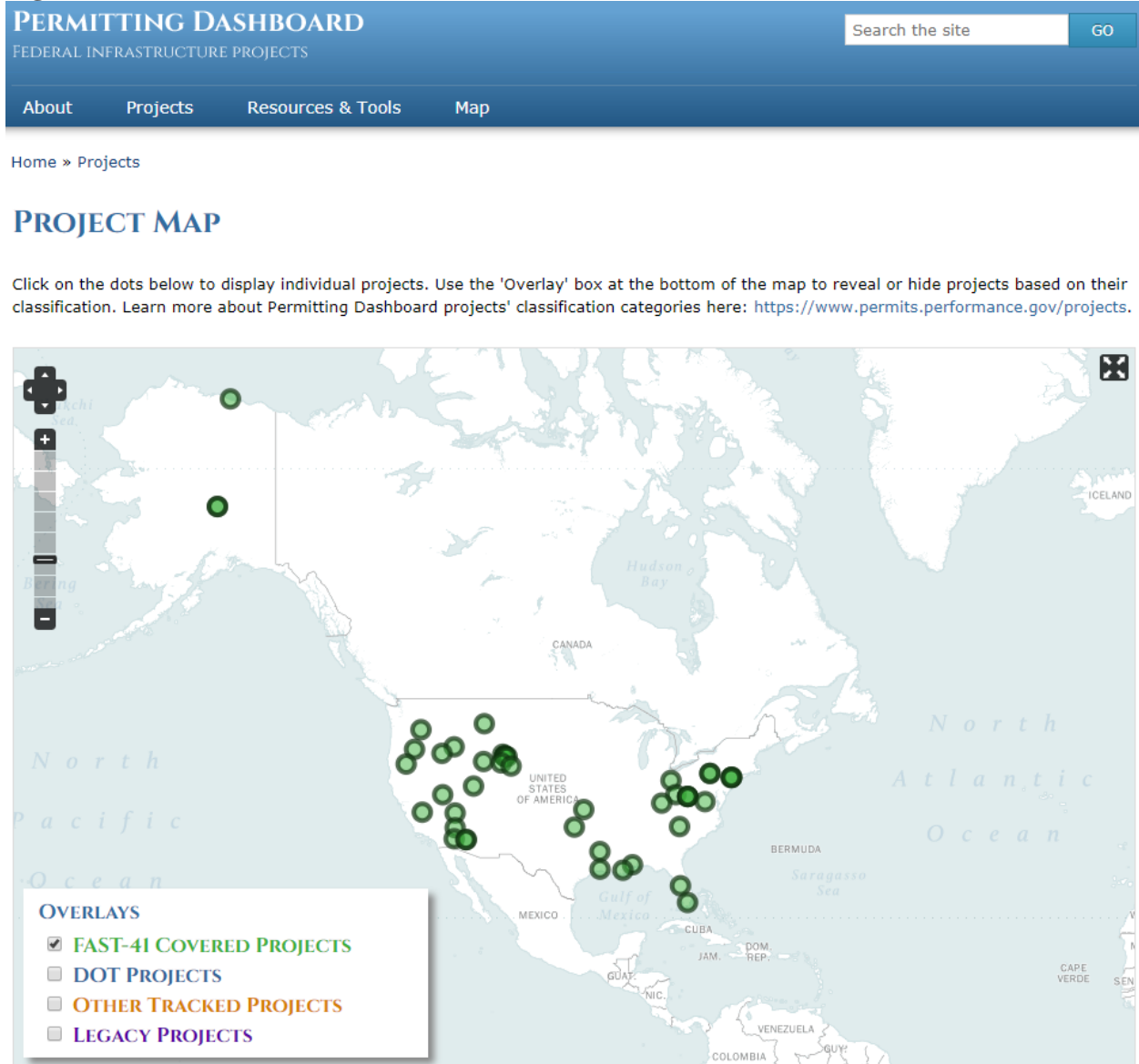


Figure 4:



B. Executive Director and FPISC Council

The Executive Director is a Presidential-appointed (but not Senate confirmed) position and the chair of the FPISC. The Executive Director has numerous responsibilities and obligations.¹⁰ For example, he or she establishes an inventory of “covered projects” under FAST-41; maintains the permitting dashboard; makes determinations of what projects are “covered” under FAST-41; develops performance schedules for environmental reviews and authorizations; designates “facilitating agencies;” mediates any disputes over permitting timetables; grants extensions of project deadlines and tracks and accounts for those extensions; and submits an annual status report to Congress.

¹⁰ See Implementation Guidance, *supra* note 7, at Appendix A, Table 3.

