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S. Hrg. 115–194

CUTTING THROUGH THE RED TAPE: OVERSIGHT OF FEDERAL INFRASTRUCTURE PERMITTING AND THE FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

HEARING

BEFORE THE

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

SEPTEMBER 7, 2017

Available via the World Wide Web: http://www.fdsys.gov/

Printed for the use of the
Committee on Homeland Security and Governmental Affairs

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U.S. GOVERNMENT PUBLISHING OFFICE

28–027 PDF WASHINGTON : 2018

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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CUTTING THROUGH THE RED TAPE: OVERSIGHT OF FEDERAL INFRASTRUCTURE PERMITTING AND THE FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

THURSDAY, SEPTEMBER 7, 2017

U.S. SENATE,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Rob Portman, Chairman of the Subcommittee, presiding.

Present: Senators Portman, Daines, Carper, Tester, Heitkamp, and Peters.

Also present: Senator McCaskill.

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. We are going to go ahead and get started. Senator Carper is on his way. He had another commitment. As Senator Tester and I were just talking about, this is one of those mornings where there are five or six different competing Committee hearings and meetings on our agendas, and I appreciate Senator Tester being here, and I told him we want to get to his questions as soon as we can.

We have a great panel here in a moment and then a second great panel, so we are blessed to have two really fulsome panels. I have talked to Senator Carper about it this morning. We are looking forward to getting this testimony because it is so important for the oversight that we are doing over infrastructure and permitting.

The hearing will officially come to order. Our infrastructure, as all of us know, is outdated. It is not just outdated; it is also in some cases unsafe. In my hometown of Cincinnati, we have an issue with a bridge that is actually not just outdated and aging but very unsafe for motorists. It is also hurting our economy, and it is hurting our ability to create jobs and to raise wages.

Reports consistently show that infrastructure in the United States is lagging behind other developed countries, so compared to other countries we are way behind. And one reason always cited is the time and cost to get a green light to build something.

The World Bank ranks the United States 39th in the world for dealing with construction permits. And, by the way, that is down

from 26th in the world in 2008. So we are getting worse. Other countries are getting better.

In its 2017 Infrastructure Report Card, the American Society of Civil Engineers gave the United States a "cumulative GPA" of D-plus ranging from a B for Rail to D for roads to D-minus, I think, for Transit. Those are not the kinds of grades you would want to bring home to your parents.

So we have a problem, and it is clear we have to rebuild. We have to rebuild our aging infrastructure. We have to improve those roads and bridges, pipelines, ports, waterways, and manufacturing facilities.

While underway, while these projects are being built, of course, they create great jobs. We appreciate the Building Trades being here today to talk about that.

But also, after they are completed, improved infrastructure, of course, encourages economic growth and business startups, gives the economy an important shot in the arm.

The President's budget, as you may have seen, calls for a significant investment in infrastructure, $200 billion in funding that can be leveraged for a $1 trillion investment into highways, ports, transit, broadband, energy, and other infrastructure projects.

Given the very serious budget problems our Nation faces—it is going to be a very tight budget—it is going to be tough to find that funding. But we have to be sure that whatever funding set aside for infrastructure development is used in the most efficient way possible. We want to stretch that dollar as far as we can.

In order to get the most out our investment, we have to fix the process the Federal Government uses to approve infrastructure projects.

Let me give you one example. Right now, when a project sponsor wants to build a new source for hydropower, that sponsor has to brace itself for a permitting process that can typically last 10 years. Capital is just not that patient.

I first got involved in this issue about six years ago with Senator McCaskill because American Municipal Power (AMP), who is here to talk to us today, came to me to talk about their frustration with the hydropower plant on the Ohio River, the R.C. Byrd Power Plant. At that point, I think it had taken them about six years, and, of course, they still had not completed it. I am glad, Marc Gerken, that you are here today to talk about that. The Chief Executive Officer (CEO) of American Municipal Power is going to be talking about why it has taken so long to get permitted, what the impact has been, and what is involved in terms of additional costs for that project.

How many of us would be willing to have that kind of lag time and be able to move forward with a project? It is the reason it is just so important.

In 2013, Senator McCaskill—who has just joined us—and I introduced legislation called the Federal Permitting Improvement Act to help streamline the permitting process. In 2015, Congress enacted that legislation as part of Title 41 of the Fixing America's Surface Transportation Act (FAST Act). Now we call it "FAST–41." That bipartisan project, by the way, with the support of Senator Carper and Senator Tester—Senator Peters, I do not think you were here

yet, but this entire Committee voted for it—one person did not vote for it, one Republican. It was a 12–1 vote. She is no longer with the Committee. But the point is this was a bipartisan effort, and one reason it was bipartisan and one reason it was so popular and we were able to get it done is because we had great help from the outside. And some of those folks are here today.

We recognize that the permitting process is really important. Projects should be built the right way and need to take care of the environment and follow the law. We know regulations are needed. That is not the issue here.

But too often, permitting requirements from different agencies overlap each other, conflict with each other, and there is duplication. This leads to the delays that have hamstrung our ability to improve economic growth and job creation.

Our focus on FAST–41 was very simple-to address these problems. The Chamber of Commerce, the Natural Resources Defense Council (NRDC), and the Building Trades Unions all worked with us, as well as others—the National Association of Manufacturers and others—and, these outside groups were critical to us getting the legislation through.

By the way, the NRDC, the Chamber, and the Building Trades are all here this morning to share their perspectives. We were grateful for their critical support at that time, and we are grateful for their input and insights today.

One problem we all identified was a lack of accountability, and FAST–41 created this process called "covered projects" that assigns one accountable agency to serve as the lead agency on each project. That helps.

The agency gets together with all of the other relevant agencies to come up with a permitting timetable. The agencies have to post that timetable on a Permitting Dashboard so the project sponsor and everyone else can see what the timelines look like.

If that agency misses a deadline, it has to explain why. We believe that more transparency leads to greater accountability, and that is why that is included.

FAST–41 also created a Council called the "Federal Permitting Improvement Steering Council (FPISC)" that sits at the Office of Management and Budget (OMB) to oversee the permitting process and helps resolve conflicts between the agencies.

FAST–41 was designed to leverage that accountability you get from all of this—the transparency, the Council, the lead agency—to increase efficiency in the permitting process.

As some of you know, I have expressed concern about implementation of FAST–41, as has Senator McCaskill and others. I would like to touch quickly on three of these we are going to address today.

First, of course, is the Permitting Council itself. Although it has been making progress recently and I commend them for that, I am concerned about how long it has taken to get the structure off the ground and get this in place.

This goes back to 2015, and just now really are we getting going. The Obama Administration failed to appoint an Executive Director for the first six months that the Council existed.

In January, President Obama's Executive Director stepped down during the transition to a new Administration, understandably, and Janet Pfleeger, who has been serving admirably as Acting Executive Director and who we will hear from today, stepped in to fill the gap. But we still do not have a permanent Executive Director, and we need one.

We have sent suggestions of people who the Administration should consider for the role, both from the public sector and the private sector, qualified people.

For the Council to be truly effective and fulfill its mandate, we need a permanent Executive Director in place now, and I know Janet agrees with that.

Second, the Council needs sufficient funding. It is currently funded at $4.5 million. The President's budget requested $10 million for its operations, which the Council has indicated to us is the minimum amount needed to do the job that Congress has given them. The minimum amount. The House budget proposes funding at only $1 million. Again, $10 million being the minimum.

Senate appropriators, in our view, must fully fund the Council and its efforts for it to function the way Congress intended.

Without objection, I want to enter into the record a level of service chart from the Council[1] that indicates how much money they would need to perform the services that have been authorized by our legislation.

I want to see the Council succeed in its mission to streamline permits and be able to expand to improve the process for more projects. It needs sufficient funding to be able to accomplish those goals.

Finally, third, the agencies that sit on the Council need to be fully bought into the process and cooperate with the Council's goals.

I appreciated the opportunity address the Council at its very first meeting under this Administration. I was glad to see broad participation at that meeting, but I conveyed the message there and I will convey it now: Agencies on the Council need to be fully engaged for this process to work. They need to be fully engaged in terms of providing the input for the Dashboard, and we will talk a little more about that. I know, Bill, you have some information on that.

The Obama Administration released guidance on its way out the door that said independent agencies like the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission (NRC) do not have to fully comply with FAST–41.

That is not what the law says. Independent agencies are expected to fully comply with this law.

Bill Kovacs from the Chamber has provided in his written testimony a useful chart, I think, that examines whether agencies have met their statutory requirements or not.

For some agencies, including the NRC and the Housing and Urban Development (HUD), the Department of Agriculture (USDA), and Interior departments, the Chamber assesses that their compliance with their statutory obligations to be "minimal at best." So we have to do better.

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[1] The chart referenced by Senator Portman appears in the Appendix on page 130.

I am eager to hear about that and hear what the agencies have to say in our second panel about participation.

The goal of this hearing is to determine how we can stretch that Federal dollar to get the most bang for the buck, how we can rebuild our aging infrastructure and do it more effectively and more efficiently.

If we do so, we are going to give the economy an important boost. We are going to create better jobs. We are going to create higher wages. That is all of our goals.

I am looking forward to hearing from the witnesses today and how they think the FAST–41 process is going and what we can do to help achieve those goals.

With that, I would like to give the opportunity to my Ranking Member, Senator Carper, who I spoke about earlier. I said, Senator Carper, that we all have five or six things going on right now, and you were going to be a couple of minutes late. I really appreciate his support of FAST–41 over the years and his willingness to work with me on a good hearing today.

Also, if it is all right, we would like to give other Members an opportunity to speak, starting with Senator McCaskill as the lead sponsor, if they would like to give a brief opening statement. Then on my questions, once we hear from the panelists, I am going to defer my questions until the end so that those who came early, particularly Senator Tester, who was the first here, have a chance to ask their questions. Senator Carper.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thank you. Thank you so much, Mr. Chairman. Our thanks to you and especially to Senator McCaskill for the leadership that both of you have shown on what I think is an important issue and what I believe we all believe is an important issue.

One of the many things that I think we agree on is the need to invest in our Nation's infrastructure and put more people to work on projects that will help our economy continue to grow, for example, by building and rebuilding roads, highways, and bridges, but also by addressing the need to invest in our railroads, our airports, our ports, and broadband deployment across especially rural parts of our Nation. And water and wastewater, oftentimes we shortchange water and wastewater. One of the key ingredients in job creation and job preservation is to make sure that we have water, clean water, available and cost-efficient ways of dealing with our wastewater.

But today's hearing will focus on the work that occurs before we put shovels in the ground to get a project started.

As a long-time member—and now the Ranking Member—of the Environment and Public Works (EPW) Committee, I have thought a lot about how we can build infrastructure projects, build them smarter, and build them more cost effectively. I have also thought a lot about how well the rules and permitting processes we have in place work and how they sometimes do not work as well as they could and should.

There are times when coordination between the agencies responsible for vetting a project is not done well and projects are delayed without good reason. So I have supported reasonable changes de-

signed to improve the permitting process and done so in both of the last two transportation infrastructure laws we have adopted, as well as the last two Water Resources Development Act laws.

One of my top priorities at EPW is to ensure that these initiatives are implemented fully and effectively while ensuring that we do not cause needless delays in the ultimate implementation of the measures that may have already been adopted.

A March 2017 report by the U.S. Department of Transportation's Office (DOT) of Inspector General (IG) provides us a cautionary tale about enacting new streamlining measures before the old ones are given a chance to work. That report found that some of what we did in the FAST Act—our most recent transportation law—may have actually delayed the implementation of what we did to speed projects along just a few years ago with our 2012 legislation.

In addition, it has become clear through our work at EPW that there are a number of permitting changes included in the last two versions of the Water Resources Development Act that have not even begun to be implemented by the U.S. Army Corps of Engineers (USACE).

It is critical that the provisions we enact in this area be fully implemented so we can understand the impact that they will have before we look to do a whole lot more. To be able to do that, we need effective oversight like we are doing today. This is important, and our panels' presence here today to testify before us is hugely important.

That brings me to the main topic we will be discussing at this hearing: the provisions that our Chairman and Ranking Member McCaskill were able to include in the FAST Act to better coordinate agency permitting activities and improve transparency for certain major infrastructure projects.

There is clear value in the reforms set in motion by the Portman-McCaskill law and the Federal Permitting Improvement Steering Council that it created, and I look forward to hearing more details today about how all of it is working. I am especially interested in learning about how the transparency the new law offers regarding agency permitting timelines can speed things along and about how the sharing and adoption of best practices for project review can help agencies work smarter.

That said, it has become clear to me in examining the work that our Chairman and Ranking Member have done that strong and effective senior leadership at the Council and at the agencies responsible for a given project is key. It is important then that the President appoint a skilled and capable permanent Executive Director for the Council who is equipped with the authority necessary to push projects through to completion.

Before we hear from our witnesses, Mr. Chairman, I just want to briefly make a couple points and then close.

First, it is important to note that while we all want permitting decisions to occur quickly—God knows I do—the rules and processes we have in place are not always just "red tape." They are intended to help agencies make good decisions that protect public health and natural resources. They also ensure that State, local, and tribal stakeholders have a say. If this work is well coordinated, it can improve outcomes, reduce costs, and identify potential con-

flicts early on. A strong Federal Permitting Improvement Steering Council can help make sure that happens more often.

Second, while environmental reviews are often blamed for project delays—and in some cases, they are to blame—studies have also shown that projects are usually held up for other reasons—lack of capital funding for large projects being chief among them.

Similarly, limited resources at permitting agencies like the Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service (FWS) can diminish their ability to engage early and complete their work on time. So we should work to ensure that all of the agencies involved in getting infrastructure projects off the ground, including the Federal Permitting Improvement Steering Council, have the resources they need to do their jobs well.

Lastly, in closing, Mr. Chairman, I want to congratulate you and Senator McCaskill for the bipartisan work that went into the permitting reforms we are going to be discussing today. I know how difficult it can be to get consensus on these issues. The two of you deserve our thanks for authoring legislation that promises to create jobs while building and rebuilding our infrastructure more quickly, all with the support of the business community, labor unions, and the Obama Administration.

So my thanks for holding the hearing. We look forward to hearing from all our witnesses. Thanks so much.

Senator PORTMAN. Thank you, Senator Carper. I appreciate that.

Senator McCaskill, do you have an opening statement you would like to make?

OPENING STATEMENT OF SENATOR MCCASKILL

Senator MCCASKILL. Just briefly, Mr. Chairman. First of all, thank you for having this hearing. This hearing is a symptom of a disease that runs rampant, and that is, we pass legislation to correct a problem, and we check back two years later, and the legislation has not had the impact that we had hoped it would have. You have outlined I think very thoroughly the issues that we have, and some of it is delay. Some of it is calcified processes that sometimes changing those processes require more than a bill being signed by the President. Sometimes it takes continued pressure, continued oversight, continued aggressive efforts at looking at what is happening, why is it not happening, and what can we do to really make this law have the impact that it has the potential to make.

We worked hard getting this across the finish line. We did what you are supposed to do in the Senate. We had lots of folks upset about various things, and we kept working it and working it and working it and finding agreement and finding agreement until we got a bill that had broad support in the U.S. Senate on a bipartisan basis.

So what a shame it would be, and I am glad that we have cleared up the confusion that the President's first Executive Order (EO) created. That was not a good moment where all of a sudden we had an Executive Order being issued that clearly did not even envision or understand the current law. So now we have a corrected Executive Order which I think puts us in a much better place. But I want to echo your comments about how important it is that we get a permanent Director of the Permitting Council.

And then I want to say to all the witnesses that are here, I hope I will have a chance to question. As you know, Senator Portman and Senator Carper, we have an important Finance Committee hearing this morning on the Children's Insurance Program that I need to also attend. But when I read about AMP and the problems they have had with trying to get Fish and Wildlife and FERC on the biological opinion and then to have the Army Corps basically take their football and go home and say that is not going to work, excuse me, that is not what this law says. This law says the Permitting Council at that moment steps in and says, "No, you are not going to take your football and go home. We are not going to make them go through this again." This is why we passed this law.

So what I really want to hear about are—even if they are anecdotal—these examples of where the law is not working the way it is supposed to work and what we need to do, what 2-by-4 we need to pick up to exert pressure against the Army Corps or against any of the others, whether it is FERC or whether it is Fish and Wildlife, National Park Services, whatever it is, wherever we have to exert that pressure, I think it is really important. I know that Senator Portman is committed to that, and, frankly, I enjoy doing that.

So give me a chance to go to work and try to make this bill what we had hoped it would be, and I look forward to learning more about the problems that everyone is facing and the fits and starts we have had in getting this in place. But I hope two years from now, for a variety of reasons, I hope two years from now I will be back here with you, Senator Portman, to have a hearing talking about the successes we have had with FAST–41, because I think those successes are within reach now, and thank you very much.

Senator PORTMAN. Thank you. It is good to have a partner who likes to pick up that 2-by-4 on oversight. Not everybody does. I do think this hearing alone has caused more activity and I think we are heading on the right track. Senator Tester.

OPENING STATEMENT OF SENATOR TESTER

Senator TESTER. Yes, thank you, Mr. Chairman. I want to thank you and the Ranking Member for holding this hearing. I can do the math, and we have got four people on the next panel, so I am not going to be able to ask questions. I will try to get back. But I do hope that some of you, if not all of you, address this issue.

Look, we have mines that, whether they get permitted or not, they are just not getting any answers in Montana. We have tree cuts that regularly go to court and regularly lose. Both those things are disturbing. But if you take a look at the lack of manpower in these agencies and the fact that the Forest Service, for example, spends half their money on fighting fires—this year, I bet it is north of two-thirds fighting fires—you have to ask yourself: Do we have the manpower to be able to permit these projects? Are we funding these agencies? And is the money going to what it is for and, that is, working on whether it is permitting a mine, making sure the mitigation is there for water and wildlife, or a tree cut, same kind of thing, restoration that is involved in it? Or are we putting the agencies in a situation where we are all frustrated with the permitting process, but they simply do not have the resources

that they need to be able to do the permitting process in a timely manner that is done right?

And so I hope you address that. I think we are all frustrated on this side of the rostrum about how long it takes, because we have a project in each one of our States that takes far too long and should have been permitted not years but maybe decades ago. And so hopefully we will get to that, and I think in the end, your testimony today is going to be critically important in allowing us to move forward, so thank you.

Senator PORTMAN. Senator Peters, do you have an opening statement? We will get to the witnesses otherwise. Senator Heitkamp.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Just very quickly, I wanted to make sure that I stopped in to impress upon everyone here that we are serious about this process. As Senator McCaskill has outlined, this is a bipartisan fix that does not seem to be working very well. Both Senator Tester and I have a very important hearing in Banking on North Korean sanctions; otherwise, we would be here permanently asking these questions. But we trust our colleagues to do a great job and to work with us in following up on what needs to be changed, if anything, in the legislation and how we should continue our commitment for streamlining this process, because not only is it time, it is money. Time is money. And as a result, money is short. We have infrastructure projects we want to do. We want to make sure when we do an infrastructure bill, which I hope we will, that we have this problem taken care of.

Thank you, Mr. Chairman, for holding this hearing.

Senator PORTMAN. Thank you. Let us go ahead and call the witnesses. We are going to call our first panel now.

Marc Gerken is the chief executive officer of American Municipal Power, which is the sponsor of the R.C. Byrd Hydropower Project on the Ohio River I talked about. Please come forward and have a seat.

Brent Booker is secretary-treasurer of North America's Building Trades Unions (NABTU). I appreciate your being here, Brent.

Bill Kovacs is senior vice president for Environment, Technology, and Regulatory Affairs at the United States Chamber of Commerce.

Scott Slesinger is legislative director of the Natural Resources Defense Council.

I appreciate all of you being here today. As I said earlier, it is a distinguished panel that was very helpful to us in getting this legislation passed and shares with us this passion to be sure it is properly implemented.