In July 2016, President Obama appointed Richard Kidd as the Executive Director of the FPISC. Kidd previously served as a Deputy Assistant Secretary of the Army. With the change in the administration in January 2017, Janet Pflieger, the Deputy Director of the FPISC, is serving as the Acting Executive Director.

The FPISC is composed of 13 Federal agencies: the Departments of Agriculture, Commerce, Interior, Energy, Transportation, Defense, Homeland Security, and Housing and Urban Development; the Army Corp of Engineers; the Administrator of the Environmental Protection Agency; the Chairman of the Federal Energy Regulatory Commission; the Nuclear Regulatory Commission, and the Advisory Council on Historic Preservation. The Director of OMB and the Chairman of CEQ are also members of the FPISC. The FPISC has several responsibilities, including consulting with the Executive Director on establishing an inventory of “covered projects,” developing and publishing recommendations on “best practices” for various permitting activities, and making recommendations to and consulting with the Executive Director on “facilitating agency” designations.¹¹

C. Process

1. Initiation

Projects under FAST-41 are initiated by the project sponsors through the submission of an Initiation Notice to the Executive Director and the appropriate “facilitating agency.” The “**facilitating agency**” serves as the point of contact for the project sponsor until a “lead agency” is determined.¹² OMB has designated “facilitating agencies” for several of the project types covered by FAST-41.¹³ For example, FERC is the “facilitating agency” for interstate natural gas pipelines, and USDA is the “facilitating agency” for rural broadband infrastructure.

An “**Initiation Notice**” must include the following:

- the purpose and objectives of the proposed project;
- the location of the proposed project, and the locations of any environmental, cultural, and historic resources within the project area;
- the technical and financial feasibility of the construction project;
- any Federal financing, environmental reviews and authorizations likely to be needed to complete the proposed project; and
- an assessment that the proposed project satisfies the “covered project” criteria under FAST-41.¹⁴

¹¹ See *id.* at Appendix A, Table 1.

¹² *Supra* note 2, at § 4370m(13).

¹³ See Implementation Guidance, *supra* note 7, at § 3.3.

¹⁴ *Supra* note 2, at § 4370m-2(a)(1)(C).

After the facilitating agency determines that an Initiation Notice¹⁵ is complete, the Executive Director makes the final decision on whether the proposed project is covered under FAST-41. If it is a covered project, the Executive Director has **14 days** to post it on the Permitting Dashboard. Once the project is posted, the following deadlines are triggered for the facilitating agency or the lead agency:

- **45 days** to:
 - “identify all Federal and government entities likely to have financing, environmental review, authorization, or other responsibilities with respect to the proposed project”; and
 - invite all appropriate agencies to become a “participating agency” or a “cooperating agency.”¹⁶
- **60 days** to develop a “Coordinated Project Plan.”¹⁷

Under FAST-41, a “**cooperating agency**” is any agency with jurisdiction under Federal law or special expertise for environmental reviews.¹⁸ For states to be cooperating agencies under FAST-41, they must choose to participate in the FAST-41 process. According to OMB’s Implementation Guidance, a FAST-41 “cooperating agency” has “a concurrence role for the permitting timetable, a heightened role for the modification of schedules and decisions to extend public comment periods, a specific role in alternative analyses and selection of methodologies for environmental review of the covered project, and a concurrence role in decisions to develop the preferred alternative to a higher level of detail.”¹⁹

A “**participating agency**” participates in the environmental review or authorization for a covered project under FAST-41;²⁰ but it has no authority or jurisdiction over the covered project.²¹ Participating agencies, which may include states, local or tribal governments who choose to be involved, may become cooperating agencies if there is a change in circumstances. Among their roles, FAST-41 participating agencies: (1) consult with the facilitating or lead agency on the establishment of the Coordinated Project Plan; (2) consult with the facilitating or lead agency on setting a permitting timetable for a covered project; (3) work cooperatively with the lead agency and cooperating agency to identify and resolve issues that could delay a covered project; and (4) identify any potential environmental impacts that could delay substantially or prevent an agency from completing an environmental review for a covered project.²²

¹⁵ For a project sponsor interested in submitting an Initiation Notice for a proposed project, the form can be found at <https://www.permits.performance.gov/tools/interim-fast-41-initiation-notice-instructions>.

¹⁶ *Supra* note 2, at § 4370m-2(a)(2)(A).

¹⁷ *Id.* at § 4370m-2(c)(1)(A).

¹⁸ *Id.* at § 4370m(4).

¹⁹ Implementation Guidance, *supra* note 7, at § 2.13.

²⁰ *Supra* note 2, at § 4370m(17).

²¹ *Id.* at § 4370m-2(a)(4)(A).

²² See Implementation Guidance, *supra* note 7, at Appendix A, Table 11.

2. Permitting Timetable

As part of the project coordination process, a permitting timetable includes intermediate and final completion dates for action by each participating agency on any Federal environmental review.

3. Permitting Dashboard

FAST-41 provides for the establishment of a Permitting Dashboard.²³ Within a few months of the enactment of FAST-41, OMB had updated and enhanced an existing dashboard platform, thereby creating the FAST-41 Permitting Dashboard at www.permits.performance.gov. The statute requires the Executive Director maintain the Permitting Dashboard, which must include a “specific and searchable entry for each covered project.”²⁴ The permitting dashboard is available online currently.²⁵ Figure 5 and 6 are examples of the information that is on the dashboard:

Figure 5:

The screenshot shows the 'PERMITTING DASHBOARD' for 'FEDERAL INFRASTRUCTURE PROJECTS'. It includes a search bar with the text 'Search the site' and a 'GO' button. Below the search bar are navigation tabs: 'About', 'Projects', 'Resources & Tools', and 'Map'. Under the 'Projects' tab, there are sub-tabs for 'FAST-41 Covered Projects', 'DOT Projects', 'Other Tracked Projects', and 'Legacy Projects'. A text block states: 'The infrastructure projects below are identified as Covered Projects under Title 41 of the Fixing America's Surface Transportation (FAST) Act.'

Below this text is a filter interface with dropdown menus for 'Project Title', 'Lead Agency' (set to '- Any -'), 'Sector' (set to '- Any -'), 'State' (set to '- Any -'), and 'Status' (set to '- Any -'). An 'Apply' button is to the right.

The main content is a table with the following data:

Title▲	Lead Agency	Bureau/Mode	Sector	Project Type	Status
Aiya Solar Project (Moapa)	Department of Interior	Bureau of Indian Affairs	Renewable Energy Production	Solar	Complete
Atlantic Coast Pipeline, Atlantic Coast Pipeline Amendment, Supply Header, and ACP-Piedmont Lease	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Interstate Natural Gas Pipelines	In Progress
Atlantic Sunrise	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Interstate Natural Gas Pipelines	In Progress
Boardman to Hemingway Transmission Line	Department of Interior	Bureau of Land Management	Electricity Transmission	Electricity Transmission (all)	In Progress
Chokecherry-Sierra Madre Wind Energy	Department of Interior	Bureau of Land Management	Renewable Energy Production	Wind: Other than Federal Offshore	In Progress

²³ *Supra* note 2, at § 4370m(7).

²⁴ *Id.* at § 4370m-2(b).

²⁵ *See* Permitting Dashboard, *supra* note 8.

Figure 6:

PERMITTING DASHBOARD
FEDERAL INFRASTRUCTURE PROJECTS

GO

About
Projects
Resources & Tools
Map

Home » Projects

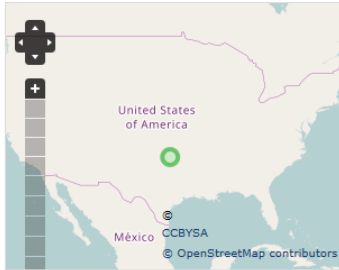
PLAINS AND EASTERN CLEAN LINE

Project Information

Sector: Electricity Transmission
Project Category: FAST-41 Covered Projects
Project Status: In Progress
Project Website: <http://www.plainsandeasterneis.com/index.php>
Total Estimated Project Cost: \$2,500,000,000

Description:

Clean Line seeks the Department's participation in the development, siting, construction, operation, maintenance, and ownership of high voltage direct current (HVDC) transmission facilities running approximately 705 miles from western Oklahoma to the Arkansas-Tennessee border (the Project). Clean Line, acting on its own and without the Department's participation, would build additional facilities that would connect to the Project in Texas and Tennessee. The Project would deliver up to 4,000 megawatts (MW) of primarily wind generation from the Oklahoma and Texas Panhandle region to the mid-South and Southeastern United States, which could meet the annual energy needs of more than 1.5 million average American homes.