It is the custom of this Subcommittee to swear in all the witnesses, so at this time, I would ask you, now that you just have gotten seated, to please stand and raise your right hand. Answer in the affirmative. Do you swear that the testimony you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. GERKEN. I do.

Mr. BOOKER. I do.

Mr. KOVACS. I do.

Mr. SLESINGER. I do.

Senator PORTMAN. Thank you. Please be seated. Let the record reflect the witnesses answered in the affirmative.

We are going to use a timing system today, gentlemen, so all of your written testimony will be printed in the record in its entirety, but we are going to ask you to limit your oral testimony to five minutes, and we are going to enforce that.

Mr. Gerken, we would like to hear from you first.

TESTIMONY OF MARC S. GERKEN,[1] CHIEF EXECUTIVE OFFICER/PRESIDENT, AMERICAN MUNICIPAL POWER, INC.

Mr. GERKEN. Thank you. Good morning, Chairman Portman, Ranking Member Carper, and distinguished Members of the Subcommittee. My name is Marc Gerken. I am CEO of American Municipal Power, headquartered in Columbus, Ohio. I am pleased to have this opportunity to testify about AMP's regulatory experiences developing new hydro infrastructure this morning and be a sponsor of a project in the initial Federal Permitting Improvement Infrastructure Steering Committee inventory. I commend the Subcommittee for holding this hearing and for looking for needed ways to cut red tape in the licensing and permitting process.

AMP is a nonprofit wholesale power supplier and service provider for 135 municipal member systems across nine States, including the home States of Senators Portman, Carper, Paul, and Peters. AMP is one of the largest public power joint action agencies in the country, and we have a diverse portfolio, including a mix of fossil fuel as well as renewable resources.

We have a unique perspective on infrastructure development and regulatory processes as we are in the process of completing the largest development of new run-of-the-river hydropower projects in the United States today. Our four new projects are located at existing Army Corps of Engineers dams along the Ohio River in the States of Kentucky and West Virginia. Our projects represent more than 300 megawatts of emission-free, long-life generation, and a $2.6 billion investment.

Hydropower projects are expensive to build and typically begin above market as resources; however, their operational, economic, and environmental attributes make hydropower an excellent investment long term.

There is also significant untapped potential of new hydropower, and that is detailed in the Department of Energy (DOE's) recent hydro vision report published last year.

The siting and permitting processes of any new generation are not for the faint of heart. The licensing and permitting processes for hydropower are especially arduous and typically take more than a decade, considerably longer than most other electric generation.

While FERC is the lead agency, approvals for hydropower development must come from a variety of Federal and State agencies and require separate permitting by the Army Corps and State resource agencies.

AMP just received the FERC license for the potential fifth project, which would be located at the R.C. Byrd Gallia Locks and

[1] The prepared statement of Mr. Gerken appears in the Appendix on page 47.

Dam in the State Ohio. We began that licensing process in 2007. The final license was issued a decade later on August 30, 2017, largely due to delays associated with issues raised by the Corps of Engineers.

The R.C. Byrd Project has been part of the initial Federal Permitting Improvement Steering Council inventory. To date, our experience with the permitting Dashboard and the FAST–41 processes have shown improvements in timeliness, predictability, and transparency. However, it is critical that these improvements continue as the R.C. Byrd Project transitions from licensing to permitting.

In Appendix A to my written testimony is the detailed timeline of the R.C. Byrd Project licensing process, which illustrates the stop, start, and repeat nature of the agency interactions.

From an AMP perspective, securing financing has not been a challenge to our infrastructure development efforts. Regulatory uncertainty and the associated time delays have been. Securing the FERC license for our hydropower projects has been a milestone step but, unfortunately, has only signaled the start of the new process negotiating many of the same elements debated during the licensing process with the Corps of Engineers in the 408 and 404 process. This needs to change.

As a developer, you must be passionate about the benefits that will result from your projects and have supportive participants and flexible financing. One of the key challenges is to keep the costs down and stay on schedule. As said earlier, the old adage is, "Time is money." The regulatory process plays a critical role in the project schedule and ultimately can drive whether or not the project comes to fruition.

So much uncertainty exists in both the outcomes and timeliness in the Corps permitting process, it is extremely difficult for a developer to build construction schedules and place equipment orders with any confidence. The gauntlet that the developer must endure and the cost of delays and disincentives to hydropower investments are huge.

For instance, we estimate that the delays associated with the Corps' permitting in our four projects ended up costing AMP and our members approximately 50 basis points on our financing of $1.4 billion while waiting for the Corps 408 and 404 process. The added transparency of the FPISC process and having an impartial referee to help identify impediments in the Federal regulatory process will be extremely beneficial. The FPISC process and Permitting Dashboards are solid concepts that should be more transparent to the developers and agencies, and it will be an important process that matures and transitions from the initial investment inventory to the retained scope.

With that, Mr. Chairman, I look forward to questions.

Senator PORTMAN. Thank you. You came in at five seconds over your time. I like that. Mr. Booker.

TESTIMONY OF BRENT BOOKER,[1] SECRETARY-TREASURER, NORTH AMERICA'S BUILDING TRADES UNIONS

Mr. BOOKER. Good morning, Chairman Portman, Ranking Member Carper, Senator McCaskill. My name is Brent Booker, secretary-treasurer of North America's Building Trades Unions, and on behalf of the nearly three million construction workers in North America that I am proud to represent, I would like to thank you for allowing me to testify before this Subcommittee on an issue that directly impacts building and construction trades men and women across America, which is permitting reform.

America's labor leaders and businesses agree: The permitting process for major U.S. infrastructure projects must be modernized to make it more efficient, more accountable, and more transparent. These projects employ hundreds of thousands of building trades members, and the sooner projects can break ground, the sooner our members can get to work applying their crafts and providing for their families.

Chairman Portman, your work and leadership along with Senator McCaskill on the Federal Permitting Improvement Act demonstrated a steadfast commitment to cutting red tape in order to get much needed infrastructure projects moving forward. NABTU, and, in fact, the entire building trades community, is extremely grateful that these efforts resulted in Title 41 of the FAST Act, which will greatly streamline the Federal permitting process, leading to more job opportunities for construction workers across this country.

We are pleased that permitting reform is an issue on which there is a bipartisan recognition that steps must be taken to address the inequities in the process. In fact, in "Road Map to Renewal: Invest in Our Future, Build on Our Strengths, Play to Win," President Obama's Jobs Council found that an unnecessarily complex Federal permitting process is a major barrier to capital investment and job creation. They also found that other countries expedite the approval of large projects better than the United States.

The general problem with the permitting process is this: Project owners, whether it is the public or private sector, oftentimes find the Federal permitting process to be overly burdensome, slow, and inconsistent. Gaining approval for a new bridge or factory typically involves negotiating a complex maze of review by multiple Federal agencies with overlapping jurisdictions and no real deadlines.

Often, no single Federal entity is responsible for managing the process. Even after a project has cleared extensive review and a permit is granted, lawsuits and judicial intervention can stymie effective approval for years—or, worse, halt a half-completed construction project in its tracks.

By some estimates, a 6-year delay in starting construction on public works, including the effects of unnecessary pollution and prolonged inefficiencies, costs this Nation over $3.7 trillion.

The reforms instituted in FAST–41 are designed to take steps to rectify this problem. We believe the creation of the Federal Permitting Improvement Council is a long overdue step in the right direction. We believe the new procedures set forth in FAST–41 to stand-

[1] The prepared statement of Mr. Booker appears in the Appendix on page 64.

ardize interagency coordination and consultation will ultimately lead us toward the better coordination among agencies and deadline setting that has been lacking in the permitting process and frustrating construction owners, contractors, and workers for years. As an organization that relies upon standards, we welcome this.

Furthermore, by tightening litigation timeframes surrounding permitting decisions, major infrastructure projects will no longer be subject to the seemingly never-ending cycle of lawsuits project opponents advocate.

On this point I want to be very clear: North America's Building Trades Unions support responsible regulations that protect the environment, public health, and worker safety. We believe they are critical to responsible infrastructure development that lasts for decades and allows for future generations to use these invaluable assets. What we are opposed to is the constant stream of endless lawsuits that project opponents rely upon because they cannot defeat a project on the merits of the project itself. When projects are tied up in the courts, our members are not working, they are not putting food on the table, and they are not providing for their families.

The enhanced transparency resulting from the Federal Infrastructure Permitting Dashboard is also a welcome development in the construction industry. We believe displaying project timelines and providing important and detailed information on each project on such a public forum will bring about increased accountability to government agencies involved in the permitting process and will allow for the general public to access information that will inform their understanding and appreciation of the impact of these projects on their communities.

One such project currently listed on the Dashboard that will employ building trades members is the Atlantic Coast Pipeline, a vitally important infrastructure project that will ensure the economic vitality, environmental health, and energy security of the Mid-Atlantic region.

FERC is the lead Federal agency responsible for overseeing the environmental review and approval process for this project. In coordination with more than a dozen other local, State, and Federal agencies, FERC will conduct a thorough and exhaustive review to evaluate all potential environmental, cultural, socioeconomic, and other impacts of the project. Throughout the process, FERC and other agencies will carefully analyze all the potential impacts to the land, air, and water quality, wildlife and other resources to ensure the project has adopted all the necessary measures to protect the environment, landowners, and public safety.

The environmental review process provides numerous opportunities for the public to provide meaningful input to the agencies, including more than two dozen public meetings and multiple public comment periods. Over the last two years, the FERC has received more than 35,000 public comments from landowners, residents, businesses, and organizations in communities across the region.

The Atlantic Coast Pipeline will be an energy provider, job creator, and economic game changer for the region. This underground natural gas transmission pipeline will transport domestically produced, clean-burning natural gas from West Virginia to communities in Virginia and North Carolina that lack the infrastructure

needed. Along the way, the pipeline will help the region lower emissions, improve air quality, grow local economies, and create thousands of new jobs in manufacturing and other industries. Projects such as this one are exactly the type of major infrastructure permitting reform moves forward.

With that, I thank you for the opportunity to be here and look forward to any questions you may have.

Senator PORTMAN. Thank you, Mr. Booker. I really appreciate your being here. Bill Kovacs.

TESTIMONY OF WILLIAM L. KOVACS,[1] SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY, AND REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE

Mr. KOVACS. Mr. Chairman, Ranking Member Carper, and Members of the Committee, thank you for inviting me to testify on the implementation of FAST–41.

FAST–41 creates a new governance structure to streamline the Federal environmental review process for infrastructure projects that historically have had a very poor track record on meeting time limits and very little transparency.

The FAST–41 process includes clear procedures for decision-making, developing project schedules, coordinating agency reviews, mechanisms for State participation, a dashboard to ensure transparency, and it reduces the statute of limitations for legal challenges to final agency action from six years to two years.

The passage of FAST–41 was a bipartisan achievement, led by Senators Portman and McCaskill, and its implementation continues to be bipartisan. Upon enactment, President Obama transferred funds from the General Services Administration (GSA) to provide operational support for the new law, appointed an Executive Director, and secured staff for the program. Between the enactment of FAST–41 on December 14, 2015, and today, the Federal Permitting Council has established an initial inventory of 35 covered projects on its Dashboard, developed guidance on how to carry out the program responsibilities, released recommended performance schedules, prepared for Congress its Fiscal Year (FY) 2016 annual report, and it is currently developing regulations to implement the project fee provisions of the statute.

Let me stop here for a second. This is very important to what Senator Tester was saying, because the fee provisions are essential to the operation. There are three ways money can come in: transfers from GSA and other agencies, congressional appropriations, and the fee structure. And I know some have asked, Well, why a fee structure? Within the Federal Government, there are $64 billion a year in fees that are collected. So it is not something that is out of the ordinary. It is actually very common, and I believe FERC is completely funded by fees.

Continuing this bipartisan support for FAST–41, President Trump's budget sought $10 million for the program. Unfortunately, only $1 million is currently in the House Subcommittee appropriations bill.

[1] The prepared statement of Mr. Kovacs appears in the Appendix on page 70.

More important, however, President Trump's August 24th Executive Order 13807 concerning Federal permitting clearly supports the FAST–41 process and extends many of its expedited procedures to non-covered procedures, which is going to be essential, especially as you have a lot of projects that do not hit the $200 million threshold. The Executive Order also directs GSA to provide organizational support to the Council, including budget support.

While permit streamlining has gotten off to what I think is a solid start, there are a few barriers that need to be mentioned. Again, I will reiterate the position of the Executive Director is vacant. It should be filled immediately, and the reason is that is the person that decides what are the covered projects, selects the lead agency, manages the dashboard, and mediates initial disputes.

Two, many stakeholders are just simply unaware of its existence. I know a lot of our members just are not aware of it, even though we have had four meetings with members and had the Council there.

Moreover, the lack of knowledge is causing some in Congress to insert permanent streamlining provisions in other legislative vehicles which, if enacted, would create an inconsistent permitting process.

Four, Congress should appropriate funding for the Council at the President's request of $10 million.

And, finally, during the 2015 negotiations over the provisions of FAST, the House attached a seven year sunset provision on the FAST–41, and I believe that should be repealed.

As Congress and the President propose ways to improve America's infrastructure, we should recognize that FAST–41 is a valuable tool. It provides to the project sponsors the regulatory certainty that is needed to make the kind of substantial investments that they are going to make.

With that, I am going to turn back 58 seconds of time, and everyone is going to be on time. Thank you very much, and I look forward to answering your questions.

Senator PORTMAN. God bless you, Bill. Fifty seconds, actually. [Laughter.] Mr. Slesinger.

TESTIMONY OF SCOTT SLESINGER,[1] LEGISLATIVE DIRECTOR, NATURAL RESOURCES DEFENSE COUNCIL

Mr. SLESINGER. Thank you for the opportunity to testify today. My name is Scott Slesinger, and I am the legislative director of the Natural Resources Defense Council. I appreciate the opportunity to testify and hope that my remarks will assist the Subcommittee as it considers the important issues raised by the implementation of Title 41 of the FAST Act.

Over several years, NRDC worked cooperatively with the U.S. Chamber, the Administration, Senators Portman and McCaskill, and the HSGAC staff to work on a compromise on what became FAST–41. Although we opposed many provisions, we appreciate the compromises that were worked out to improve the system and to be more efficient and lead to better environmental outcomes.

[1] The prepared statement of Mr Slesinger appears in the Appendix on page 94.

One reform that the Chamber and NRDC both agreed on from the beginning, which has already been mentioned, was the need for more funding and more staff to do the permitting and environmental reviews. As I mentioned in my written statement, the loss of agency expertise and the lack of support for the National Environmental Policy Act (NEPA) within agencies and permitting staffs is responsible for many of the problems in implementing NEPA. In our eyes, the key reform in the legislation is the authority to use non-appropriated dollars to augment agency funds to complete the reviews necessary. We urge the permitting board to quickly implement a system to collect fees from project sponsors to address these bottlenecks by allocating those funds to agencies whose regulatory budgets have been decimated.

Additionally, we have all heard the President talk about launching a new major infrastructure program. For this to succeed, the permitting board probably needs close to $30 million to get up and running and to provide those monies for those agencies before the fee kicks in. The House Committee's token appropriation to the board of $1 million is barely enough to carry out its statutory duties in hosting the dashboard's tracking of projects.

The permitting board needs strong leadership to carry out its statutory mandate, as I think everyone has mentioned. We applaud Senator Portman and Senator McCaskill's letter urging the President to quickly appoint an Executive Director. This law gives the Executive Director significant authority. The person selected must have the political skills to bring the siloed interests within the Federal family together—not just to make a faster system, but one where the environmental outcomes are better. Leaving in place an acting executive who is not a political appointee despite her skill undercuts the board's ability to get significant cooperation from department and agency leaders.

Despite the enactment of this, I think, far-reaching legislation in 2015, we are very concerned with the number of bills in both Houses of Congress that would further amend the NEPA process without regard for their impact on process changes already made in FAST–41. If these bills became law, instead of making things simpler, they would create new conflicts, sow confusion, and delay project reviews, all of which will unfairly be blamed on NEPA, even though the real culprit is Congress passing contradictory legislation.

Those that reached the House floor to establish a different permitting and NEPA processes for hydroelectric power projects, water supply projects, natural gas pipelines, international pipelines, fisheries management, and several others, all inconsistent with each other. The same for the Senate energy bill.

President Trump's first Infrastructure Permitting Executive Order also contradicted authorities and responsibilities already in FAST–41, to the consternation of project sponsors that were already participating in the permitting board's existing processes.

The President's revised EO of August 15th ameliorated most of those inconsistencies; however, it also gave a green light to wasteful Federal construction in areas susceptible to flooding by revoking an Executive Order that previously updated flood protection standards. As Harvey will show, revoking these standards will ensure

that billions of dollars are wasted rebuilding vulnerable public facilities that could have been built more safely or in a safer location.

I cannot conclude without noting that the emphasis on streamlining seems to be a diversionary tactic from the real problem of our failing infrastructure. Countries all over the world, including those with better infrastructures than our own, have adopted statutes based on our NEPA statute; bullet trains, modern subways, and efficient airports around the world have been built subject to NEPA-like requirements. What these countries have that the United States currently lacks is a national commitment to adequately funding infrastructure to compete in the 21st Century. Recent studies of the Department of Treasury and Congressional Research Service (CRS) show that funding, not regulations, are the major source of project delay.

Thank you again for the opportunity to participate in this hearing, and I look forward to your questions, and Mr. Kovacs' 10 seconds.

Senator PORTMAN. Yes, Mr. Kovacs, thank you for your generosity to Mr. Slesinger.

First, thank you for the great testimony, and colleagues have now had to go to other hearings. Some of them will probably be back. I said I was going to defer my questions, but I will go ahead and ask a couple quickly and then get to Senator Carper.

All of you talked a lot about this issue of the dashboard and whether it is working or not. There are 34 projects currently listed. I think you said 35, Bill. I guess there is one more that has been added from a sponsor. Our intent was not to just have projects listed that the Council thought were appropriate, but also to have sponsors be able to apply for that.

Mr. Kovacs, you may know something about this, having worked with some of these sponsors. Are there other project sponsors who are applying to have their projects designated? And if not, why not, from your perspective? Or anyone else who has a thought on that.

Mr. KOVACS. As I mentioned in my statement, we have had four meetings with our members on this issue to educate them, and there was honest concern as to, well, why is Congress putting permit streamlining in this bill or that bill? I think Scott and I have talked about this many times, and we have obviously tried to lobby both the House and the Senate on why are you doing this. So I think there was a lot of confusion.

Two, without the Executive Director, I think that there was really not the time pressure to really move the projects. The projects were initially put on by President Obama, and it sort of stopped at that point in time. I am not criticizing it, but it is a lack of knowledge of the part of the business community. One of the things that is going to have to happen is that there is going to have to be an educational program for everyone to understand this, or as a few projects get in, but, like everything else, there is going to have to be success in the system to show that it can work. Certainly the structure should be able to work. But there is still going to have to be this push to say come into the system.

The other thing is I think President Trump's Executive Order really helped. When the first Executive Order came out, there was an enormous amount of confusion as to what is going on in the sys-

tem. Through education, that has been worked out, and I think everything that is coordinated, and coordinated very well, because other projects that may not necessarily get into the system can now come into the process.

But the second thing is a lot of the projects that we are looking at are standard, like, for example, the FERC projects or the water projects. You also have the ability to put in manufacturing, and that goes to the West Virginia projects where they are trying to really redevelop all of West Virginia. But it also goes to broadband where they are looking at putting in $250 billion into rural broadband. So there is a lot of potential, but it has to be used.

Senator PORTMAN. I think that is a good point. My perspective from talking to some of these folks in the private sector with regard to public-private partnerships, which is part of the intent of this with infrastructure, is that they saw too much uncertainty, both because of the slow implementation of the Council and because of some of the confusion as the new administration came in with the Executive Order that seemed to be, as Mr. Slesinger said, contradictory in some respects and literally shifted responsibility, as you know, away from OMB that we had put in the legislation on purpose because we wanted OMB, with the levers that they have with agencies, to have that ability to help make this Council and the interagency process effective.

So I think you are right. I think now that we are back on track and now that we have an Executive Order that seems consistent with the legislation—although some of you are going to have some comments on the Executive Order, I think we are in much better shape to have these sponsors realize there is some benefit here rather than the confusion.

Mr. KOVACS. I would just add one point. The two things that the FAST Act has, FAST–41, one, the funding or the fee provisions are very important because that goes to Scott's point that one can help out the agencies that do not have the money. That is crucial. But the second thing is it has a two year statute of limitations, and that is something that none of the other permitting processes have, and that is crucial to ensuring that the process will be quick.

Senator PORTMAN. Yes. That two years started, as I recall, with 120 days or something like that, and Mr. Slesinger and others convinced us to lengthen that as part of a compromise. But it is an advantage, and I think a lot of people do not realize that. It goes to the issue that Brent was talking about. Mr. Booker, you were talking about the litigation issues and how some of your guys cannot put food on the table and keep their jobs because of litigation being used inappropriately to try to slow down projects that they cannot stop otherwise on the merits. So I think that is something we have to communicate better to people.

I will say D.J. Gribbin, Janet Pfleeger, and others have been very helpful with the Executive Order, trying to be sure we straightened out that issue. I think there was just a lot of activity early on. So I think we are in better shape there. But that is an important part of how to move forward.

Mr. Slesinger, you had a question?

Mr. SLESINGER. I would just suggest that I have a feeling it is going to be difficult to get project sponsors to voluntarily enter this

program until it is shown that it works. And, therefore, I think the Federal Government, where it is the lead such as on NASA projects or military projects, if these agencies use it and show it works, I think then you will get the private sponsors to be more comfortable with it. And so those projects are usually bigger, which is what is usually left for the Federal Government to do. But I think those projects, if we can get those moving and work efficiently, I think that would make sponsors more willing to try this.

Senator PORTMAN. Yes, I think that is an excellent point.

I am going to turn to Senator Carper, and then I have some follow up questions. Go ahead.

Senator CARPER. Thank you. Thank you so much for joining us.

Mr. Gerken, I listened with interest to what you had to say about hydro. My wife and I were fortunate to attend with, I think, about 20 other congressional couples—House Members, Senators, Democrats, Republicans from all over the country—an Aspen Institute seminar. I do not know if Senator Portman has ever attended one of those, but George Voinovich, I know, and his wife used to go. But we do not spend a lot of time with the House as colleagues, and we do not always have the kind of communications across the aisle that we should have with the opportunity between Democrats and Republicans. It was a great chance to do that.

I was interested to find out that Norway is numbered five or six in terms of known oil and gas reserves in the world, a little country of five million people. They derive 98 percent of their electricity from hydro. Forty percent of their cars are powered by electricity now, and they are hugely interested in finding ways to clean the environment and meet their environmental goals, but also to create jobs, and they are pretty good at it, and really good at retraining people for new industries that are emerging.

I know not everyone is comfortable with hydro. In some places it is appropriate; in some places it is not. Scott, this might be a question I could just lead off with you. I live in the lowest-lying State in America. Every day we see the vestiges of climate change and global warming. Our State is sinking, and the seas around us are rising. And we are anxious to address climate change and do it sooner rather than later. I am not sure if hydro can be part of the solution. I am an advocate for nuclear power plants, done safely, but we are seeing nuclear plants being closed down across America, and they have been for years, like 60 percent of our source of electricity is pollution-free. So are we missing something with hydro or not?

Mr. SLESINGER. I am not a hydrologist or one of the experts on that, but we do have those at NRDC. I would just say there are issues with the water temperature that hydro creates that could have impacts on fish and fishing. And so that is, I think, the major issue, but I can get our staff to get back to you on that.[1]

As far as nuclear power——

Senator CARPER. No, I am not interested in talking about nuclear.

Mr. SLESINGER. All right.

Senator CARPER. I just wanted to focus on hydro.

[1] The information from Mr. Slesinger appears in the Appendix on page 187.

Anybody else have a thought on hydro? Marc, you can comment more. Brett, please?

Mr. BOOKER. I do not have a whole lot of experience. I am actually going to Canada next week, and they have some very large hydro projects that they are building in Canada. From our perspective on a job creation and a clean power perspective, it works up there. I am going to Newfoundland next week to tour a site and get some more information, and we will certainly follow back up with you.

Senator CARPER. Do you know where the first Finns came to America and landed? Wilmington, Delaware. And do you know what they declared as they planted their flag? The Colony of New Sweden, because at the time there was no Finland. It was like 375 years ago. They were part of Sweden. But the Finns, go visit those guys.

Go ahead, finish.

Mr. GERKEN. I think I would like to just give a little bit of injection, too.

Senator CARPER. Please.

Mr. GERKEN. There are a lot of different applications for hydro. There is pumped storage. Ours are run-of-the-river, low RPM, so we do not have the fish mortality. We do not have a lot of impacts on the environment. We do have mussel monitoring required. But you have some other bigger dams. They have bigger impacts. So I think you have to take each type of hydro as a one-off and analyze it.

For us, it is a long-term strategy. We fit it into our whole portfolio, and our members own about 20 percent renewable energy in Ohio themselves, and they are not mandated. So they see the need to get cleaner.

And from a CEO perspective, I feel a lot better about the operation of hydro than I do with my coal plants or my combined cycle plants because those have higher maintenance costs. With these turbines that are low-spinning, there can be bearings issues, but it is usually a 10 year cycle for major maintenance overhauls, that type of stuff, and it is very minimal cost. So we see it as the future.

Senator CARPER. OK. Thanks.

A long time ago, I learned that the key to success in most organizations—I do not care if they happen to be a government, a business, a school, a sports team—the key is almost always leadership. And to paraphrase—I think it was Alan Simpson. Alan Simpson used to say: "Integrity, if you have it, nothing else matters. Integrity, if you do not have it, nothing else matters." I think the same thing is true about enlightened leadership and principled leadership.

We have the position of Executive Director of the Federal Permitting Improvement Steering Council, and it needs leadership. They have interim leadership right now, but I am going to ask each of you to share with our Chairman and myself some of the key elements that the President and the folks running it should be looking for in identifying and selecting someone to lead this Council. Do you want to start off, Mr. Gerken?

Mr. GERKEN. Fine, and I do believe leadership is—it does wonders when you have an organization that has great leadership, so I think that is the key.

I think that—I am not sure who talked on this—I think it was Senator McCaskill, that it takes some political ability to wade through the politics, which are always going to be there. I think he or she has to have a strong understanding of the stakeholders on all sides of the fence. From that perspective, you just cannot take and pluck one side out. I think it has to be somebody that can work across the aisle. And then, actually, the other thing is that you need to put a team underneath that Executive Director that is effective.

Senator CARPER. All right.

Mr. GERKEN. And it needs the proper funding as well.

Senator CARPER. OK.

Mr. GERKEN. Or else it will die.

Senator CARPER. Thank you. Brent.

Mr. BOOKER. Without being repetitive, leadership——

Senator CARPER. You can be repetitive. Sometimes repetition is good.

Mr. BOOKER. Leadership, knowledge, knowledge of the agencies, knowledge of the stakeholders, someone to be able to convene the stakeholders, all of the stakeholders around the table and trying to realize the solution. At the end of the day, we are looking for predictability. Whether you are a CEO of a power company, whether you are a labor leader, the Chamber of Commerce, everybody needs predictability. And for us to be able to train people, for our contractors to be able to bid it, for our owners to be able to deploy capital, you have to have somebody that is leading that ship and to know that it is going to take X amount of time for me to get through that. Tell me what the rules are and let us follow the rules. So predictability, something that can provide that for us would be key.

Senator CARPER. Great. Mr. Kovacs.

Mr. KOVACS. Well, I would stay with the political skills specifically to organize and negotiate with the various stakeholders, because at this point in time, you have almost every agency in the Federal Government in some way that could possibly be involved.

I think the second thing is they really need to understand the administrative procedures, just how agencies work, how does government works, what can you do legally, what can you not do legally.

And I think, finally, some understanding of budgets and how to get the money, because at the end of the day, if this agency or group is not going to be able to get the money, it is not going to be able to function.

Senator CARPER. That is a good list. Thanks. Scott.

Mr. SLESINGER. The permitting process can be a very complicated area, multiple scientific disciplines, economics, and the law. So the Executive Director must have broad experience and sufficient qualifications to successfully lead in the implementation effort.

More importantly, as you point out, because of the political issues that are involved with all these Federal agencies, this person needs the support of the CEO, the President because that is the only way he or she is going to be effective to make this program work with all these agencies involved.

Senator CARPER. OK. Good. Thanks to all of you.

Senator PORTMAN. Thank you all very much.

Let me just ask a couple of follow up questions. One for Mr. Booker, just to get it on the record. You made a lot of good points about the fact that the Jobs Council and the Obama Administration actually recommended that we proceed with this, and that is one reason, I think, in the end we were able to get support from the Administration for the proposal. You also mentioned the cost of delay to the economy; $3.7 trillion was the number you used. I want to find out what your data is on that, because that is an incredibly important part of this, what is the cost of delay, which we have a tough time putting our hands around sometimes. You talked about the lawsuits. Sean McGarvey, by the way, has been terrific to work with on this, and particularly with regard to the NEPA issue and, how to ensure you have these regulations in place to ensure you have an environmentally sound project, but that you do it in a way that keeps people at work.

Can you give us any specific examples of agencies delaying projects that impacted your members? If you cannot give them to us today, maybe you could follow up with some specific examples for us.

Mr. BOOKER. The first one I will refer back to is one that is in FAST–41, in the fast track, is the Atlantic Coast Pipeline. In talking to them, they report out, National Park Service took over 14 months to grant permission to survey a 0.1-mile crossing of the Blue Ridge Parkway. So 14 months to grant permission to do the survey. Once they granted the permission to do the survey, in one afternoon the survey was complete. So, I mean, that is one that is where you look at where we have problems with where we currently sit, and commenting on Mr. Kovacs and Mr. Slesinger and the other panelists here, you have to have success. We have a project, a $5 billion project, started the first initial permitting in 2015. One of the delays which is going to put a year-long delay of in-service date is because it took 14 months to grant somebody permission to go survey the Blue Ridge Parkway, a 0.1-mile stretch of land.

That is a current example of where we need improvement, where we can get a little bit better. We can look back, and I can provide you with a multitude of lists.

One of the problems in preparing for this testimony is contacting owners that we work for, contractor partners that we work for. The problem is that they are all numb to it at this point. They know that whatever project it is, whether it is a combined cycle gas plant, a pipeline project, you name it, they have built into their time period it is going to take three, four, five years to get my permits; it is going to take millions and millions of dollars for me to do that. At the end of the day, the result of that is that instead of having four capital projects that they are considering, they have dropped that list down to two or three because they know how long it is going to take and they are numb to that fact, and that is just the way the game has been played.

So getting this up and running, getting an Executive Director in place, having some success of these projects that are in FAST–41 I think is going to change the perception, because the perception

right now is that I am not even going to go down this road on trying to deploy my capital on a multitude of infrastructure projects or energy projects or whatever they may be, because I know that it is going to take such a long amount of time for me to do it that I am limiting my resources. So instead of considering four projects, we are limiting it to two. That is how you get in your opening remarks of where we are at on American Society of Civil Engineers with a D-plus overall infrastructure grade. We cannot invest in our own infrastructure.

Senator PORTMAN. Yes, and us being 39th in the world, and I think you make some excellent points, and, again, this is sort of the basis of this thing. Now let us make sure that it works to address that so that, in fact, they can have more projects and that your folks can have more certainty, as was said earlier.

Mr. Gerken, you talked specifically about time is money. You said you had a 50 basis points increase in your borrowing because of the delay that you can point to. So, capital is global now, and what I have heard from a lot of folks with regard to infrastructure as we have dug into this is that one reason you see all those cranes in London or in Asia is because they do green-light projects more quickly, not just in the developed world but in the developing world, that they have figured out ways to have a NEPA-type process but to do it more efficiently and effectively. And, that makes it difficult for you to be able to get the borrowing costs down to be able to proceed with the next AMP hydropower project. Is that right?

Mr. GERKEN. Right. Yes, exactly. To give you an example with R.C. Byrd, let us look at this project now. We have a license. Now we have to—as Senator McCaskill said, the Corps has already said, well, we do not like the biologicals, so we are going to go back and address the EA during their 404 or 408 process. Well, quite frankly, if you look at the 404 and the 408, what it is meant to do with the Corps has nothing to do with that process. It is dredging and dam stability.

But what I am saying is I have a project. If I knew that there is FAST–41 and it was a two year process, I would be glad to pay some fee to help accelerate this thing. So that I could order turbines and have them ready to be put in along with the concrete, all that timing and that job sequencing saves money. And when you can stretch that construction period—and that goes with ordering the equipment—those are long lead time items—you can save money. And that is where it is at for us.

Senator PORTMAN. Well, it is great testimony, great specific examples.

Mr. Kovacs, you have this analysis of agency participation showing that some agencies have been less cooperative than others. I assume you included that in your testimony so it is part of our testimony here today. If not, without objection, I want it to be made part of the record. But if you could please just quickly—and this will be my last question—tell us what we ought to do about it. If you want to talk a little bit about which agencies are lagging, that would be good. I named some earlier. Naming names always helps. But what should we do about that? Obviously we would like to have continued follow up from all of you on the questions we have

asked today to be able to continue to have this oversight that Senator McCaskill, Senator Carper, and I talked about today. But, Bill, why do you not address that quickly?

Mr. KOVACS. Sure. It was not put in there to be critical of the agencies. What it was to show is that the agencies that do permitting a lot, FERC and the Bureau of Land Management (BLM), are fairly good if you look at the dashboard. Everything that they do, every permit that is involved, the deadlines, whether they met it or not, they seem to be able to do the process.

When you get into the Bureau of Indian Affairs, HUD, Nuclear Regulatory, they just do not do a lot of it, and I think one of the things that is going to happen is you need some education within the agencies. And I say this because when we were dealing with energy savings performance contracts, nothing to do with this, but it was a very novel concept, how the Federal Government finances renewable energy within office buildings. The biggest problem that we have is that the energy officers who are working in the agencies did not understand how to do it, and gradually it went up from about $500 million to $4 billion, which is money that is being invested that the government does not have to pay for, and it is paid for out of the energy savings.

And, again, I think if this is going to be successful, not only do you have to have the political organization to be able to work with the various agencies, but you have to educate them, and that is crucial because you may think that the most important ones in the world are the energy projects or the highway projects. But at the end of the day, you are still going to want to do broadband and you are going to want to do other things. I think you have to bring the others in.

Senator PORTMAN. Yes. Well, we want you to keep their feet to the fire. Again, thank you very much for your testimony today.

I am going to turn to Senator Carper for any final questions.

Senator CARPER. Thanks, Mr. Chairman.

I was privileged to serve as Governor of Delaware from 1993 to 2001. The person who preceded me as National Governors Association (NGA) Chairman was George Voinovich, a dear friend of the Chairman's and mine. The year after I stepped down as Chairman, I got to be Chairman of something called the NGA Center for Best Practices, and what it is is a clearinghouse for ideas that work. It could be reducing recidivism. It could be reducing dropout rates. It could be success in getting people off of welfare and working on a permanent basis. But the idea was to find out what was working from one State to the other and see if it was replicable and provide contact information. It is actually more vibrant today than it was when George and I were serving together.

It seems to me that one way that the Federal Permitting Improvement Steering Council could make a difference is by learning what some agencies might do well when it comes to environmental reviews and permitting decisions and encouraging other agencies to be aware of that and to see if that might be replicable.

Do you know of any progress that the Council has made in this area to date? I describe it as, "Find out what works, do more of that." And do you know of anything that has been done along these lines to help in this regard, in this specific regard?

Mr. KOVACS. They actually have issued their first booklet on best practices, and it is to be done every year, and it is in several places within the statute. So it is something that is being incorporated. It is just going to have to be something that they really do every year, and that is just keep on top of it.

Senator CARPER. Anyone else?

Mr. GERKEN. I think that one of the things that is important is the transparency side of it, and I think that when everybody has a flashlight shined on them and they have to do a job, it does makes a difference. And that is why I think the Council getting an Executive Director is critical, because—and I am saying the flashlight goes on my folks, too. I mean, it is not one way. And so I think the sooner you have that and the dashboard from schedule, from transparency, is very important. And even for a person like me, I am going to be able to look at it and be able to see where we are letting ourselves down, because there are times when we are not holding up our end of the bargain either. So the transparency, I think is critical.

Senator CARPER. All right. Thank you.

Today, as we are trying to help a lot of unfortunate people in Texas and the gulf coast to recover from a desperate situation, and now we have another storm bearing down on Florida. And I mentioned earlier I represent a State that is the lowest-lying State in America, and we see the vestiges of climate change literally every day. This hearing has been focused on the risks and uncertainties for projects prior to being built, which is important. However, there can also be risks to infrastructure once it has been built, and particularly in low-lying areas like my own State, where we are seeing the vestiges of sea level rise every day.

How do you believe that public agencies and project sponsors should be integrating climate change projections and sea level rise into project reviews? Mr. Slesinger?

Mr. SLESINGER. I think it is critical, and I think the law, actually the way the National Environmental Policy Act works, you are supposed to look at what the environmental impact of a project is going to be. And many of those projects, those larger projects, will have either climate impact or will be impacted by climate. And so, therefore, we have to do projects that make sense.

There is an amendment in MAP–21 that says, if there is a declared emergency, you can avoid NEPA and get moving right away by rebuilding in the exact same place with the exact same footprint. That seems, if you look at what has happened in Houston, the exact wrong thing to do. And so we want to make sure when people do rebuild, when they do have a climate impact, that they know this is not a 1 in 1,000 year event that is not going to happen for millennia. Flooding again is a risk, and we need to look at what is reasonably going to happen because of climate and take that into account. And that is—frankly, one of the key parts of NEPA, other than letting the local people know what is going on in their area by the Federal Government, is to think before you act. Think before—plan, then build; not build, get flood insurance, and then rebuild again.

And so the Council on Environmental Quality (CEQ) came out with guidance to help agencies do this. It has the terrible name of

"social cost of carbon." But when agencies do projects, when big sponsors do projects, they really have an obligation under NEPA to look at what the environmental and community impacts are going to be before they build so we can build smart and save, in the end, taxpayers' money and probably lives.

Senator CARPER. All right. Anybody else want to comment on this? Mr. Gerken.

Mr. GERKEN. I will. One of the things that AMP has done on all of our hydros that we have on the river is we set our elevations on the top of our projects to be at the 100-year flood, so they get overtopped at a 100-year flood. One of the reasons is we do not want to impact anything, catastrophic flooding down the river, so the modeling addresses that. So once we get a 100-year flood, our project, our hydro project, is not impacting those hydraulics going forward. And we think that is very important for a lot of reasons. One is permitting. But, two, we think it has less impact, and we feel good about that.

Do we get overtopped a few times? Yes. It is just some work you have to do to seal it up. But we think that is being a good steward as well, as well as running run-of-the-river hydro is carbon-free.

Senator CARPER. Thank you, sir.

One last word, Mr. Kovacs.

Mr. KOVACS. One of the great parts of the FAST–41 is that there is initial consultation so that the agencies and the project sponsor have some idea what they are to do and what kind of information they are going to have. In that, one of the things that has not been mentioned today is we still have this Information Quality Act that is in the Federal Government where we use the best and most updated information. I think when you get to the flood areas, we have been using outdated information for decades. I think one of the things that is going to have to happen as part of the initial consultation is you are going to have to be honest with each other, because at the end of the day, if the project is not going to go forward, the sponsor would rather know that and get out. When we did our project no-project study, one of the things people found out is they had their financing for five years, but the effort and the permitting took seven. They would have just rather known in year one that they needed to go somewhere else.