Primary Location

City:
State: OK
Zip Code:

Lead Agency Information:

POC Name: Christopher Lawrence
POC Title: Electricity Policy Analyst
POC Email: Christopher.Lawrence@hq.doe.gov
Agency/Department: Department of Energy
Bureau/Mode: Office of Electricity Delivery and Energy Reliability

Sponsor Contact Information:

Project Sponsor: Clean Line Energy Partners

PERMITTING TIMELINE

Action	Agency	Target Completion	Status
▸ Environmental Impact Statement (EIS)	Office of Electricity Delivery and Energy Reliability		Complete 03/25/2016
▸ Section 106 Review	Office of Electricity Delivery and Energy Reliability		Complete 12/02/2015
▸ Clean Water Act Section 404 Permit	Department of Defense (Cooperating under FAST-41), (Cooperating under NEPA)	11/08/2018	In Progress
▸ Section 408 Permit	Department of Defense	11/08/2018	In Progress
▸ Clean Water Act Section 404 Permit	Department of Defense (Cooperating under FAST-41), (Cooperating under NEPA)	11/08/2018	In Progress
▸ Clean Water Act Section 404 Permit	Department of Defense (Cooperating under FAST-41), (Cooperating under NEPA)	11/08/2018	In Progress
▸ Section 408 Permit	Department of Defense (Cooperating under FAST-41), (Cooperating under NEPA)	11/08/2018	In Progress
▸ Section 408 Permit	Department of Defense (Cooperating under FAST-41), (Cooperating under NEPA)	11/08/2018	In Progress
▸ Endangered Species Act Consultation - FWS	Office of Electricity Delivery and Energy Reliability		Complete 11/20/2015
▸ Section 106 Review	US Army Corps of Engineers - Regulatory (Cooperating under FAST-41), (Cooperating under NEPA)		Complete 03/14/2017
▸ Endangered Species Act Consultation - FWS	US Army Corps of Engineers - Regulatory (Cooperating under FAST-41), (Cooperating under NEPA)		Complete 06/21/2017
▸ Section 10 Permit	US Army Corps of Engineers - Regulatory (Cooperating under FAST-41), (Cooperating under NEPA)	11/08/2018	In Progress

Under FAST-41, the Executive Director is required to publish on the Permitting Dashboard for each covered project: (1) the permitting timetable; (2) the status of each agency's compliance with the timetable; (3) any changes to the permitting timetable and explanations for those changes; and (4) any memorandum of understanding on coordination between the facilitating or lead agency, and any state, local or tribal government.²⁶ Cooperating and participating agencies are also required to post various initiating and supporting documents throughout the review process.²⁷ They must publish that information no later than **5 business days** from when they receive it.²⁸

4. Other Important Provisions

FAST-41 contains several other significant streamlining provisions, including:

- Incorporation of State Documents: State documents prepared under state laws and requirements that are “substantially equivalent” to NEPA can be adopted for FAST-41 reviews.²⁹
- Concurrent Reviews: In order to achieve a “single, synchronized process,” FAST-41 requires agencies “to the maximum extent possible” to conduct environmental reviews and authorizations in a concurrent manner as opposed to sequentially.³⁰
- Dispute Resolution: Fast-41 and the subsequent OMB Implementation Guidance provide several mechanisms for resolving disputes that may arise between agencies involved in FAST-41 review.³¹ Based upon anecdotal information, agency disagreements have been known to hold up and significantly delay project reviews, from time to time, so focus on resolving those disputes quickly and early could be particularly impactful. Under FAST-41 the Chairman of CEQ shall resolve any dispute over designation of a facilitating or lead agency for a particular covered project.

D. Litigation Reforms

An aspect of FAST-41 that does not always receive as much attention is the significant legal reform to NEPA reviews subject to FAST-41. Specifically, FAST-41 imposes a **2 year** statute of limitations to any claims “arising under Federal law seeking judicial review of *any authorization* issued by a Federal agency for a covered project” for which an agency has published notice “in the Federal Register of the final record of decision or approval or denial of a permit.”³² The 2 year statute of limitations begins to run when the notice of the authorization is published in the Federal Register. Previously, reviews done pursuant to NEPA – which is silent on the subject of a statute of limitations – have been subject to a **6 year** statute of limitations

²⁶ *Supra* note 2, at § 4370m-2(b)(4).

²⁷ *Id.* at § 4370m-2(b)(3)(A).

²⁸ *Id.* at § 4370m-2(b)(3)(B).

²⁹ *Id.* at § 4370m-4(b).

³⁰ *Id.* at § 4370m-4(a); Implementation Guidance, *supra* note 7, at § 4.39.

³¹ *Id.* at § 4370m-2(c)(2)(C); Implementation Guidance, *supra* note 7, at §§ 4.9 and 4.30.

³² *Id.* at § 4370m-6(a)(1) (emphasis added); Implementation Guidance, *supra* note 7, at § 6.

based upon judicial precedent.³³ Reducing the statute of limitations for claims under FAST-41 will bring more certainty and finality to permitting decisions for major infrastructure projects.