Senator CARPER. Our thanks to each of you.

As the Chairman knows, we have a Finance Committee hearing underway and the Children's Health Insurance Program (CHIP) reauthorization, which is an important piece of legislation. And the Health, Education, Labor, and Pensions (HELP) Committee, has the Governors before them today on health care reform and trying to stabilize the exchanges. I am going to try to hit both of those, and I will try to get back before the next panel is through. But if I miss it, just our thanks to all of you for being here. And, again, to my leadership, my Chairman and for Senator Claire McCaskill, thank you.

Senator PORTMAN. Gentlemen, thank you very much. I appreciate your testimony. We will now call the second panel.

The first witness in the second panel is Janet Pfleeger. We talked about Janet Pfleeger earlier as the Acting Executive Direc-

tor of the Federal Permitting Improvement Steering Council. We appreciate her service.

Second, Terry Turpin. Terry is Director of the Office of Energy Projects at the Federal Energy Regulatory Commission. We have talked about FERC quite a bit in this hearing.

Third, Robyn Colosimo. Ms. Colosimo is the Assistant for Water Resources Policy for the Office of the Assistant Secretary of the Army for Civil Works (OASACW). We have talked about the Army Corps quite a bit today.

And then, finally, Gary Frazer, Assistant Director for Ecological Services at the U.S. Fish and Wildlife Service.

We appreciate each of you coming today, and thank you for your willingness to be here to hear the other panel and also to testify today and for your good testimony you submitted in advance. We look forward to hearing from you.

Again, it is the custom of this Subcommittee to swear in witnesses. I ask you, now that you are seated, to please stand and raise your right hand, and I am going to ask you a question. Do you swear the testimony you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. PFLEEGER. I do.

Mr. TURPIN. I do.

Ms. COLOSIMO. I do.

Mr. FRAZER. I do.

Senator PORTMAN. Excellent, noting that each of the witnesses has answered in the affirmative. I want to tell you that we will stick to the timing system, as we did earlier, and try to keep it to five minutes each. Then we will have the opportunity for some questions. We appreciate your being here today and the valuable information you are going to provide with regard to this important oversight hearing.

Ms. Pfleeger, we will hear from you first.

TESTIMONY OF JANET PFLEEGER,[1] ACTING EXECUTIVE DIRECTOR, FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

Ms. PFLEEGER. Chairman Portman, thank you for the opportunity to appear before you today. The time required for infrastructure projects to navigate through the labyrinth of the Federal permitting process is simply unacceptable. The Federal Permitting Improvement Steering Council brings accountability and transparency to what has been for too long an uncertain and unpredictable process, one that does not lead to better community and environmental outcomes.

Through FAST–41, you provided us with the tools to bring transparency, accountability, and predictability to the permitting process while protecting public health, safety, and the environment.

My office is actively working with the Administration to improve the permitting process for infrastructure projects. Last month, President Trump signed Executive Order 13807, entitled "Establishing Discipline and Accountability in the Environmental Review

[1] The prepared statement of Ms. Pfleeger appears in the Appendix on page 103.

and Permitting Process for Infrastructure Projects." The EO enhances the work of the Permitting Council through the establishment of a "One Federal Decision" policy and through a Cross-Agency Priority (CAP) Goal that establishes management accountability within agencies for infrastructure permitting modernization goals. The framework for implementing One Federal Decision will be developed in consultation with the Permitting Council, as will the CAP Goal's accountability system.

Since being hired in January as Deputy Director of the Permitting Council's Office of the Executive Director, where I am now serving as Acting Executive Director, my office has been using FAST–41 to break down the institutional silos responsible for red tape and unacceptable permitting decision timelines. My office has focused on three areas that I would like to highlight for you today: institutionalization of best practices through early and formalized cross-agency coordination, increased transparency through the Permitting Dashboard, and project-specific coordination and dispute resolution.

To my first point, FAST–41 requires the development of interagency Coordinated Project Plans (CPPs), an essential tool for cross-agency planning and implementing best practices. The initial development and quarterly updates of CPPs formalize interagency collaboration and force agencies to address difficult issues early in the permitting process to prevent confusion and delays later in the process.

To my second point, the Permitting Dashboard brings an unprecedented degree of transparency to the permitting process. The permitting timetable developed in every project's CPP is made public on the dashboard, which lists target completion dates for all permits. Each quarter, my office and the permitting agencies review those dates, and my office enforces the FAST–41 restrictions for modifications to those dates. With nationwide visibility and built-in accountability structures, the dashboard helps keep projects on schedule and provides permitting predictability.

To my third point, project sponsors have contacted my office for help with specific issues such as when a sponsor received contradictory information from headquarters and field offices or when different agencies working together on a project disagreed on a path forward. We are requiring agencies to use the tools FAST–41 provides to share information so they identify and resolve discrepancies early.

By focusing on these three areas, the Permitting Council is transforming the Federal permitting process, with recent successes in both systematic and project-specific improvements. FAST–41 brings about a new way of doing business that addresses common stakeholder concerns and improves permitting timelines.

My office has only just begun to carry out our responsibilities under FAST–41 using initial funding from Cross-Agency Priority Goals. Going forward, the President's Fiscal Year 2018 budget request of $10 million provides the funding support we need to fully carry out responsibilities given to us in statute. Additionally, FAST–41 provides the authority to issue fees regulations, and the Permitting Council is working to take advantage of this important tool.

In conclusion, FAST–41 is not the first time the Federal Government has tried to reform the permitting process, but this is the first time the framework to accomplish real reform is in place. I thank you for the opportunity to testify before the Subcommittee today and welcome your questions.

Senator PORTMAN. Thank you for that good testimony, Ms. Pfleeger. Mr. Turpin.

TESTIMONY OF TERRY L. TURPIN,[1] DIRECTOR, OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION

Mr. TURPIN. Good morning, Chairman Portman. I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission. The office is responsible for taking a lead role in carrying out the Commission's duties in siting infrastructure projects including: non-Federal hydropower projects, interstate natural gas pipelines and storage facilities, and liquefied natural gas (LNG) terminals.

Thank you for the opportunity to appear before you to discuss FERC's process for reviewing this kind of infrastructure as well as FERC's work with the Federal Permitting Improvement Steering Council. As a member of the Commission's staff, the views I express in my testimony are my own and not necessarily those of any individual Commissioner or of the Commission.

Under the Natural Gas Act, the Commission is responsible for authorizing the construction and operation of interstate natural gas facilities and facilities for the import or export of natural gas. Since 2000, the Commission has authorized nearly 18,000 miles of interstate natural gas pipeline totaling more than 159 billion cubic feet per day of transportation capacity, over one trillion cubic feet of interstate storage capacity, and 23 sites for either the import or export of LNG. Under the Federal Power Act (FPA), the Commission regulates over 1,600 non-Federal hydropower facilities at over 2,500 dams. Together these represent about 56 gigawatts of hydropower capacity, which is more than half of all the hydropower capacity in the United States.

In the last five years, the Commission has authorized 69 new projects with a combined capacity of over 2,400 megawatts and has relicensed 42 projects which provide over 91 megawatts of generating capacity. For both these types of infrastructure, the Commission acts as the lead agency for the purposes of coordinating Federal authorizations as well as for the purposes of complying with the National Environmental Policy Act. The environmental review that is done is carried out through a process that allows cooperation from numerous stakeholders, including Federal, State, and local agencies, Native Americans, and the public.

The Commission's current approach allows for a systematic and collaborative process and has resulted in substantial additions to the Nation's infrastructure. To a great extent, the process established by FAST–41 to improve early consultation and to increase transparency of project review mirrors the Commission's existing collaborative process.

[1] The prepared statement of Mr. Turpin appears in the Appendix on page 114.

Commission staff is committed to working with the Council to assist in the successful implementation of FAST–41 and to ensure the most effective processing of energy infrastructure matters before the Commission.

This concluded my remarks. I would be happy to take any questions you have.

Senator PORTMAN. Great. Thank you, Mr. Turpin. I appreciate that. Ms. Colosimo.

TESTIMONY OF ROBYN S. COLOSIMO,[1] ASSISTANT FOR WATER RESOURCES POLICY, OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

Ms. COLOSIMO. Chairman Portman, I am Robyn Colosimo, the Assistant for Water Resources Policy in the Office of the Assistant Secretary of the Army for Civil Works. Thank you for the opportunity to discuss the U.S. Army Corps of Engineers water resources infrastructure projects and the Regulatory Program within the context of Title 41 of the Fixing America's Surface Transportation Act.

The underlying objective of the FAST–41 provisions is to improve the Federal permitting process for infrastructure projects by integrating and streamlining Federal agency processes relevant to permits, approvals, determinations, and permissions. The Corps fully supports this objective.

The Corps strives to provide timely and efficient decisionmaking both for the development of its water resources infrastructure projects and for applicants that may seek approval under one of its regulatory authorities for construction of an infrastructure project. The Corps fosters deliberate and open communication with applicants that request permits from the Regulatory Program under Section 10 of the Rivers and Harbors Act and/or Section 404 of the Clean Water Act (CWA) or request permission to modify or alter authorized water resources development projects under Title 33 of the U.S. Code, Section 408. The Corps also engages early and often with other Federal agencies to seek their feedback and synchronize their review with the Corps decisionmaking processes for infrastructure project proposals.

For several years, the Corps has been sharing best practices from its Regulatory Program with other Federal agencies, including on the use of general permits and on the synchronization of review processes. The Corps also supports transparency and accountability, for example, by working with other agencies to provide permitting timelines for projects on the Infrastructure Permitting Dashboard.

Starting in 2016, the Corps has been actively working with the Federal Permitting Improvement Steering Council and its member agencies to provide information on its Regulatory Program tools, databases, and codified decisionmaking procedures. The Regulatory Program utilizes a streamlined permitting process for the majority of activities it reviews. General permits are available where the proposed activity is minor in terms of its anticipated impact on aquatic resources. General permits reduce the time and cost to the applicant of preparing an application and reduce the time and cost

[1] The prepared statement of Ms. Colosimo appears in the Appendix on page 124.

to the Corps of reviewing the application. In Fiscal Year 2016, 94 percent of the Corps permit workload was processed by general permits, and 87 percent of these were issued in 60 days or less. This enable the Corps districts to focus on the proposed activities that are more likely to have the potential for substantial adverse environmental impacts on aquatic resources and, therefore, to require a more detailed project-specific review. For applicants proposing such activities, the process involves submitting an individual permit. Of the activities requiring individual permits, 58 percent were issued within 120 days of receipt of a complete application.

The Corps has actively engaged with FPISC and other member agencies in the development of the implementation guidance for FAST–41. The scope of covered projects under FAST–41 generally applies only to certain infrastructure proposals that are subject to NEPA, likely to require an investment of more than $200 million, and do not qualify for abbreviated authorization or environmental processes under any applicable law. Another factor for projects to be included is when the size and complexity make the projects likely to benefit from enhanced oversight and coordination, including projects likely to require authorization from or environmental review involving more than two Federal agencies or the preparation of an environmental impact statement under NEPA.

The Corps has worked expeditiously in the implementation of FAST–41, and is continuing to work at further improvements to facilitate implementation of this act such as automating data entry to the extent possible by making the Federal Infrastructure Dashboard compatible with existing agency websites that track some of the data required on the dashboard.

FAST–41 is most beneficial to those projects where the Federal Government has a substantial role in permitting or approving the project, but which does not already qualify for abbreviated authorization or environmental review processes under other statutes. For example, there may be large infrastructure projects that meet FAST–41 criteria, but the Federal Government may only have a role in the review of an ancillary component of the larger infrastructure project, the review of which is already abbreviated, using existing authorities such as the Corps' nationwide Permits Program under the Clean Water Act.

Thank you for the opportunity to share the Corps' experience and perspectives on implementation of FAST–41. We look forward to continuing to support FPISC and other member agencies on sharing of best practices and greater efficiency and transparency in our review of infrastructure projects.

Senator PORTMAN. Great. Thank you, Ms. Colosimo. Mr. Frazer.

TESTIMONY OF GARY FRAZER,[1] ASSISTANT DIRECTOR, ECOLOGICAL SERVICES, U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR

Mr. FRAZER. Good morning, Chairman Portman, Ranking Member Carper, and Members of the Subcommittee. My name is Gary Frazer, and I am the Assistant Director for Ecological Services at

[1] The prepared statement of Mr. Frazer appears in the Appendix on page 127.

the U.S. Fish and Wildlife Service. I appreciate the opportunity to testify today on the Service's work on implementation of FAST–41.

The Service is responsible for reviewing and permitting projects under a number of statutory authorities, including the Endangered Species Act, the National Environmental Policy Act, and the Fish and Wildlife Coordination Act. The Service's role is to facilitate the development and timely decisionmaking of environmentally sound infrastructure projects. The Service works with project proponents and regulatory or construction agencies to help avoid and minimize harm to fish and wildlife and to offset those impacts that are unavoidable so as to facilitate these important projects while ensuring the conservation of our Nation's fish and wildlife resources.

The Service typically carries out these activities in the field as a participating or cooperating agency under FAST–41, working with the lead agency for a project in reviewing and commenting or consulting on the project plans within set deadlines. We also engage at the national level to advise the Council in identifying and implementing best practices and policies related to FAST–41.

The overwhelming majority of the Service's activities are carried out at the field level. The Service's local field staff have in-depth knowledge of the ecosystems in which they work and the species that inhabit them, bringing expertise to project reviews to facilitate efficient, project-specific analyses. Larger and more complex projects, like those covered by FAST–41, may fall under the jurisdiction of two or more field offices or regions. Our objective is to provide project proponents and regulatory agencies with consistent and efficient review and comments and, where feasible, a single point of contact.

At this time, the Service is either a cooperating or participating agency in the majority of FAST–41 projects. I have highlighted a couple of these projects in my written testimony, and they illustrate ways in which the Service has worked with other agencies and project proponents to efficiently and effectively review and permit large and complex infrastructure projects.

But we are not perfect, and FAST–41 provides a helpful framework for us to improve our processes. The Service is committed to improving the environmental review process to facilitate environmentally sound infrastructure development through timely, transparent, and predictable reviews, while ensuring the conservation of our Nation's fish and wildlife resources. We view FAST–41 as a constructive framework for arriving at more timely decisions. In addition to facilitating increased coordination, FAST–41 increases the accountability of all parties involved by designating priority projects, ensuring commitment to agreed-upon timelines, and helping to identify and elevate potential issues earlier in the process. FAST–41 is a positive step in helping to integrate various reviews and facilitating efficient processes across the Federal Government.

Thank you for the opportunity to discuss the Service's work in implementing FAST–41, and I would be happy to address any questions you may have.

Senator PORTMAN. Great. Thank you. Thank you all for your testimony.

Since the last two witnesses talked about their extensive work with regard to FAST–41, let me just follow up quickly on a concern

that has been raised to us and I think also to Ms. Pfleeger, and she can speak about herself, and that is that at the headquarters level, there seems to be quite a bit of sophistication and focus on this issue; whereas, at the district offices, sometimes that breaks down. So we hear from people who say, "Yes, I think, they understand at headquarters it ought to be done, but those requirements are applied inconsistently across the country, and we work with the agencies or offices that are dispersed elsewhere."

Can you talk a little about that? One, what are you doing to communicate to your district offices, your local offices, about the requirements of FAST–41? I know AMP included in its written testimony that the Corps sometimes, have not been communicating clearly to every office. I have certainly seen that with regard to other Corps projects sometimes. Sometimes the right hand does not exactly share what the left hand is doing. Eventually, we resolve those issues. If you can talk a little about that and what could be done to ensure that we are getting that communication down and appropriate training down to your district and local offices. Why do you not go first, Mr. Frazer, since you were the last one to talk about this issue?

Mr. FRAZER. Well, we have a network of about 80 Ecological Services field offices where most of our environmental review work is done and most of the project-specific coordination is done, and they obviously deal with some FAST–41 projects, but they also deal with many other projects. The mail brings in new projects every day, and they do their best to provide a high level of service for all of those. But when we are putting together and trying to stand up a new process that focuses on these particularly high-profile and highly important infrastructure projects, it is not something that is an immediate game changer for them unless they are informed as to the significance of this new process, the priority placed upon timely and effective review, and how they should consider that in the context of all the other work that is coming into their office. That is where we play a role at the national level.

I have staff that are directly engaged in working with FPISC Council in developing and standing up the rules and procedures and coordinating between the work of the Service and the other agencies. We are in regular communication with our regions and, through the regions, our field offices so they are aware of how this process is going to develop and the importance of them being able to work effectively in this, to be committed to the process, to working within the timeframes, to being conscientious about taking the actions that we are committing to when we engage in these sorts of projects.

So it is a process. I think just like the Council is standing up their overall infrastructure, we need to also ensure that within our agency we have that sort of education and training going on internally. That is where we have a role in staffing and regular coordination with our field offices in that regard.

Senator PORTMAN. Well, that is encouraging to hear. If you would, please, be willing to supply to the Subcommittee an example

of that communication and perhaps as a template for others as well.[1]

Mr. FRAZER. I would be happy to.

Senator PORTMAN. Ms. Colosimo, could you respond also to this issue of field offices being consistent with headquarters?

Ms. COLOSIMO. From a big picture, here are a few things about FAST–41 and our engagement. By purpose and design, the Steering Committee member is actually out of the Office of the Assistant Secretary of the Army for Civil Works, where we provide oversight to the Corps of Engineers. But by intention, the Chief Environmental Review and Permitting Officer (CERPO) is actually at the Corps headquarters, and that was intended to help engage the field and provide more direct oversight from both our regulatory and our 408 programs.

That said, we have actually spent a substantive amount of time with Corps field personnel in terms of developing guidance with them on how to implement, and we are making sure we are powering down those decisions to the appropriate level, but yet providing enough oversight for consistency.

So as an example, in the 408 program, which is more about the impacts to Corps projects, the Federal investments Congress asks us to build, there have been concerns about application across the districts and we have spent a lot of time in training and trying to make sure that is happening. We are providing that oversight and trying to solve the problems that were highlighted by Ohio AMP.

In terms of the actual day-to-day work, we are also tracking things like Mid-Barataria, which is a dashboard project where we are the lead agency, that are managed at the district level, where we can help engage with FPISC to solve problems as they emerge. We are making sure that we are focusing at the right level but providing the training and support at the DC level to make sure that personnel are embracing this process.

It is true when it was stood up, to be frank, that it was more DC-driven. We are trying to put together a lot of the implementation guidance, and the challenge has been to make sure that we are getting out there and moving toward this project process.

Senator PORTMAN. You mentioned Mid-Barataria. It was the first project, as I understand it, to be covered.

Ms. COLOSIMO. Yes.

Senator PORTMAN. And so the Corps was asked to be the first to jump off the diving board into the FPISC waters.

Ms. COLOSIMO. It was fun.

Senator PORTMAN. I guess the broad question is: What did you learn from that? What is it like to be the lead agency? And, what did you learn for the next project? It sounds like you were trying to lead from the headquarters at that point even though the folks in Louisiana were involved with the day-to-day, I assume, with that project. How did you work that out? What lessons did you learn that would be helpful for other agencies?

Ms. COLOSIMO. There were a lot of lessons to be learned, and, frankly, we did it together with FPISC. I think the actual FIN came in on December 27. Not a lot of people were available to co-

[1] The information submitted by Mr. Frazer appears in the Appendix on page 265.

ordinate with at that time, but we got the right folks in the room and tried to figure out how to best proceed to meet the 14-day timeline specified in the law.

I would say the biggest thing we learned in that process was to anticipate those activities coming forward, and we had known that there was some interest in putting Mid-Barataria on the dashboard, however we probably did not do enough on the pre-application side or pre-interest side to find out about the timing of that request so we could better align.

Once we got into the process, I think we had already done a lot of work as a Steering Committee and a working group to develop the CPPs, the coordinated project schedules. Then it really became that we had not gotten all folks engaged enough to understand how to develop and populate those schedules once we concurred that it was a covered project.

I would say since then the things that we are learning that apply across all the 35 projects on the dashboard have a lot to do with what we are actually populating in the CPP on the dashboard for transparency. So as an example, there are 15 projects on the dashboard where we are engaged. All of them involve some level of a Section 404 10 permit from us or a review from us. I believe a number of them, maybe 10, will likely be a general permit. And because of its abbreviated nature, it is sort of an estimate in time on when we would actually issue that permit where we are not the lead agency and where we would expect to get the information and then make the determination. The estimate versus when we get the application so we can make a more firm date, that kind of fluidity is the area I think we are all learning a lot about at this time. And, of course, once you put it on the dashboard, it is transparent and there are a lot of questions. It is very adaptable.

Senator PORTMAN. Yes, that is the flashlight that was talked about earlier that is on you.

Ms. COLOSIMO. Yes.

Senator PORTMAN. So to all of you, thank you for what you do, because this is going to fail or succeed based on implementation at your level. There are some who complain, as you know, that this legislation did not go far enough in establishing not just goals but deadlines that had more significant consequences for the agencies. So to the extent you are, as you say, not just setting these out as goals but actually pushing your offices to meet these deadlines, it makes the process more effective, the structural work, but it also takes off some of this heat of people saying, well, FPISC is not strong enough in enforcing deadlines and timelines.

I think it can work. I am not against having even more accountability in it, but this was a bipartisan process, and this is, I think, a very helpful structure. As Ms. Pfleeger has said, without this structure, despite all the efforts over the years, we have not had much success. Now we have structure that makes sense. But your job is to implement it and make sure that you are putting the pressure on your folks.

Along those lines, Mr. Turpin, I have to ask you about FERC because FERC is now the lead on 13, I think, of the 34 projects, which would put you—I believe, Ms. Pfleeger, FERC then becomes your number one sponsor or number one lead. I do not think any

agency has that many leads. And I am concerned, as I said earlier, that FERC—I mentioned NRC. There are others who do not believe that all the provisions of FAST–41 apply to them.

If I go on the dashboard and I look at any FERC project, I see that for every timeline entry, FERC says it cannot disclose timing of the proposed actions because its own regulations State that the nature and time of any proposed action by the Commission are confidential and shall not be divulged to anyone outside the Commission. Interesting. I am a recovering lawyer, so this is dangerous for me to talk about—but I always believed that statutes actually trumped regulations. And the statute requires you to provide that information.

I would ask you—I do not want to accuse you of being a lawyer here, so if you do not feel comfortable answering the legal question—but how do you deal with that? Do not legislative actions like FAST–41 trump the regulations that you have in place?

Mr. TURPIN. Well, I am an engineer, so I do not take offense at being accused of being a lawyer. I work with quite a lot of lawyers. I think that question is one we asked ourselves. Obviously, statutes will always trump regulations. We looked at the statute when it came out and tried to figure out how does it fit into the independent nature of a commission. From a practical standpoint, the schedule is set by the five-member panel. There is not an ability for us as staff to bind them to when they make a decision. Their judgment is based on when the record is right, that is when they are going to issue their decision on it.

I did meet with your staff back in the spring, and this question did come up. At that point, we were without a quorum. Now we have one. It is certainly a question that can be raised with the new Commissioners and to see what direction they feel this should go in or instructions they can give to staff.

Senator PORTMAN. We want to communicate directly to the Commissioners, and we have one member of the Commission, as you know, who is a former staffer up here who understands this process and helped us get this legislation through, understands the legislation well. And I guess, forgetting for a second the legal issue here, which I think is pretty clear, as you say, it is hard to see how FAST–41 can be effective if FERC is not going to disclose its timelines. That is my concern. How do you coordinate with other agencies and allow them to plan their own timelines if you cannot share that information with them? So I think we have to resolve this issue. Now that you have a quorum, you are going to start moving forward, as I understand. We are going to be discussing that with your Commissioners and also with the staff to ensure that we can move forward.

Ms. Pfleeger, maybe you could comment on this. How does it work for FERC or the Nuclear Regulatory Commission I talked about not to disclose their timetables? How has the Council addressed that problem? Maybe you could talk more generally about how the Council addresses issues where agencies are not cooperating with FPISC.

Ms. PFLEEGER. We are working very diligently with every agency, including FERC, and I think the point that Terry just made, now that the quorum is in place, we will be able to revisit this

issue. That Permitting Dashboard, with all those target completion dates, really is vital. It allows the project sponsors to plan. It allows the public to understand the timing for a project that might affect their area. So in terms of FERC specifically, we are looking forward to those conversations again.

As far as all of the agencies go, it has been a learning process. How do they use the Dashboard? How do they put together a coordinated project plan? And though it is slower than you would have liked, we really are coming along now and seeing some of the successes. So just even three months ago, if you had looked at the Dashboard, compared to today, agencies have been trained in how to use the dashboard. We are working out some of the tweaks to ensure they can be successful. So I am seeing that as each month goes by, we are having successes that just build one upon another, and including with project sponsors, you are going to start hearing about how it is working, because we are seeing it. It is small successes building one on top of another, and I hope that you will be hearing similarly, because the Dashboard, the agencies, and the project sponsors, we are getting there. It took more time than we wanted, but we are at a place where I think you will start to see how things are working.

Senator PORTMAN. Well, I appreciate that. This is where the rubber meets the road, and I am going to continue to be impatient because I think it is so critical to get this in place and get it right, in part, frankly, because of the other legislative initiatives that were talked about today, and I do not think more duplication and even inconsistencies or contradictory statutory provisions are going to be helpful, because our goal is to get these projects up and going.

Part of the Permitting Council's charge, as was talked about earlier, is to develop best practices, to streamline processes. Is that correct?

Ms. PFLEEGER. Yes, that is correct.

Senator PORTMAN. One of the best practices that has been identified is agencies jointly producing documents so that duplicative reviews do not have to be conducted by more than one agency. That is just sort of a common-sense part of this. We learned early on about the duplication and the cost in terms of time.

In the testimony we have gotten today on the Byrd Project, we saw that FERC and the Corps were not able to come to an agreement and thus likely create that duplication. Why did FPISC not step in to push for best practices in this case if best practice is to have agencies jointly producing these documents? Do you need more authority to do that, to follow these best practices? In this particular case, why was FPISC not able to get these two agencies to work better together?

Ms. PFLEEGER. So, certainly, yes, that is a vital best practice, the joint decisions. I would have to look at the exact timing here.

One of the things I would say is as the project sponsor just mentioned in the first panel, with the issuance of the FERC license, we are going to be meeting with the Corps to carry out our responsibility for FAST–41 oversight, because once a quarter they have to review the coordinated project plan and the permitting timeline. So we are certainly going to be working with them on enforcing the provisions of FAST–41 and the best practices and joint decisions,

and also using some of the tools of the recent Executive Order that are moving toward these joint documents.

So we agree that is the goal, and we need to enforce that, and that is the next step.

Senator PORTMAN. Yes. And, adding Mr. Frazer in here, duplicative studies is another issue with the Corps and with others, I assume FERC. The idea is to not require that we have duplication of studies, and, again, we have heard about this in some of these projects, including the Byrd Project.

A final question that I have is about funding, and all of you are free to chime in. I assume Ms. Pfleeger has some special insights on this. But, you all have the ability through this fee authorization to develop some resources there, and we heard from some public-private partnerships here earlier that they are willing to do that if they know there is some certainty and they are going to actually get faster review that way. You are looking at a budget request of $10 million, a House appropriations mark of $1 million. You have given our Subcommittee some information, which we appreciate, sort of the level of service chart, which I mentioned earlier, and you talk about what you could do with $4.5 million, what you could do with $15 million, and so on.

Can you just give us today what you have discussed with us in private sessions, which is what is the minimal amount that you and your people need to be able to comply with the statute and actually continue to make the progress we all want to see and take it to the next level? What would that number be? What do you think is necessary?

Ms. PFLEEGER. The President's budget for Fiscal Year 2018 reflects the $10 million that we need to fully execute FAST–41, and we look forward to the funding that will allow us to use every tool that FAST–41 has given us, to work with every agency to get those benefits of the efficiencies from best practices. The Dashboard enhancements, that is going to be a key thing, to make sure we do not just take what the Dashboard has today, but we can fund enhancements to it to make it an even more important tool for that public transparency and accountability. So, yes, the Fiscal Year 2018 President's budget will allow us to do that.

Senator PORTMAN. OK. Are there any further comments from the panel before I excuse you all? Any thoughts? Ms. Colosimo.

Ms. COLOSIMO. I guess the one thing I would say is that we were talking a lot about the law and FPISC and the framework. The thing that is most important to me, and that has happened before we even got to the implementation guidance process last January is that it is really about relationships. We have projects up and we are learning lessons, and I think there is a lot of goodness there. But I think it is about reconnecting across agencies because we have been constrained by resources for a long time, so we have been in our own silos.

I think a lot of the documents matter, but it is knowing who to call and how to frame the question and how to try to negate those problems through these relationships. I think that has been largely successful for all of us. These are complex projects on the dashboard, and that is important to remember. We do not want all the

goodness we do on the routine things to go away, but these complex projects require important relationships.

Senator PORTMAN. I think that is an important point, and that is what I was saying earlier in terms of the importance of each of you and others who are in attendance at the hearing today or watching this proceeding. These agencies and the people who are in charge of providing the information is what is going to sink this or make it succeed. I liked your comment, Ms. Pfleeger, earlier when you said that FAST–41 has already enabled us to break down—and I will quote you—"agency silos." You mentioned silos, and that has been one of the issues, not just with regard to permitting but with regard to other coordination. I think this is a great framework to be able to do that. So thank you for your personal commitment to this, each of you. And to Ms. Pfleeger, I have told you before we appreciate your service and continuing to push hard. I do think more certainty and predictability is part of this, and that is why we need a permanent Director.

I want to thank all the witnesses for their testimony. On this panel, as you can tell, we have high hopes for this to succeed. We have a lot of interest on both sides of the aisle to make this not just a law that was important to pass but implementation that is actually effective in getting people more opportunity to create more jobs, better jobs, not just through the construction of these projects but also because these projects will lead to a better economy and better wages, better jobs. So it is an exciting opportunity as we are beginning to talk about infrastructure. I think it is going to come back a lot to, as George Voinovich used to say, because he was quoted earlier by my colleague Senator Carper, I have to quote him, too, because he is from Ohio. But he used to always say we are doing more with less. We are not actually talking about less. We are talking about some increases in funding here, and we have to do more. We have to figure out how to make that dollar work as effectively as possible in our budget-constrained environment.

So thank you very much for your testimony. We appreciate it. Please stay in touch with us. Our team back here is going to do some follow up on some of the questions that I asked and some of them we did not get to, and we appreciate your responses and look forward to continuing to work with you.

This hearing is now adjourned.

[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]

APPENDIX

1

STATEMENT OF CHAIRMAN ROB PORTMAN
U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
Cutting Through the Red Tape: Oversight of Federal Permitting and the Federal Permitting Improvement Steering Council
SEPTEMBER 7, 2017

Our nation's infrastructure is aging, outdated, and in some cases unsafe. It's hurting our economy and our ability to create good paying jobs.

Reports consistently show that infrastructure in the United States is lagging behind other developed countries and one reason cited is the time and cost to get a green light to build something.

The World Bank ranks the United States 39th in the world for dealing with construction permits[1]— down from 26th in 2008[2].

In its *2017 Infrastructure Report Card*, the American Society of Civil Engineers gave the United States a "cumulative GPA" of D+ ranging "from a B for Rail to D for roads."[3]

These are not the kinds of grades you want to take home to your family.

It is clear we must rebuild our infrastructure to improve our nation's roads and bridges, pipelines, ports, and waterways, and manufacturing facilities.

While underway, these projects create good jobs.

And after they are completed, improved infrastructure encourages more economic growth and business startups, further helping the U.S. economy.

The president's budget calls for $200 billion in infrastructure funding that can be leveraged for a $1 trillion investment into highways, ports, transit, broadband, energy, and other infrastructure projects.

Given the serious budget problems our nation faces, we have to be sure whatever funding set aside for infrastructure development is used in the most efficient way possible.

And in order to get the most out our investment, we must fix the process the federal government uses to approve infrastructure projects.

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[1] The World Bank, Doing Business: Measuring Business Regulations, Dealing with Construction Permits, June 2016, *available at* http://www.doingbusiness.org/data/exploretopics/dealing-with-construction-permits.
[2] The World Bank, Doing Business: Measuring Business Regulations, Dealing with Construction Permits at 143, June 2008, *available at* http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB09-FullReport.pdf.
[3] American Society of Civil Engineers, *2017 Infrastructure Report Card*, *available at* https://www.infrastructurereportcard.org/americas-grades/.

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Let me give you an example: right now, when a project sponsor wants to build a new source for hydropower, that sponsor has to brace itself for a permitting process that could last ten years.

I first got involved in this issue 6 years ago because American Municipal Power came to me to talk about their frustration with getting approval on their R.C. Byrd hydropower project on the Ohio River.

I'm glad that Marc Gerken -- the CEO of American Municipal Power, which is the sponsor of the R.C. Byrd project -- is here today to explain why it's taken so long to get their project permitted, and what the impact has been.

How many of us are willing to undertake ten years of applications, studies, and uncertainty before we even get started building a project? Capital is just not that patient.

In 2013, Sen. McCaskill and I introduced legislation called the Federal Permitting Improvement Act to help streamline the permitting process. In 2015, Congress enacted that legislation as Title 41 of the FAST Act – now called FAST-41. This bipartisan project with the support of Sen. Carper and a 12-1 vote of this Committee was all about making the permitting process more efficient and effective.

We recognize that the permitting process is important—projects should be built in the right way that takes care of the environment and follows the law.

But too often, permitting requirements from different agencies overlap or conflict with each other.

And they lead to delays that hamstring our ability to improve economic growth and job creation.

Our hope was that FAST-41 would help solve these problems.

And we weren't the only ones—everyone from the Chamber of Commerce, to the Natural Resources Defense Council, to the Building Trades unions saw that our infrastructure permitting process is broken and needs to be fixed.

All three of those groups are here today to share their perspectives. We were grateful for their critical support in the process and are grateful for their insights today.

One problem we all identified was a lack of accountability.

FAST-41 created a process for so-called "covered projects" that assigns one accountable agency to serve as the lead agency on each project.

That agency gets together with all of the other relevant agencies to come up with a permitting timetable.

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The agencies have to post that timetable on a Permitting Dashboard, so the project sponsor and everyone else can see what these timelines look like.

Then, if an agency misses a deadline, it has to explain why.

FAST-41 also created a Council—the Federal Permitting Improvement Steering Council—that sits at the Office of Management and Budget to oversee the permitting process and to help resolve conflicts between agencies.

In my experience, more transparency leads to greater accountability.

Here, FAST-41was designed to leverage that accountability to increase efficiency in the permitting process.

As some of you know, I've been concerned about some aspects of its implementation.

I'd like to touch on three issues:

First, although the Permitting Council has been making progress recently, I am concerned about how long it's taken to get the structure off the ground.

The Obama Administration failed to appoint an Executive Director for the first six months that the Council existed.

In January, President Obama's Executive Director stepped down during the transition to a new administration, and Janet Pfleeger, who has been serving admirably as Acting Executive Director and who we'll hear from today, stepped in to fill the gap.

But we still *do not* have a permanent Executive Director.

We've sent suggestions of people who the Administration should consider for the permanent role, both from the public and private sectors.

For the Council to be truly effective and fulfill its mandate, we need a permanent Executive Director in place soon, and I know Janet agrees.

Second, the Council needs sufficient funding.

The Council currently is funded at $4.5 million.

The President's budget requested $10 million for its operations, which the Council has indicated to us is the minimum amount needed to do the job Congress has given them.

However, the House budget proposes funding at only $1 million.

Senate appropriators must fully fund the Council and its efforts for it to function as Congress intended.

Without objection, I will enter into the record a level of service chart from the Council.

We want to see the Council succeed in its mission to streamline permits and be able to expand to improve the process for more projects—it needs sufficient funding to accomplish those goals.

And third, the agencies that sit on the Council need to fully buy into the process and cooperate with the Council's goals.

I appreciated the opportunity address the Council at its first meeting under the new Administration.

I was glad to see broad participation at that meeting, but I conveyed the message there, and I'll convey it now: agencies on the Council need to be fully engaged for this process to work.

The Obama Administration released guidance on its way out the door that said independent agencies like the Federal Energy Regulatory Commission and Nuclear Regulatory Commission don't have to fully comply with FAST-41.

But that's not what the law says.

Independent agencies are expected to fully comply with the law.

I noticed that Bill Kovacs from the Chamber of Commerce has provided in his written testimony a useful chart that examines whether agencies have met their statutory obligations to post information to the Dashboard.

For some agencies, including the Nuclear Regulatory Commission, Housing and Urban Development, Agriculture, and Interior, the Chamber assesses that their compliance with their statutory obligations has been "minimal at best."

I'm eager to hear more about that in Mr. Kovacs's testimony today and learn what the government witnesses have to say about agency participation on the second panel.

The goal of this hearing is to determine how we can stretch the federal dollar to get the most bang for the buck—how we can rebuild our aging infrastructure, and to do so more efficiently and effectively.

If we do so, it will give an important boost to our economy and lead to more job creation and higher wages.

I'm looking forward to learning how our witnesses think the FAST-41 process is going and what it can do to help us achieve those goals.

Opening Statement of Ranking Member Carper: "Cutting Through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"

Mr. Chairman, thank you for holding this hearing today and, especially, for the leadership that you and Senator McCaskill have shown on the issue before us.

One of the many things that you and I agree on is the need for us to invest in our nation's infrastructure and put more people to work on projects that will help our economy continue to grow, for example, by building and rebuilding our roads, highways, bridges, railroads, and airports, as well as deploying broadband in rural parts of America.

Today's hearing will focus on the work that occurs before we put shovels in the ground to get a project started.

As a longtime member – and now the Ranking Member – of the Environment and Public Works Committee, I've thought a lot about how we can build infrastructure projects smarter and more cost effectively. I've also thought a lot about how well the rules and permitting processes we have in place work, and how they sometimes don't work as well as they could.

There are times when coordination between the agencies responsible for vetting a project isn't done well and projects are delayed without good reason. So I've supported reasonable changes designed to improve the permitting process, and done so in both of the last two transportation infrastructure laws we've adopted, as well as the last two Water Resources Development Act laws.

One of my top priorities at EPW is to ensure that these initiatives are implemented fully and effectively, while ensuring that we don't cause needless delays in the ultimate implementation of the measures that may have been adopted earlier.

A March 2017 report by the U.S. Department of Transportation's Office of Inspector General provides us a cautionary tale about enacting new streamlining measures before the old ones are given a chance to work. That report found that some of what we did in the FAST Act – our most recent transportation law – may have actually delayed the implementation of some of what we did to speed projects along just a few years before in 2012.

In addition, it's become clear through our work at EPW that there are a number of permitting changes included in the last two versions of the Water Resources Development Act that have not even begun to be implemented by the Army Corps of Engineers.

It is critical that the provisions we enact in this area be fully implemented so we can understand the impact they'll have before we look to do more. To be able to do that, we need effective oversight like we're doing here today.

That brings me to the main topic we'll be discussing at this hearing, Mr. Chairman – the provisions you and Senator McCaskill were able to include in the FAST Act to better coordinate agency permitting activities and improve transparency for certain major infrastructure projects.