The FAST-41 litigation section also mandates that only a party that submitted a comment during the environmental review may file a legal challenge to a NEPA review for a covered project.³⁴ This will prevent third parties from weighing in for the first time on a FAST-41 covered project through a lawsuit. As FAST-41 demands, concerns underlying such a lawsuit must be raised earlier in the process.

While it is important that these review and permitting processes for major infrastructure projects focus on environmental impacts, there also must be opportunities to recognize the employment impacts realized from these projects. FAST-41 provides just such an opportunity on the litigation front. Specifically, in any legal action seeking a temporary restraining order (“TRO”) or a preliminary injunction against an agency or a project sponsor regarding the review of a covered project, the court must consider “the potential effects on public health, safety, and the environment, and the potential significant negative effects on jobs resulting from an order or injunction,” and it cannot presume that any of those harms are repairable.³⁵ Consequently, courts will have to acknowledge and address jobs that could be lost if FAST-41 projects are blocked through TRO or preliminary injunction challenges. The business community has been advocating for many years for this type of balancing of environmental and economic impacts during the federal permitting process.

III. FUNDING THE FAST – 41 PROGRAM

The implementation of the FAST-41 program can be funded in several ways through fees, agency transfers, and direct appropriations.

FAST-41 provides for the establishment of a “fee structure for project proponents to reimburse the United States for reasonable costs incurred in conducting environmental reviews and authorizations for covered projects.”³⁶ This Environmental Review Improvement Fund would be in a separate fund in the Treasury, and likely overseen by OMB. This fee structure would help facilitate timely and efficient environmental reviews for FAST-41 covered projects. Notably, the aggregate amount of fees that could be collected for a fiscal year under the FAST-41 fee structure would be limited to 20% of the “total estimated costs for the fiscal year for the resources allocated for the conduct of the environmental reviews and authorizations” covered by FAST-41.³⁷

Congress may also provide appropriations for the Fund. In the House, the Appropriations Subcommittee on Financial Services and General Government (the “Subcommittee”) has jurisdiction over those appropriations. Its FY18 appropriation marks the first time that the

³³ See 28 U.S.C. § 2401(a) (the general statute of limitations for Federal suits against the government).

³⁴ *Supra* note 2, at § 4370m-6(a)(1).

³⁵ *Id.* at § 4370m-6(b).

³⁶ *Id.* at § 4370m-8(a).

³⁷ *Id.* at § 4370m-8(c)(3).

Subcommittee will appropriate money into the fund, as the Subcommittee did not appropriate Funds for FY17.³⁸

In his budget request for FY18, President Trump requested that \$10,000,000 remain available in the Fund until used “for necessary expenses of the Environmental Review Improvement Fund.”³⁹ Rather than meet this request, the Subcommittee has instead proposed to appropriate \$1,000,000 towards the Fund.⁴⁰ The Chamber supports the funding levels requested by the President.

IV. FPISC’S PROGRESS ON IMPLEMENTATION

With a relatively small staff, FPISC has made significant accomplishments in the short time since passage of FAST-41 on December 4, 2015. Below are some of the major achievements FPISC has made to implement FAST-41:

- On **September 22, 2016**, FPISC released the initial inventory of **34** existing infrastructure projects that would be considered “covered” under FAST-41.⁴¹
- On **January 13, 2017**, in coordination with FPISC, OMB and CEQ issued guidance to carry out their responsibilities under FAST-41. The guidance highlighted agency roles and responsibilities, covered projects, project-specific guidance, use of the Permitting Dashboard, statute of limitations provisions, and information collection among other things.⁴²
- On **January 18, 2017**, FPISC released both its Recommended Performance Schedules⁴³ and Recommended Best Practices under FAST-41.⁴⁴
- In **April 2017**, FPISC released its FY16 Annual Report to Congress describing its progress accomplishments under FAST-41.⁴⁵

³⁸ Compare Financial Services and General Government Appropriations Act, 2018, H.R. ___ at 83, 115th Cong. (2017) (as proposed) (appropriating \$1,000,000 in FY18 for the Fund) with Financial Services and General Government Appropriations Act, 2017, H.R. 5485, 114th Cong. (2016) (appropriating no money in FY17 for the Fund).

³⁹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018, at 1070 (2017), available at <https://www.govinfo.gov/content/pkg/BUDGET-2018-APP/pdf/BUDGET-2018-APP.pdf>.

⁴⁰ See Financial Services and General Government Appropriations Act, 2018, *supra* note 38.

⁴¹ FED. PERMITTING IMPROVEMENT STEERING COUNCIL, ESTABLISHMENT OF COVERED PROJECT INVENTORY (Sept. 22, 2016), available at <https://www.permits.performance.gov/about/news/fpisc-announces-fast-41-covered-projects>.

⁴² [Implementation Guidance](#), *supra* note 7.

⁴³ FED. PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED PERFORMANCE SCHEDULES FOR ENVIRONMENTAL REVIEWS AND AUTHORIZATIONS FOR FAST-41 COVERED INFRASTRUCTURE PROJECTS (Jan. 18, 2017), available at <https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/FPISC%20Performance%20Schedules-%20FINAL-%2001182017-final.pdf>

⁴⁴ FED. PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES FOR ENVIRONMENTAL REVIEWS AND AUTHORIZATIONS FOR INFRASTRUCTURE PROJECTS (Jan. 18, 2017), available at <https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/FPISC%20Best%20Practices-%20FINAL%2001182017%283%29.pdf>

⁴⁵ FED. PERMITTING IMPROVEMENT STEERING COUNCIL, FAST-41 FY2016 ANNUAL REPORT TO CONGRESS (Apr. 2017), available at <https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/FAST-41%20FY%202016%20Annual%20Report%20to%20Congress%204.15.17.pdf>

- Presently, FPISC member agencies and the General Services Administration with OMB guidance, is developing a fee structure for infrastructure project proponents and sponsors to reimburse FPISC for reasonable costs incurred for implementing FAST-41.

V. RECENT ACTIONS CONFUSE THE STATUTORY PERMIT STREAMLINING PROCESS

While the provisions of FAST-41 are both clear and structurally sound, it is not a law that is widely known either within or outside of government. As a result some in Congress are proposing new permit streamlining legislation for specific industries, and the President has issued Executive Order 13766 to establish an administrative process that streamlines project permitting. These new legislative and administrative activities foster confusion as to the status of FAST-41.

A. Confusing Congressional Efforts that Duplicate FAST-41 Streamlining

The purpose of permit streamlining is to provide regulatory certainty. Passage of FAST-41 brought about this much needed certainty to a multitude of diverse industries and projects critical to our economy such as renewable and conventional energy, electricity transmission, aviation, certain water resources, broadband, pipelines, and manufacturing. FAST-41 was designed to eliminate the historical patchwork of permitting regimes that created regulatory uncertainty. Since FAST-41 is statutory, it establishes a permanent system of faster, more reliable environmental permitting for infrastructure projects. Without implementing FAST-41 we are locked in a historical system that does not have time limitations which can lead to almost limitless delay in project completion. Yet several congressional committees with substantive jurisdiction over specific laws are attempting to develop targeted permit streamlining legislation as if FAST-41 has never been enacted.

While many of these bills currently being considered by Congress draw upon the principles of FAST-41, they all set up different processes and time-frames and sometimes different statutes of limitations, which is a source of confusion. Some permitting improvement bills also do not provide a mechanism for funding to ensure the agency can comply with streamlining requirements while others enable stakeholders to fund the permitting process. FAST-41, on the other hand, enables agencies to charge a fee to fund the agencies' streamlined review of a project. Similarly, a bill already passed by the House of Representatives this year, H.R. 1654, "the Water Supply Permitting Coordination Act" allows for non-governmental entities to pay for expedited review with the condition that the deciding agency must be impartial.

Transparency is another principle that has been incorporated into various permitting bills. Legislation like H.R. 2910, the "Promoting Interagency Coordination for Review of Natural Gas Pipelines Act" streamlines requirements for obtaining a natural gas certificate of public convenience and requires a publication of an online a tracker of actions required by federal

agencies. FAST-41 similarly requires the Executive Director of FPISC to post an online dashboard of FAST-41 projects.

Some other bills seek to expand the scope of permit streamlining, either by strengthening requirements or enlarging the range of projects that can be included. For instance, S. 1363, the “Rural Broadband Deployment Streamlining Act”, creates a 270-day shot clock after which an application for siting of telecommunications equipment on federal land is deemed granted if the Department of the Interior does not act.

H.R. 540 and S. 145, known as the “National Strategic and Critical Minerals Production Act” cover an economic sector, mining, that is not specifically identified by FAST-41 but draws upon many of the principles of FAST-41 such as encouraging agencies to conduct concurrent reviews when possible. Like FAST-41, agencies would be required to follow a permitting schedule. Unlike FAST-41, the “National Strategic and Critical Minerals Production Act” imposes a 30-month deadline if the parties involved cannot agree upon a permitting schedule.