There is clear value in the reforms set in motion by the Portman-McCaskill law and the Federal Permitting Improvement Steering Council it created. I look forward to hearing more details today about how all of them are working. I'm especially interested in learning about how the transparency the new law offers regarding agency permitting timelines can speed things along, and about how the sharing and adoption of best practices for project review can help agencies work smarter.

That said, it's become clear to me in examining the work you and Senator McCaskill have done that strong and effective senior leadership at the Council and at the agencies responsible for a given project is key. It's important, then, that the President appoint a skilled and capable permanent Executive Director for the Council who is equipped with the authority necessary to push projects through to completion.

Before we hear from our witnesses, Mr. Chairman, I'd like to briefly make a few additional points and then close.

First, it's important to note that, while we all want permitting decisions to occur quickly, the rules and processes we have in place are not just "red tape." They're intended to help agencies make good decisions that protect public health and natural resources. They also ensure that state, local, and tribal stakeholders have a say. If this work is well-coordinated, it can improve outcomes, reduce costs, and identify potential conflicts early on. A strong Federal Permitting Improvement Steering Council can help make sure that happens more often.

Second, while environmental reviews are often blamed for project delays – and in some cases, that's true – studies have shown that projects are usually held up for other reasons – lack of capital funding for large projects being chief among them.

Similarly, limited resources at permitting agencies like EPA and the U.S. Fish and Wildlife Service can diminish their ability to engage early and complete their work on time. So we should work to ensure that all of the agencies involved in getting infrastructure projects off the ground – including the Federal Permitting Improvement Steering Council – have the resources they need to do their jobs well.
Finally, in closing, Mr. Chairman, I want to congratulate you and Senator McCaskill for the bipartisan work that went into the permitting reforms we'll be discussing today. I know how difficult it can be to get consensus on these issues. You and Senator McCaskill deserve our thanks for authoring legislation that promises to create jobs while building and rebuilding our infrastructure more quickly, all with the support of the business community, labor unions, and the Obama Administration.

My thanks again for holding this hearing. I look forward to hearing from our witnesses.

U.S. Senate Homeland Security and Governmental Affairs Committee
Permanent Subcommittee on Investigations

Cutting Through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council

Washington D.C.

September 7, 2017

Written Testimony of

Marc S. Gerken, PE, CEO/President,

American Municipal Power, Inc. (AMP)

Summary Points

- American Municipal Power, Inc. (AMP) is the wholesale power supplier and services provider for 135 member municipal electric systems in nine states. AMP has a diverse generation portfolio, including a mix of fossil and renewable resources.
- AMP has a unique perspective on infrastructure development and regulatory processes as we are in the process of completing the largest development of new run-of-the-river hydropower generation in the United States today. Our four projects are located at existing U.S. Army Corps of Engineers (USACE) dams along the Ohio River.
- Hydropower projects are expensive to build and typically begin as above-market resources; however, their operational, economic and environmental attributes make hydropower a good investment in the long term.
- Regardless of where in the country you are located, the siting and permitting processes for any new generating asset are not for the faint of heart; the licensing and permitting processes for hydropower are especially arduous and typically take more than a decade.
- While the Federal Energy Regulatory Commission (FERC) is the lead agency, approvals for hydropower developments must come from myriad federal and state agencies and require separate permitting by the USACE and state resource agencies.
- Licensing for the R.C. Byrd Project, which would be located at the Gallia Locks and Dam in Ohio on the Ohio River, began in 2007. A decade later, on August 30, 2017, FERC just issued the final license, with the delay largely due to issues raised by the USACE.
- The R.C. Byrd Project licensing process is part of the initial Federal Permitting Improvement Steering Council (FPISC) inventory. To date, our experiences with the permitting dashboard and FAST-41 processes have shown improvements in timeliness, predictability, and transparency. However, it is critical that these improvements continue during the permitting stages.
- The hydropower licensing and permitting reform legislation that the US Senate and House are considering will also improve processes. However, additional steps can be taken to: avoid unnecessary studies, establish and recognize best practices, coordinate scientific reviews and credit project developers for time lost during permitting.

Good morning, Chairman Portman, Ranking Member Carper and distinguished members of the Subcommittee. My name is Marc Gerken. I am a registered professional civil engineer and the Chief Executive Officer of American Municipal Power, Inc. I commend you for holding this hearing and I am pleased to have the opportunity to appear before you this morning to discuss the importance of reasonable, timely and cost-conscious permitting of generation projects, as well as the Federal Permitting Improvement Steering Council and FAST-41 process.

AMP is the non-profit wholesale power supplier and services provider to 135 member municipal electric systems in nine states, including the home states of the Chairman and Ranking Member. More information on AMP, our assets and operations appears in the next section of this written testimony.

While I am appearing today on behalf of AMP, I am the former Chair of the National Hydropower Association (NHA) Board and I currently serve as Co-Chair of the NHA CEO Council. I am also the former Chair of the American Public Power Association (APPA) Board of Directors. AMP is an active member of both organizations.

AMP has a unique perspective on infrastructure development and regulatory processes as we are in the process of completing the largest development of new run-of-the-river hydropower generation in the United States. Our four new projects located in Kentucky and West Virginia at existing U.S. Army Corps of Engineers (USACE) dams along the Ohio River total more than 300 megawatts (MW) and represent nearly $2.6 billion in capital investment, along with an estimated 1,600 direct jobs, more than 1,000 indirect jobs, $342 million in payroll and the use of vendors from at least 12 states during construction. (Our four new projects join with existing hydropower projects that AMP and AMP members own to total more than 600 MW of hydropower in the region.)

We appreciate the support provided by Senator Portman for our projects, as well as his efforts and those of other subcommittee members to pursue balanced regulatory reforms.

I have been asked to discuss the licensing and permitting process for our remaining hydropower project -- the proposed 48 MW R.C. Byrd run-of-the-river hydropower project, which would be located in Ohio at the existing USACE Gallia Locks and Dam on the Ohio River. The project is one of the 34 projects in the initial FPISC inventory of covered projects. This written testimony includes information about AMP, hydropower and our infrastructure development experience followed by detailed information on the project, its history and my staff's experience with the FPISC process.

Background on AMP

AMP is a non-profit wholesale power supplier and service provider for 135 members, including 134 member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana and Maryland, and the Delaware

Municipal Electric Corporation, a joint action agency with nine members, headquartered in Smyrna, Delaware. These member utilities combined serve more than 650,000 customers. AMP is based in Ohio and has more than 177 employees at its headquarters and generating facilities. The organization is governed by a 21-member Board of Trustees comprised of member community officials.

AMP's core mission is to be public power's leader in wholesale energy supply and value-added member services and AMP is one of the largest public power joint action organizations in the country. We offer our member municipal electric systems the benefits of scale and expertise in providing and managing energy services. AMP's diverse energy portfolio makes it a leader in deploying power assets that include a variety of baseload, intermediate, and peaking generation, using coal, natural gas, hydropower (our new projects as well as older projects), solar, wind and diesel assets, as well as a robust energy efficiency program.

Last year, the organization sold 16.7 million MWh of energy, with power sales revenue of $1.2 billion and total assets of $6.7 billion. In addition to power supply, AMP offers a variety of services to its members to assist in their service to their customers, including: engineering, financial, environmental, sustainability, generation operations, legal, mutual aid coordination, safety training and regulatory support.

AMP utilizes third-party nationally recognized firms to develop strategic long-term power resource plans for each of our members. Our members then use this information as part of their local decision-making regarding their power supply planning with respect to purchase power agreements and generation project investments.

We offer our members the opportunity to subscribe to each generation project, providing them with an independent feasibility study, beneficial use analysis and market projection provided by third-party experts. Members who choose to participate in a project do so only after affirmative action by their local governing board and execution of a take-or-pay power sales contract. Our projects move forward if we achieve the critical mass of AMP member participation required. When projects advance, a committee representing our participating member communities is formed to govern major project decisions.

AMP finances our projects using a mix of tax-exempt and taxable bonds. Since 2000, all AMP construction project financing ratings have been in the "A" category and AMP has maintained an A1 entity rating from Moody's (the only agency to offer such a rating). Because of the importance of tax-exempt financing to our infrastructure projects, we have been working in tandem with other state and local government groups to protect this essential mechanism in the context of congressional tax reform.

We also utilized Build America Bonds to finance our hydro and coal investments and New Clean Renewable Energy Bonds to finance our hydro investments. Unfortunately, the

federal payments promised with these direct pay bonds were subjected to budget sequestration, which has resulted in our participating members and their consumers losing more than $20 million to date and an estimated $42 million more over the life of the sequester. We strongly encourage that this situation be corrected and the sequestration of these bonds end in the next budget cycle.

Our philosophy is not to place all of our eggs in one basket, but to diversify our generation resource portfolio to include fossil fuel assets, renewable assets, purchase power agreements and energy efficiency so that our members can blend costs and risks. Our projects represent fuel, technology and geographic diversity, and will yield a long-term, risk-balanced portfolio with predictable rates. We firmly believe this is the best approach.

Hydro Benefits and Opportunities

As a public power entity, AMP is unique in our resource planning approach because we are able to take a longer view than investor-owned utilities that are subject to quarterly profit reports. Our member city, village, town and borough council members have been willing to invest in certain projects that will be above market in the early years because of the overall benefits in the long term. Our development of hydropower generation is a good example – the price of power from these facilities will be above market in the early years, competitive in the middle years, and below market in the later years once the debt service is paid off. However, when you take into account the many positive attributes associated with hydropower, the value of the investment is clear even in the early years.

Hydropower projects are capital intensive, but have many very attractive qualities, including:

- The ability to provide baseload power (unlike many other renewable resources);
- Dispatchability (we can forecast the output a day ahead);
- The ability to provide ancillary services and grid support;
- No fuel risk (meaning no hedging exposure, no counterparty risk and no transportation risk);
- No waste stream;
- Low operation and maintenance costs;
- Reliability;
- Predictable rates;
- Limited regulatory risk (once operating);
- A long life span (80 to 100 years); and
- No emissions (a sustainable resource and the leading form of renewable energy in the country).

Hydropower projects can also provide a significant revenue stream to the federal government. For instance, AMP's budget for FERC fees for 2018 across our projects is in excess of $5 million. Additionally, the USACE receives electricity at no cost from the projects for lock and dam operations, which amounts to an additional $900,000 a year from our projects.

Hydropower does have limitations, particularly in our region where the number of existing dams and the generation capacity are finite; however, more can still be done with hydropower even in our region, and the figures regarding untapped hydropower nationally are staggering.

In July 2016, the Department of Energy (DOE) released "Hydropower Vision: A New Chapter for America's 1st Renewable Electricity Source." This analysis found that as of the end of 2015, the U.S. hydropower generation fleet included 2,198 active power plants with a total capacity of 79.6 GW and 42 pumped storage hydropower (PSH) plants totaling 21.6 GW, for a total installed capacity of 101 GW. At the beginning of 2014, hydropower supported approximately 143,000 jobs in the United States, with 2013 hydropower-related expenditures supporting $171.1 billion in capital investment and $5.9 billion in wages paid to workers.

Looking to the future, the analysis predicts that "U.S. hydropower could grow from 101 gigawatts (GW) of capacity to nearly 150 GW by 2050. Growth under this modeled scenario would result from a combination of 13 GW of new hydropower generation capacity (upgrades to existing plants, adding power at existing dams and canals, and limited development of new stream-reaches), and 36 GW of new pumped storage capacity."

Hydropower resources can play an important role in efficient operation of the grid. Hydropower, like natural gas, can be a good partner for balancing resources like wind and solar, and can provide ancillary services such as frequency control, regulation, load following, spinning reserves and supplemental reserves. Natural gas and some hydropower resources have the capability to come online quickly and provide significant rotating mass (inertia). Hydro pumped storage is the only widely implemented grid-scale energy storage technology. The benefits to the grid are considerable, including deferral or avoidance of costly transmission upgrades at a time when the North American Electric Reliability Council (NERC) has estimated that 27 percent of grid upgrades are related to integrating wind and solar resources.

Hydropower Licensing and Permitting

Regardless of where in the country you are located, the siting and permitting processes for any new generating asset are not for the faint of heart. The regulatory approval process for each type of new generating source presents its own unique challenges. As

a developer, you must be passionate about the benefits that will result from your project, have supportive participants, flexible financing, be open to working with various stakeholders, be committed to the project, and willing to tackle the unanticipated challenges that present themselves.

As a developer, you have many challenges and opportunities. One of your key challenges is to keep costs down and stay on schedule – escalation can kill even the best project, and as the old adage goes, "time is money." The regulatory process plays a critical role in a project schedule and ultimately can drive whether or not a project comes to fruition.

It's important to note that most developers don't enter the regulatory process with unreasonable expectations – we understand the need to balance environmental protection with economic development, and that there will be some bumps along the road. Unfortunately, regulatory timelines don't align efficiently across the numerous required permits, various agencies and different jurisdictions – it's not an A to Z process. Across our various projects, AMP has worked with dozens of different state and federal regulatory bodies throughout the air, water, waste, transmission and siting permitting processes. Attachment B is a listing of the various agencies that AMP has worked with during our permitting for both fossil fuel and hydro resources.

Developers must carefully time the required modeling, studies and site assessments when preparing their regulatory schedules as some studies have seasonal or weather limitations that must be taken into account. For instance, there are only limited months of the year when you can perform certain tree clearing work in our region because of the migratory habits of the Indiana bat.

Based on our experience, the timeframe from inception to commercial operation for new natural gas combined cycle generation is four to five years – approximately two years of which is dedicated to required regulatory permitting approvals, and the remainder to siting, contract and equipment vendor negotiation, construction and commissioning. Coal and nuclear developments have a much longer timeframe. And, while the development timeframe for wind and solar resources is shorter, those projects are not necessarily "easier" compared to fossil fuel generation – you still may potentially deal with "NIMBYism" and multi-faceted approval processes that can involve both state and federal agencies.

Despite hydropower's many positive attributes, hydropower faces an extremely arduous approval process. The time from initial application to final approval from regulatory agencies can best be described as a gauntlet, typically taking a decade and costing millions of dollars.

During the FERC licensing process, the public and mandatory conditioning agencies, including State and Federal Fish and Wildlife Service (FWS) agencies, are consulted.

This consultation is to ensure that activities during initial construction and ongoing operation are carried out in a manner that safeguards wildlife, including endangered or threatened species. In addition, USACE serves as a mandatory conditioning authority under Section 4(e) of the Federal Power Act. The USACE uses this authority to influence the direction and extent of FERC license articles. Through a Memorandum of Understanding (MOU) with the USACE, FERC includes a series of license articles that were created to help protect the USACE navigation interests established in the Rivers and Harbors Act of 1899. The articles also include a requirement that the licensee provide power for the USACE dam for the term of the license.

After the FERC license process has been completed, the USACE has several regulatory approvals that an applicant must obtain to get a final approval to start construction of a hydropower project. One of these regulatory processes involves Section 10 of the Rivers and Harbors Act, which prohibits unauthorized obstruction or alteration of any navigable water without a permit from the USACE. The USACE retains its post licensing authority under Section 404 of the Clean Water Act, which regulates the discharge of dredged, excavated, or fill material in wetlands, streams, rivers, and other U.S. waters. In general, to obtain what is termed the "404 permit," applicants must demonstrate that the discharge of dredged or fill material will not significantly degrade the nation's waters and that there are no practicable alternatives less damaging to the aquatic environment.

Prior to issuance of the 404 permit, a "408 Approval" must be provided by the USACE. The intent of this approval is to protect government property and ensure the facilities are not compromised by other non-federal developments. The Section 408 Approval is granted by the USACE once they complete their evaluation of a project, involving reviews of the technical aspects of a project, specifically the water retaining structures and their interface with the existing USACE facilities, as well as completion of a physical hydraulic model to verify that a project will not have any detrimental effects on navigation into or out of the locks.

It is interesting to note that the USACE 408 approval process for run-of-the-river hydropower is a new obligation. AMP was the first hydropower developer required by the USACE to obtain a 408 Approval in addition to the 404 permit. Unfortunately, this extended our permitting timeframe by roughly to two and a half years for one plant and an average of one year across all four new projects.

USACE authorizations begin at the District level where the locks and dams are operated, but also require approval from the Division, and ultimately from the Director of Civil Works from the USACE Headquarters. In our experience, there is wide variability between the District evaluations. For example, some Districts will defer to FERC license-based evaluations by the State Preservation Office for cultural impacts, and state and federal FWS agencies for issues within their areas of expertise. However, another District will

conduct a repetitive evaluation of these same criteria and reach different conclusions. In the case of R.C. Byrd, the USACE responded to FERC's Environmental Assessment (EA) by stating that the USACE would pursue the same issues they raised, but that FERC determined should not be included in the EA, to their satisfaction through their subsequent permit process. As such, for planning purposes, it is assumed that the issuance of the 408 Approval and 404 Permit will take anywhere from 12 to 36 months after issuance of the FERC license in spite of many of the issues having already been resolved by FERC.

This method of permitting costs licensees millions of dollars in capitalized interest. Extended permitting timeframes and redundant review of issues has caused AMP to not award supply contracts until after permits are issued, which results in longer construction schedules and increased costs. For our recent hydropower projects, AMP had to delay financing at significant cost to members. By a point of comparison, we estimate that we lost 50 basis points for financing our hydro projects when compared to our financing for our investment in the Prairie State Generating Company over a six month period. This was a direct result of uncertainty associated with USACE permitting.

Our Willow Island project located in West Virginia provides an example of the challenges that developers face when undertaking significant infrastructure projects and how those challenges can result in delays. In order for AMP to gain approval for the USACE's Section 408 and 404 permits, the USACE required AMP to perform more than $1.5 million in archaeological work at the powerhouse site adjacent to the dam in a location where the USACE had itself previously re-routed a creek, excavated and filled over known archaeological sites. From 2008 to 2011, AMP was required to undertake three progressively more expensive and elaborate archaeological investigations that involved probes, test pits, more than 24 backhoe trenches and finally full excavation of bones, mussel shells and charcoal pieces that were sent to labs for further evaluation. All of the required work was justified by the USACE as necessary to address research questions regarding the nature of 2,000-3,000-year-old settlement patterns in the area; however, the items found were common along this stretch of the Ohio River, which is a known artifact area.

In addition to the FERC license and the USACE's Section 408 and 404 permit processes, the Environmental Protection Agency (EPA), through the states, requires a 401 Water Quality Permit under the Clean Water Act (CWA). The intent of the 401 Permit is to provide for the protection of the physical, chemical, and biological integrity of water bodies.

A developer must have significant capital (millions of dollars in many cases) to cover the cost of the hydropower project through permitting, including: subsurface core drilling, hydraulic model studies, design and initial payments for equipment with long lead times.

Long-term financing is unlikely until a developer has all of the required permits in hand, which can drive both the timing of the access to the market and the cost of money.

R.C. Byrd and FAST-41

In 2007, AMP decided to pursue a license for a 48 MW hydropower plant at the R.C. Byrd (Gallia) Locks and Dam on behalf of the AMP member community of Wadsworth, Ohio (the licensee) for potential subscription to interested AMP members.

In April 2007, a Preliminary Permit Application (PPA) was filed with FERC by Wadsworth, effectively beginning the process. Meetings were held with the USACE to review the project and plans in November 2008 at the project site with several USACE staff providing input on the project concepts. Attachment A is a detailed timeline of the regulatory process to date for FERC Project No. 12796.

Based on those early engagements and input from the USACE, a proposed project concept was developed. In June 2009, AMP filed with FERC (and served copies to the USACE's Huntington District) the Notice of Intent and Preliminary Application Document (PAD). This action initiated the more formal process and provided an opportunity for agencies to express their concerns and comment on likely conditions. In theory, this establishes a pathway and transparency for an applicant that will ultimately be seeking USACE 404 and 408 permits, as well as operating agreement approvals later in the approval process.

In October 2009, AMP held a joint regulatory agency and public meeting regarding the proposed project. In June 2010, AMP met with West Virginia DNR (WVDNR), Ohio DNR (ODNR), USACE, USFWS, and two consultants to discuss specific project studies and surveys that would meet agency needs.

By November 2010, the studies were completed and submitted to various state and federal agencies for review along with AMP's draft FERC License Application. Comments were solicited from all agencies and stakeholders on the full project proposal including protection, mitigation and enhancement measures. Based on those comments, AMP adjusted its proposed project development plan and submitted its final FERC license application in March 2011.

Shortly after the filing of the final license application in 2011, FERC arranged for the USACE, specifically the Huntington District, to be a cooperating agency in developing the National Environmental Policy Act (NEPA) environmental assessment for the Project in order to avoid multiple NEPA documents being needed.

Due to the location of the proposed plant, in 2008 and 2009 AMP also met with the Ohio Department of Transportation (ODOT) regarding the need to relocate State Highway 7. By September 2010, AMP had worked with ODOT on a clear process to design a

compliant highway relocation. From 2008 through 2012, AMP held several meetings with local land-owners who were generally supportive of the project going forward. Approximately 35 property owners would be directly affected by the relocation of State Highway 7.

In February 2012, FERC provided formal notice that the application was complete and ready for its NEPA analysis and requested terms and conditions from resource agencies. In March 2012, FERC held a public scoping meeting with all of the necessary state and federal agencies to identify any additional studies or information that was needed.

In December 2012, the USFWS, WVDNR and ODNR provided their comments and terms and conditions on the final licensing proposal. FERC worked with the federal and state agencies to incorporate necessary conditions into the draft EA and issued it on July 8, 2014.

From the point of the initial regulatory scoping process, five years had been spent on permitting this project. But that was the easy part. From this point on, the process slowed down significantly. The USACE expressed additional concerns over mussels and the impact of the project on dredging that the USACE does downstream of the dam. The USACE continued to raise concerns, including new concerns not previously identified, which appeared to be an intentional effort to prevent the project from proceeding. As an example, after working with FERC to draft the EA issued July 8, 2014, an additional 38 pages of comments that needed to be addressed were submitted on August 7, 2014 by USACE. A subsequent revised version reduced the length to 25 pages. FERC issued a final EA for the project on January 23, 2015.

The USACE has repeatedly taken the position that any comments not resolved by FERC or AMP to the USACE's satisfaction will have to be addressed in their 408 and 404 permits, which are obtained after the FERC license is issued. This position has been reiterated on several occasions, including a letter dated January 22, 2015. In June 2015, FERC held a conference call with all affected state and federal agencies. During that call, USACE staff's persistent skepticism of conclusions in FERC's draft and final EA resulted in what appeared to be frustrated FERC staff abruptly ending the call.

Much of 2016 was spent gathering and submitting additional information to FERC in an attempt to address USFWS and USACE comments. During this time, USFWS continued their evaluation of whether the project would impact endangered species, including freshwater mussel species and the Northern Long Eared Bat. Through a lengthy exchange, concurrence was reached between FERC and USFWS (which has both the statutory responsibility and technical expertise on Endangered Species Act determinations) that the project would not likely jeopardize endangered mussels or bats and the final Biological Opinion (BO) was issued by the USFWS in June of 2017. Due to disagreements with FERC's conclusions, USACE withdrew support of FERC's

determination and explained that USACE would address the same issues through the 404 and 408 permit process to their satisfaction. In late August, FERC issued the final programmatic agreement for cultural resources management.

FERC issued the license on August 30, 2017 and AMP was reviewing the license conditions at the time of finalizing this testimony. The next steps will be for AMP to begin implementing the license requirements and subsequently pursue 404 and 408 permits from the USACE.

AMP's economic commitment to this project now exceeds $4 million.

I understand that the FAST-41 effort originated with the Fixing America's Surface Transportation (FAST) Act which was signed into law on December 4, 2015. Title 41 of the FAST Act (FAST-41) was designed to improve the timeliness, predictability, and transparency of the federal environmental review and authorization process for covered infrastructure projects.

The Federal Permitting Improvement Steering Council (FPISC) as authorized, is composed of agency Deputy Secretary-level members and chaired by an Executive Director appointed by the President. FAST-41 established new procedures that standardize interagency consultation and coordination practices.

Along with other provisions to address the project delivery process and track environmental review and project milestones, the Permitting Dashboard was codified into law to track project timelines, and increase transparency, predictability and accountability. However, participation by agency stakeholders is voluntary and state agencies are currently not participants.

Other goals of the Permitting Dashboard are to improve early coordination of schedules for environmental reviews and to identify inter-agency disputes and delays in the permitting process.

AMP's experience with the FAST-41 process began on September 22, 2016, when R.C. Byrd was included as one of the 34 projects in the FPISC inventory of covered projects. In early 2017, AMP staff participated in two conference calls to educate and familiarize FAST-41 staff with hydropower permitting and explain specific challenges associated with R.C. Byrd. We also exchanged information with Senate staff who were following the process.

At that point, progress on the project was at a standstill due to a disagreement about the necessary timing of a Physical Hydraulic Model Study, estimated to cost $1-$2 million. USFWS and USACE requested that AMP complete the full hydraulic study prior to receiving the FERC license. AMP agreed to perform the study post-license but has been unwilling and unable to do so pre-licensing, as it would put the study cost at risk if the

project did not proceed. As an alternative to performing the full study prior to license issuance, AMP provided as much detail as possible, recognizing that this project was notably similar to our other recent projects. As noted in a FERC letter, the impasse resulted in USFWS's inability to draw a conclusion on whether the project would adversely affect mussels and bats.

Shortly after our communications with FAST-41, FERC issued a letter explaining its EA to USFWS and requesting concurrence within 30 days from the date of receipt of the letter. Notably, FERC also indicated that FERC would take failure to respond as concurrence that FERC had met its responsibilities and would resolve the matter. Consequently, USFWS concurred and issued a final Biological Opinion on June 19, 2017. As noted above, the final license was received on August 30, 2017, and is under review by AMP.

While the FAST-41 Committee has released permit and license processing guidance and successfully developed and continues to maintain the Permitting Dashboard, our experience places the value of FAST-41 on: (1) agency accountability through making agency actions and timeliness highly visible; and (2) the ability to informally resolve longstanding disputes and shepherd permits/licenses to completion. To that end, we are thankful for the assistance we received to break a log jam and encourage the committee to continue its efforts.

It's important to note that in the case of hydropower projects, it will be especially important that the FIPSC process continue into the permitting phase.

We are also curious about how the process will accommodate a heavier workload when the initial stages are broadened.

Process Improvements

When pursuing authorization for a new hydropower plant or even a renewal of existing permits and licenses, the general industry recommendation is to start 10 years in advance and estimate several million dollars. While the process may ultimately be completed sooner and less costly, this is the general starting point/rule of thumb. These initial investment costs are considered at-risk developmental dollars due to the unknown nature of potential opposition or concerns and resulting project terms and conditions.

The time and cost alone are a significant impediment to new hydropower development, especially in the face of other competitive generation options. While FERC has exclusive authority to issue licenses, other federal and state agencies, including USACE, both interface with the FERC process and conduct separate duplicative regulatory evaluations and permitting processes. As you know, each agency operates using their own respective guidance documents and regulations.

Unfortunately, there is no silver bullet to streamlining and accelerating the license and permit approval labyrinth. Although the shared goal of DOE, USACE, FERC and private developers as outlined in the Hydrovision Report highlights the substantial domestic energy generation potential that remains untapped within the United States, the regulatory process has negatively impacted the ability to execute this goal.

As with many complicated processes, I firmly believe that a multi-pronged approach is necessary to ensure that as many of the nuanced challenges are addressed as possible.

AMP is supportive of the hydropower reform legislation that has been enacted by Congress over the past few sessions, as well as the pending legislation that would streamline processes. We also appreciate the Trump Administration's efforts on regulatory reform.

Improving the federal process is perhaps the most tangible approach within reach. Thankfully, streamlining the federal hydropower licensing process enjoys both bipartisan and bicameral support. A key feature of S. 1460, the Energy and Natural Resources Act of 2017, would designate FERC as the lead agency for all environmental reviews, authorize FERC to set a schedule for all permitting, enable FERC to incentivize additional environmental improvements during the licensing term, and streamline the process for license amendments to enable efficiency improvements and capacity additions at existing projects. Companion hydropower licensing reforms are contained in stand-alone legislation in the House. S. 1460 is awaiting action by the full Senate.

These are profound changes that will have a direct impact; however, more can be done to help streamline the process and eliminate overlapping reviews to make the process more predictable and economically viable. The following are suggestions based on our experience:

- Identify administrative policies that add cost and time to the license process with limited or no benefit. As an example, one mandatory conditioning agency follows an internal policy of not recognizing scientific studies if they are greater than five years old. While the intent of the policy may have been innocent, in practice, this policy can require costly studies without sound scientific justification.

- Ensure that every decision and requirement is based on sound, established science that is included in the respective determination. As an example, water quality monitoring and fish mortality studies are inconsistently applied across practically identical plants. Turbines that have been previously studied and accepted by a mandatory conditioning agency to result in low fish mortality should not need to repeat these studies. Similarly, once a specific technology is demonstrated to not impact water quality, the need for continual monitoring should be retired. It's our understanding that one agency, through written guidance, has been instructed to require water quality monitoring in licenses or permits simply so

that agency need not do so themselves. The cost and requirement even continues after the developer establishes no impact on the sample parameter.

- Treat similar projects in an identical manner to the extent possible. Through shared learning between Districts or Field Offices, this approach would provide predictability for developers that similar projects, regardless of the owner, could be used as templates for subsequent projects, regardless of location.

- Agencies should allow licensees more flexibility in using offsite mitigation (e.g. mitigation banks) of measures commensurate with anticipated impacts. This minor change is an excellent example of a win-win for both the threatened or endangered species and the developer.

- Eliminate duplicative reviews by preventing alternative agencies from formally or informally contributing to the decision-making process that is outside of their authority and expertise. This would provide developers with increased predictability, reduce time, and reduce cost. We have experienced this duplicative review first hand due to the location of our hydropower plants in different USACE Districts. While one USACE District defers to the appropriate federal and state agencies specifically mandated to assess a project's impact on cultural and endangered species, projects located within the boundaries of a different District experience a duplicative, time-consuming, costly and onerous evaluation conducted by the District itself.

- Reform the culture regarding how USACE and civilian staff interact with developers during the process.

- Allow FERC to extend license terms for a period not to exceed 50 years from the start of construction for projects that are proceeding.

- Require the USACE to develop concurrent reviews between its District, Division and Headquarters by forming joint review teams from differing disciplines so that each review captures all comments in one coherent review.

For the improvements outlined above to be effective, a paradigm shift within federal and state agencies is necessary. There must be a focus on providing customer service, helping applicants comply and developing innovative solutions.

Conclusion

In closing, I want to stress my strong belief in the great opportunity that hydropower presents for this country. As a generating resource, hydropower provides baseload, reliable, low-cost power. In addition, as a qualified renewable energy resource, it provides emissions-free power with an exceptionally long generating life approaching 100 years.

Hydropower plays an important role in AMP's efforts, and we are encouraged by the increasing recognition by policymakers of the untapped potential for new and enhanced hydropower development in the United States. The commitments of AMP and its member communities serve as evidence that hydropower is recognized as a desirable and beneficial contribution to those seeking to embrace a diverse resource portfolio.

Despite hydropower's attributes, the process to obtain authorization for a hydropower plant is challenging. As evidenced in AMP's pursuit of necessary licenses and permits for our multiple hydropower projects, there is room for improvement throughout the process. The FAST-41 effort to increase transparency, predictability and accountability has already made a notable impact on the R.C. Byrd project.

Active legislation in the House and Senate will have a positive impact on the development of hydropower infrastructure, especially if coupled with additional changes outlined by AMP in this testimony, as well as ideas proposed by the NHA.

To facilitate this development and to ensure that new resources of all types can economically and timely be brought online, it's important that regulatory processes be streamlined to eliminate redundancies and provide developers and investors with added certainty.

Thank you again for holding this hearing and providing me with the opportunity to appear before you today. I would be happy to respond to any questions.

LIST OF PERMITS/APPROVAL/LICENSES/EVALUATIONS--FOSSIL

OPSB Certificate	Ohio Power Siting	Certificates for 50MW+ projects and T-line
Section 404/10	Army Corps	Impacts to jurisdictional water
Section 401	OEPA	Impacts to wetlands/streams
Permit to Install-water	OEPA	Build source(s) of water discharge
Permit to Install-sanitary	OEPA	On-site sanitary water discharge
Water withdrawal registration	ODNR	Withdrawal of water
NPDES	EPA/OEPA	Discharge of industrial water
Stormwater Permit	OEPA	Manage site/construction stormwater
Permit to Install-Air	EPA/OEPA	Installation of air emission source(s)
Title V Operating-Air	EPA/OEPA	Operation of air emission source(s)
Solid Waste Permit to Install	OEPA	Management of solid waste (ash etc)
Hazardous Waste Permit	EPA/OEPA	Management of Haz. Waste
Historic Preservation	SHPO	Evaluation of cultural/historic resources
Endangered Species Eval.	ODNR/USF&W	Evaluation of endangered/threatened species
License	FAA	Stack height approval for aviation
ODOT Permit	ODOT	Roadway considerations/crossings

LIST OF PERMITS/APPROVAL/LICENSES/EVALUATIONS--HYDRO

OPSB Certificate	Ohio Power Siting	Certificates for 50MW+ projects and T-line
Preliminary Permit	FERC	Permit to prepare and submit a License App.
License	FERC	Comprehensive energy project license
NEPA	EPA	Compliance with statute on federal projects
Section 404/10	Army Corps	Impacts to jurisdictional water
Section 408	Army Corps	Permission to impair federal structure
Section 401	OEPA	Impacts to wetlands/streams
Water withdrawal registration	ODNR	Withdrawal of water
NPDES	EPA/OEPA	Discharge of industrial water
Stormwater Permit	OEPA	Manage site/construction stormwater
Historic Preserv. Act	SHPO	Evaluation of cultural/historic resources
Endangered Species Eval.	ODNR/USF&W	Evaluation of endangered/threatened species
License	FAA	Transmission Tower approval for aviation
ODOT Permit	ODOT	Roadway considerations/crossings
Flood Impact Approval	FEMA	To insures no impacts to flood waters

OTHER REQUIRED/POTENTIAL CONSULTING AGENCIES

U.S Dept. of Agriculture-Forestry
National Park Service
U.S. Bureau of Land Management
Federal Emergency Management Agency
U.S. Geological Services
U.S. Department of Commerce

OTHER REQUIREMENT

Regional Transmission Organization Interconnection Process (more than 20 MW) – PJM or MISO in our region

North America's Building Trades Unions

Statement of Brent Booker
Secretary-Treasurer, North America's Building Trades Unions

Before the
Permanent Subcommittee on Investigations
Committee on Homeland Security and Government Affairs
United States Senate

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

September 7, 2017

Good morning. Chairman Portman, Ranking Member Carper and distinguished members of this subcommittee:

My name is Brent Booker, Secretary-Treasurer of North America's Building Trades Unions (NABTU), and on behalf of the nearly three million construction workers in North America that I am proud to represent, I would like to thank you for allowing me to testify before this subcommittee on an issue that directly impacts building and construction trades men and women across America: permitting reform.

America's labor leaders and businesses agree: the permitting process for major U.S. infrastructure projects must be modernized to make it more efficient, more accountable and more transparent. These projects employ hundreds of thousands of building trades members, and the sooner projects can break ground, the sooner our members can get to work applying their crafts and providing for their families.

Chairman Portman, your work and leadership along with Senator McCaskill on the Federal Permitting Improvement Act demonstrated a steadfast commitment to cutting red tape in order to get much needed infrastructure projects moving forward. NABTU, and in fact the entire building trades community, is extremely grateful that these efforts resulted in Title 41 of the FAST Act (FAST-41), which will greatly streamline the federal permitting process, leading to more job opportunities for construction workers across the country.

We are pleased that permitting reform is an issue on which there is a bipartisan recognition that steps must be taken to address the inequities in the process. In fact, in *Road Map to Renewal: Invest in Our Future, Build on Our Strengths, Play to Win*, it was President Obama's Jobs Council found that an unnecessarily complex federal permitting process is a major barrier to capital investment and job creation. They also found that other countries expedite the approval of large projects better than the United States.

The general problem with the permitting process is this: project owners, whether it is the public or private sector, oftentimes find the federal permitting process to be overly burdensome, slow and inconsistent. Gaining approval for a new bridge or factory typically involves negotiating a complex maze of review by multiple federal agencies with overlapping jurisdictions and no real deadlines. Often, no single federal entity is responsible for managing the process. Even after a project has cleared extensive review and a permit is granted, lawsuits and judicial intervention can stymie effective approval for years – or, worse, halt a half-completed construction project in its tracks. By some estimates, a six-year delay in starting construction on public works, including the effects of unnecessary pollution and prolonged inefficiencies, costs the nation over $3.7 trillion[i].

The reforms instituted in FAST-41 are designed to take steps to rectify this problem. We believe the creation of the Federal Permitting Improvement Council is a long-overdue step in the right direction. We believe the new procedures set forth in FAST-41 to standardize interagency coordination and consultation will ultimately lead us toward the better coordination among agencies and deadline setting that has been lacking in the permitting process and frustrating

construction owners, contractors, and workers for years. As an organization that relies upon standards, we welcome this.

Furthermore, by tightening litigation timeframes surrounding permitting decisions, major infrastructure projects will no longer be subject to the seemingly never-ending cycle of lawsuits project opponents advocate.

On this point I want to be very clear: North America's Building Trades Unions support responsible regulations that protect the environment, public health and worker safety. We believe they are critical to responsible infrastructure development that lasts for decades and allows for future generations to use these invaluable assets. What we are opposed to is the constant stream of endless lawsuits that project opponents rely upon because they cannot defeat a project on the merits of the project itself. When projects are tied up in the courts, our members are not working, they are not putting food on the table, and they are not proving for their families.

The enhanced transparency resulting from the Federal Infrastructure Permitting Dashboard is also a welcome development in the construction industry. We believe displaying project timelines and providing important and detailed information on each project on such a public forum will bring about increased accountability to government agencies involved in the permitting process and will allow for the general public to access information that will inform their understanding and appreciation of the impact of these projects on their communities

One such project currently listed on the Dashboard that will employ building trades members is the Atlantic Coast Pipeline, a vitally important infrastructure project that will ensure the economic vitality, environmental health and energy security of the Mid-Atlantic region.

The Federal Energy Regulatory Commission (FERC) is the lead federal agency responsible for overseeing the environmental review and approval process for this project. In coordination with more than a dozen other local, state and federal agencies, FERC will conduct a thorough and exhaustive review to evaluate all potential environmental, cultural, socioeconomic and other impacts of the project. Throughout this lengthy process, FERC and other agencies will carefully analyze all potential impacts to the land, air and water quality, wildlife and other resources to ensure the project has adopted all necessary measures to protect the environment, landowners and public safety.

The environmental review process provides numerous opportunities for the public to provide meaningful input to the agencies, including more than two dozen public meetings and multiple public comment periods. Over the last two years, the FERC has received more than 35,000 public comments from landowners, residents, businesses and organizations in communities across the region.

Given NABTU's direct benefit in advancing the Atlantic Coast Pipeline, hundreds of our affiliate union members have provided first-hand accounts of their views on the economic impacts of this project. Pipeline construction alone will create 17,000 new jobs and $2.7 billion in economic

activity across the region. From construction subcontractors and equipment suppliers to hotels and restaurants, construction will provide a major boost to local businesses in every community.