Given that Congress has already put in place FAST-41 to encourage regulatory certainty for a wide variety of industries, legislators should harmonize their legislative solutions with the provisions of FAST-41. If Congress finds the scope of FAST-41 too narrow, it should consider expanding it to other projects.

Permit streamlining requires a clear and defined process, timeline, and structure for the coordination and scheduling of environmental reviews. The Chamber supports the FAST-41 process because it establishes coordination among participating agencies, a method to set timetables based on data for real project reviews, and a dispute resolution process. The certainty and clarity of this process is necessary to encourage infrastructure development.

B. Recent Executive Actions

Within its first few days, the current administration made it clear through executive action that getting infrastructure projects reviewed, permitted, and built would be a high priority. On January 24, 2017, President Trump released four executive memoranda and one executive order relating to infrastructure and permitting. Most significantly, under Executive Order 13766, any Federal agency or a governor may submit a project to CEQ that it thinks qualifies as “high priority.” After considering the “project’s importance to the general welfare, value to the Nation, environmental benefits, and other such factors as the [CEQ] Chairman deems relevant,” the CEQ Chairman within 30 days must determine whether the project qualifies as “high priority.” If it does, the CEQ Chairman coordinates with other relevant agencies to establish expedited procedures and deadlines for completing environmental reviews of the project. If an agency fails to meet a deadline, they must provide to the CEQ Chairman a written explanation for the delay.

While the process set forth in the Executive Order is a laudatory goal it lacks the permanence that comes from a statutory underpinning and cannot provide a clear process for coordinating environmental reviews through multiple agencies.

C. Dashboard Consistency

It is important that the Permitting Dashboard contains the most accurate and up-to-date information on each covered project. To that end, there is a currently a clear disparity in the quality of information that each lead agency is providing to FPISC. For example, the information available for projects covered by FERC or the Bureau of Land Management includes all of the statutorily-required data, whereas the information available for projects covered by other agencies is minimal at best. To be useful the Dashboard must have information displayed in a consistent manner. The Chamber believes the appointment of an Executive Director would provide leadership to achieve this critical requirement in order to coordinate and standardize how agencies fulfill the Permitting Dashboard requirement. Figure 7 is a chart that categorizes the infrastructure presented on the Dashboard as either “Meets Statutory Obligations” or “Does Not Meet Statutory Obligations.”

Figure 7:

Title	Lead Agency	Bureau/Mode	Sector	Project Type	Status
Meets Statutory Obligations					
Atlantic Coast Pipeline, Atlantic Coast Pipeline Amendment, Supply Header, and ACP-Piedmont Lease	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Interstate Natural Gas Pipelines	In Progress
Atlantic Sunrise	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Interstate Natural Gas Pipelines	In Progress
Boardman to Hemingway Transmission Line	Department of Interior	Bureau of Land Management	Electricity Transmission	Electricity Transmission (all)	In Progress
Chokecherry-Sierra Madre Wind Energy	Department of Interior	Bureau of Land Management	Renewable Energy Production	Wind: Other than Federal Offshore	In Progress
Denbury Riley Ridge to Natrona Project CO2	Department of Interior	Bureau of Land Management	Pipelines	Land-based Oil & Gas - Production/Extraction	In Progress
Desert Quartzite Solar	Department of Interior	Bureau of Land Management	Renewable Energy Production	Solar	In Progress
Energy Gateway South Transmission Project	Department of Interior	Bureau of Land Management	Electricity Transmission	Electricity Transmission (all)	Complete
Gateway West Segments 8 & 9	Department of Interior	Bureau of Land Management	Electricity Transmission	Electricity Transmission (all)	Paused

Gordon Butte Pumped Storage	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Renewable Energy Production	Non-Federal Hydropower Licenses	Complete
Gulf LNG Liquefaction Project	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Liquefied Natural Gas Terminal Facilities and associated Natural Gas Pipelines	In Progress
Liberty Development and Production Plan	Department of Interior	Bureau of Ocean Energy Management	Conventional Energy Production	Offshore Oil & Gas	In Progress
Mid-Barataria Sediment Diversion	Department of Defense	U.S. Army Corps of Engineers - Regulatory	Water Resources	Other Water Resource Projects	In Progress
Mountain Valley and Equitrans Expansion Project	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Interstate Natural Gas Pipelines	In Progress
Nexus Gas Transmission, TEAL, DTE Lease, and Vector Lease	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Interstate Natural Gas Pipelines	In Progress
PennEast Pipeline	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Interstate Natural Gas Pipelines	In Progress
Plains and Eastern Clean Line	Department of Energy	Office of Electricity Delivery and Energy Reliability	Electricity Transmission	Electricity Transmission (all)	In Progress
R.C. Byrd	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Renewable Energy Production	Non-Federal Hydropower Licenses	In Progress
Red River L&D No. 4	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Renewable Energy Production	Non-Federal Hydropower Licenses	Complete
Swan Lake North Pumped Storage	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Renewable Energy Production	Non-Federal Hydropower Licenses	In Progress
Ten West Link	Department of Interior	Bureau of Land Management	Electricity Transmission	Electricity Transmission (all)	In Progress

Tennessee Gas Abandonment and Capacity Restoration	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Interstate Natural Gas Pipelines	In Progress
Transwest Express	Department of Interior	Bureau of Land Management	Electricity Transmission	Electricity Transmission (all)	In Progress
Venture Global Calcasieu Pass Terminal and TransCameron Pipeline Project	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Liquefied Natural Gas Terminal Facilities and associated Natural Gas Pipelines	In Progress
WB Xpress	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Interstate Natural Gas Pipelines	In Progress
Does Not Meet Statutory Obligations					
Aiya Solar Project	Department of Interior	Bureau of Indian Affairs	Renewable Energy Production	Solar	Complete
East Side Coastal Resiliency	Housing and Urban Development	Community Planning and Development; Community Development Fund	Water Resources	Other Water Resource Projects	In Progress
Fort Mojave Solar Project (Fort Mojave Tribe)	Department of Interior	Bureau of Indian Affairs	Renewable Energy Production	Solar	Cancelled
Hudson River Project: Resist, Delay, Store, Discharge	Housing and Urban Development	Community Planning and Development; Community Development Fund	Water Resources	Other Water Resource Projects	In Progress
Kake to Petersburg Transmission Project	Department of Agriculture	U.S. Forest Service	Electricity Transmission	Electricity Transmission (all)	Complete
Levy Nuclear Plant Units 1 and 2	Nuclear Regulatory Commission	Office of New Reactors	Conventional Energy Production	Nuclear Power Plant - Combined license	Complete
North Anna Power Station, Unit 3	Nuclear Regulatory Commission	Office of New Reactors	Conventional Energy Production	Nuclear Power Plant - Combined license	Complete
North-South Project	Department of Agriculture	U.S. Forest Service	Pipelines	Land-based Oil & Gas - Production/Extraction	Cancelled

Turkey Point, Units 6 and 7	Nuclear Regulatory Commission	Office of New Reactors	Conventional Energy Production	Nuclear Power Plant - Combined license	In Progress
William States Lee III Nuclear Station, Units 1 and 2	Nuclear Regulatory Commission	Office of New Reactors	Conventional Energy Production	Nuclear Power Plant - Combined license	Complete

VI. RECOMMENDATIONS

FPISC, OMB, CEQ and the other agencies involved have done good quality work in the past fifteen months to get FAST-41 up and running and to begin its implementation. There is still work to be done. Our specific recommendations are:

- Congress should encourage the President to appoint an Executive Director under FAST-41 as soon as possible so that additional projects can be submitted and, if covered, be included in the program.
- Congress should fund FAST-41 for FY18 in the amount of the President’s budget request of \$10,000,000.
- When appointed, the Executive Director needs to undertake a significant amount of educational outreach to Congress, the Executive Branch, and the public on the benefits of the FPISC process, and to encourage more projects to apply for FAST-41.
- When appointed, the Executive Director should provide additional guidance to agencies on the type and quality of information needed to ensure the information on the Dashboard is consistent and contains high quality information.
- Congress should amend FAST-41 to eliminate the seven-year sunset provision that was attached by the House of Representatives as the final bill was being negotiated informally between members of the House and Senate.
- The Executive Director, OMB, FPISC, and the Chairman of CEQ should coordinate and encourage “high-priority” projects nominated under Executive Order 13766 to apply for FAST-41 consideration. If Congress believes the scope of FAST-41 is too narrow, it should encourage the steering council to accept projects likely to benefit from enhanced oversight and coordination as authorized under 42 USC § 4370m(6)(A).

VII. CONCLUSION

The Chamber appreciates the new administration highlighting this important issue – streamlining and building major infrastructure projects. The tools to implement these concepts exist – indeed a well-thought out, bipartisan approach to this issue has been developed, legislated, enacted into law, and is already being implemented. And that approach and law is FAST-41. The provisions of FAST-41 certainly can be coordinated with the newer streamlining initiatives introduced by the current administration. In that regard, we encourage Congress and

the administration to promote and implement FAST-41 by providing the necessary resources to fully implement the statute.

Thank you for allowing me to testify before your committee today.