The Atlantic Coast Pipeline will be an energy provider, job creator and economic game changer for the region. This underground natural gas transmission pipeline will transport domestically-produced, clean-burning natural gas from West Virginia to communities in Virginia and North Carolina that lack the infrastructure needed to generate cleaner electricity, heat homes and power new industries. Along the way, the pipeline will help the region lower emissions, improve air quality, grow local economies and create thousands of new jobs in manufacturing and other industries. Projects such as this one are exactly the type of major infrastructure permitting reform moves forward.

North America's Building Trades Unions were so strongly in support of the FAST-41 reforms because they lead us toward a path of standardization and finality in decision making. If a project is approved, we will compete for the work. If a project is denied, we will move on to the next project and look for other opportunities for our members to apply their crafts. With that, I once again thank the committee for this opportunity, and look forward to your questions.

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[i] *Two Years Not Ten Years: Redesigning Infrastructure Approvals.* Common Good. Web. Accessed 12/7/15. (http://commongood.3cdn.net/c613b4cfda258a5fcb_e8m6b5t3x.pdf)

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: September 7, 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

September 7, 2017

Good morning, Chairman Portman, Ranking Member Carper, and distinguished members of the Senate Permanent Subcommittee on Investigations. 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 lead 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 35 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.[1]

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 Obama 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 environmental reviews conducted on Recovery Act projects, 184,733 were satisfied through the

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

use of categorical 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 2012 the House introduced H.R. 4377, "Responsibly and Professionally Invigorating Development Act" ("RAPID Act") to streamline the nation's environmental review process. In 2013, the Senate introduced S. 1397, the "Federal Permitting Improvement 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 multiple agency environmental 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-41[5], as well certain water resources projects[6] under the Water Resources Development Act ("WRDA").[7]

A. Current Covered Projects

As of August 2017, thirty-five "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 (3).[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 35 projects subject to FAST-41. Figure 4 is a map from the federal permitting dashboard showing where the projects are located:

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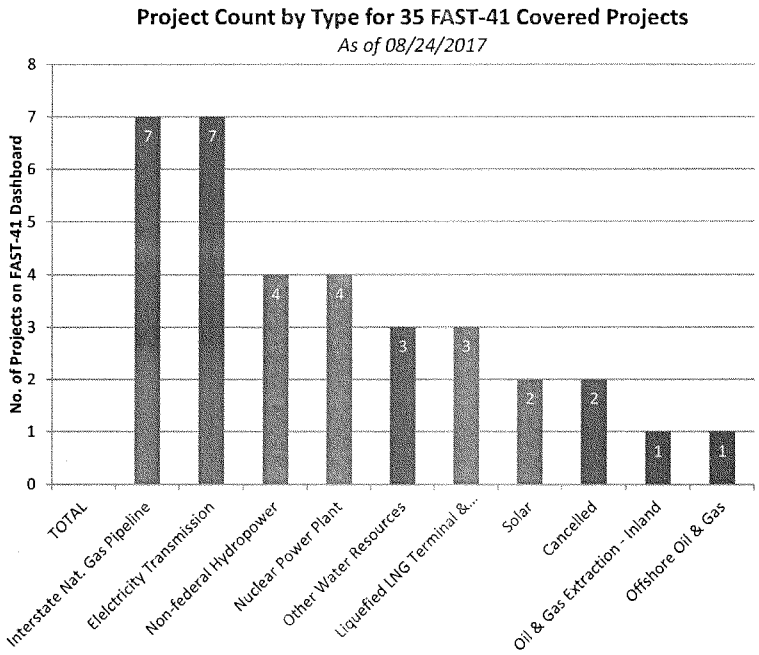
[5] *See* Pub. L. 112-141. These transportation projects have their own streamlined environmental review framework under the Moving Ahead for Progress in the 21st Century Act ("MAP-21").

[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.



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 require 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 35 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:

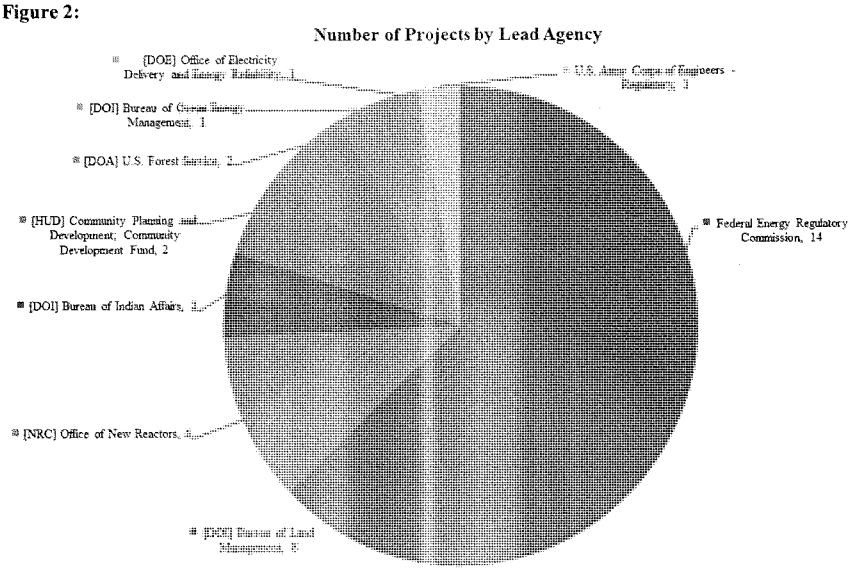


Figure 3:

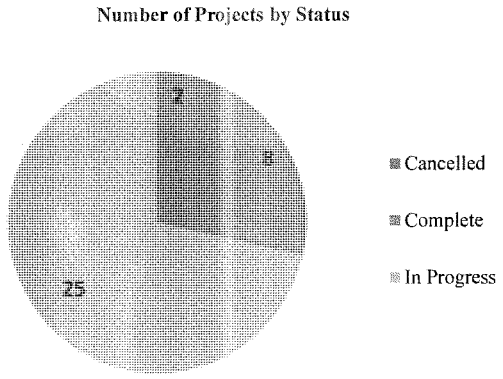
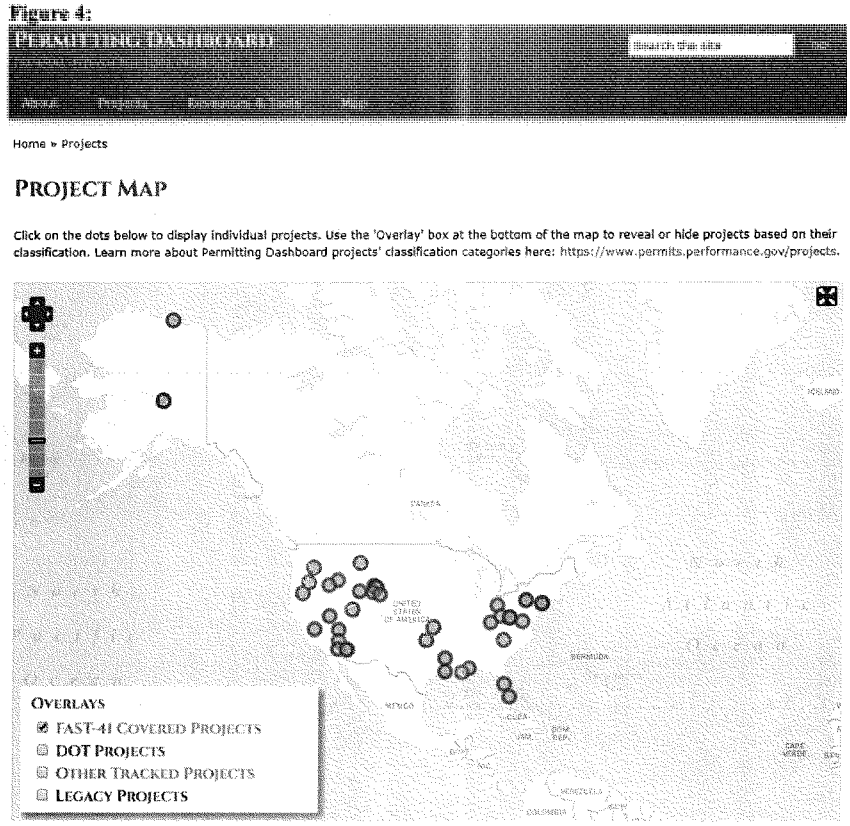


Figure 4:



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 Pfleeger, 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]

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[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 Notice[15] 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]

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[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:

FAST-41 Covered Projects | DOT Projects | Other Tracked Projects | Legacy Projects

The Infrastructure projects below are identified as Covered Projects under Title 41 of the Fixing America's Surface Transportation (FAST) Act.

Project Title | Lead Agency: - Any - | Sector: - Any - | State: - Any - | Status: - Any - | Apply

Title	Lead Agency	Bureau/Mode	Sector	Project Type	Status
Alya Solar Project (Moapa)	Department of Interior	Bureau of Indian Affairs	Renewable Energy Production	Solar	Complete
Alaska LNG Project	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Liquefied Natural Gas Terminal Facilities (Onshore or in State Water), and associated Natural Gas Pipelines	In Progress
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:

FAST-41 DASHBOARD

Search this site

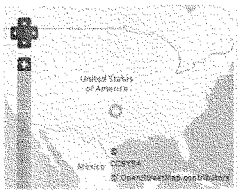
About Projects Agency Guidance Log Help

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.plainsandeasternclean.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 – were subject to a **6 year** statute of limitations under the

[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.

general statute of limitations for suits against the federal government.[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 reparable.[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 appropriate funds for the program. 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

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[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 Schedules[43] 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]

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[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. CONGRESSIONAL AND ADMINISTRATION ACTIONS REALTING TO FAST-41 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 two Executive Orders to establish an administrative process that streamlines project permitting.

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 statutory 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 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 FPISC 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, Congress 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 Trump administration made it clear through executive action that getting infrastructure projects reviewed, permitted, and built in a timely manner 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 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, it must provide to the CEQ Chairman a written explanation for the delay.

Executive Order 13766 did not address how it would be coordinated with FAST – 41. Specifically under Executive Order 13766 high-priority projects would be initiated by Governors or the heads of federal agencies and the Chairman of CEQ would determine which projects were high-priority projects. Under FAST – 41 the project sponsor initiated the project and the Executive Director of FPISC would determine if it was a covered project.

On August 15, 2017, President Trump issued Executive Order 13807 detailing how the Executive Orders and FAST – 41 would work together to achieve an efficient environmental review for infrastructure projects. Essentially the FAST – 41 process remains in place for projects covered under its application procedure as well as for high-priority projects referred to the process by the chairman of CEQ.[46] Executive Order 13807 also sets up a coordination process under which CEQ and the Executive Director of FPISC resolve disputes.

In addition, Executive Order 13807 requires:

1. The establishment of a Cross-Agency Priority ("CAP") Goal to improve interagency performance with regard to infrastructure permitting. The Government Performance and Results Act of 2010 established CAP Goals as tools to accelerate the progress of federal priorities that require active collaboration between multiple agencies to eliminate organizational barriers.

2. The creation of a single Record of Decision by the lead agency.

3. A deadline for permitting decisions to be made 90 days after the release of the Record of Decision. While FAST – 41 does not have this specific requirement, its process will achieve a similar result by having the lead agency set a permitting timetable that is based on the average permitting completion time for a particular project type.

Any conflicts that arise from these minor inconsistencies should be easily resolved since Executive Order 13807 states that nothing in the order shall be construed to impair or affect the "authority granted by law to an executive department, agency or head…." The Order also states that expedited permitting is to be consistent with FAST-41and the "best practices" annually identified by FPISC, where applicable. As to the parts of the Executive Order that impose additional requirements on agencies that are in addition to and not inconsistent with FAST – 41 requirements; e.g. CAP goals, those requirements would also apply to FPISC.

The key benefit to having both FAST – 41 and Executive Order 13807 for permit streamlining is that FAST – 41 is a statutory process for streamlining environmental reviews for facilities over $200 million and projects in need of multiple environmental reviews while Executive Order 13807 provides coordination and an expedited review similar to FAST – 41 for designated high- priority projects that may not be covered by the FAST – 41 program. Together both programs cover the vast majority of projects in need of an efficient, coordinated permit review process.

The FAST-41 program however, has statutory benefits that cannot be provided by Executive Order; i.e. the two year statute of limitation on lawsuits challenging final decisions

[46] Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure at Sec. 5(f) (Aug. 15, 2017) *available at* https://www.whitehouse.gov/the-press-office/2017/08/15/presidential-executive-order-establishing-discipline-and-accountability.

and a fee structure which funds the FAST - 41 process to ensure adequate staff is available to meet its objectives.[47]

C. Dashboard Consistency

It is important that the Permitting Dashboard contain 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."

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[47] Fee collections by federal government agencies are commonplace and well-established by precedent across a wide range of activities and agencies. A GAO study surveyed 23 federal agencies and reported that in fiscal year 2010, 21 of the agencies collected some kind of fees. *See* GAO, 2012 *Annual Report: Opportunities to Reduce Duplication, Overlap and Fragmentation, Achieve Savings, and Enhance Revenue*, GAO-12-342-SP, February 2012, Chapter 43, available here: https://www.gao.gov/modules/ereport/handler.php?1=1&path=/ereport/GAO-12-342SP/data_center_savings/General_government/43._Federal_User_Fees. In total, 3,600 different fees were collected, totaling nearly $64 billion in fiscal year 2010. Examples of fees related to permitting include:

- The Nuclear Regulatory Commission, which is required under law to recover approximately 90% of its annual budget through fees, charges licensing fees to all nuclear facility operators.
- The Federal Energy Regulatory Commission charges fees for a variety of licenses and applications, including pipeline certification, authorization, petitions for rate approvals, applications for qualifying stature as a small power production facility, etc. FERC is 100% funded by fees, collecting over $300 million per year and employing over 1,500 people. According to FERC's 2017 fee review and update, the range of fees charged varies from as little as $100 to over $30,000. FERC charges fees for various steps along the way for a project's completion. See 2017 Annual Update of Filing Fees available here: https://www.ferc.gov/docs-filing/fee-sched/annual.pdf.

The bulk of fee collections by agencies are for non-regulatory items, such as passport applications, patent applications, customs authorizations, national park entry fees, or fees for various government approval processes, such as FDA drug or medical device approvals.

Many of the 3,600 fees represented in GAO's sample are authorized directly by Congress in agency authorizing statutes or appropriations language. If an agency lacks statutory authority to collect fees, it still may do so under the processes of the Independent Offices Appropriation Act of 1952. This requires that agencies develop fair fee collection processes and that fees are assessed only insofar as they are justified by the costs that the government incurs to provide services for which they are assessed.

GAO has developed further fee structure guidance for agencies at the behest of Congress. GAO's 2008 report *Federal User Fees: A Design Guide* lays out the key principles behind the design and oversight of agency user fee programs. See GAO, *Federal User Fees: A Design Guide*, GAO-08-386SP, May 2008 available here: http://www.gao.gov/products/GAO-08-386sp. In the guidance, GAO also details requirements for continuous review of fee-based programs as required by the Chief Financial Officer Act of 1990 and OMB Circular A-25 guidance.

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
Alaska LNG Project	Federal Energy Regulatory Commission	Federal Energy Regulatory Commission	Pipelines	Liquefied Natural Gas Terminal Facilities and associated Natural Gas Pipelines	In Progress
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 at 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 covered status.

- 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.

TESTIMONY BY

SCOTT SLESINGER

LEGISLATIVE DIRECTOR

OF THE

NATURAL RESOURCES DEFENSE COUNCIL

The Federal Permitting Process for Major Infrastructure Projects, Including the Progress made by the Federal Permitting Improvement Steering Council since passage of the FAST Act in 2015

U.S. Senate Permanent Subcommittee on Investigations

Homeland Security and Government Affairs Committee

United States Senate

September 7, 2017

Thank you for the opportunity to testify today. My name is Scott Slesinger, and I am the Legislative Director for the Natural Resources Defense Council (NRDC). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 2.4 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing. I appreciate the opportunity to testify, and hope that my remarks will assist the Subcommittee as it considers the important issues raised by Title 41 of the Fixing America's Surface Transportation (FAST) Act."

Why NEPA is important

I would like the Committee to appreciate why the National Environmental Policy Act (NEPA) and the federal permitting requirements to protect our air, water and wildlife are so important. With an emphasis on "smart from the start" federal decision making, NEPA protects our health, our homes, and our environment. Passed by an overwhelming bipartisan majority and signed into law by President Nixon, the law was prompted in part by concerns from communities whose members felt their views had been ignored in setting routes for the Interstate Highway System. NEPA has empowered the public, including citizens, local officials, landowners, industry, and taxpayers, and demanded government accountability for more than 40 years.

NEPA is democratic at its core. In many cases, NEPA gives citizens their only opportunity to voice concerns about a federal project's impact on their community. When the federal

government undertakes a major project such as constructing a dam, a highway, or a power plant, or if a private entity needs a federal permit so it can pollute the air or water, it must ensure that the project's impacts – environmental and otherwise – are considered and disclosed to the public. And because informed public engagement often produces ideas, information, and solutions that the government might otherwise overlook, NEPA leads to better decisions – and better outcomes – for everyone. The NEPA process has saved money, time, lives, historical sites, endangered species, and public lands while encouraging compromise and resulting in better projects with more public support. Our website https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories highlights NEPA success stories that prove this point. Thanks to this law, tens of thousands of Americans have participated in important federal decisions.

Implementation of the NEPA process has not been perfect. Due to lack of funding, many agencies have had their NEPA staffs decimated. This has led to an over-reliance on consultants instead of conducting environmental analyses in-house. Because agencies must oversee and approve contractors' work, the process is often further delayed. There is a persistent but false narrative that NEPA is the primary cause of project delay. This is simply not true. Repeated investigations by the Congressional Research Service underscore both that factors other than federal NEPA reviews are the primary cause of project delays, and that better resource allocation at a federal agency can expedite decision making.

The Congressional Research Service report found that:

> "The time it takes to complete the NEPA process is often the focus of debate over

> project delays attributable to the overall environmental review stage. However, the majority of FHWA-approved projects required limited documentation or analyses under NEPA. Further, when environmental requirements have caused project delays, requirements established under laws other than NEPA have generally been the source. This calls into question the degree to which the NEPA compliance process is a significant source of delay in completing either the environmental review process or overall project delivery. **Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope.**"[1]

The Chamber of Commerce report, "Project No Project" (www.projectnoproject.com), contrary to its executive summary, confirms these findings. The Chamber's own case studies show that it is not federal rules that are causing the delays, but rather state and local laws, zoning, lack of funding, and citizen opposition to projects.

Recent Changes to the NEPA and Permitting Process

NRDC's role in Senator Portman and Senator McCaskill's FAST Act goes back to July 2013 when I, along with my fellow panelist Bill Kovacs from the Chamber of Commerce, testified on one of the many iterations of House bills to weaken the NEPA process, the RAPID Act. At the hearing, Democratic Rep. Steve Cohen of Tennessee and Republican Rep. Tom Marino of Pennsylvania agreed that we both made good points and that we should sit down and come to an agreement. We had a few discussions but failed to come to an agreement. When the Portman-McCaskill bill, which was based loosely on the RAPID Act, moved in the Senate two

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[1] *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*", CRS 7-5700, R42479, April 11, 2012.
ii Ibid.

years later, we again sat down with officials from the Chamber and the Senate and tried to work something out. With significant input from the Administration, NRDC supported the final agreement—although it included many provisions we opposed.

One reform that the Chamber and NRDC both agreed on from the beginning was the need for more funding and more staff to conduct permitting and environmental reviews. As I mentioned earlier, the loss of agency expertise and the lack of staff support for NEPA and permitting in the agencies is responsible for many problems in implementing NEPA. Therefore, the key reform in the FAST Act is that it grants the authority to use non-appropriated funds to augment agency funds in order to complete the required reviews. It also created a Permitting Dashboard to track and improve project timeliness. We urge the permitting board to quickly implement a system to collect fees from project sponsors, which would address bottlenecks by allocating those funds to agencies whose regulatory budgets have been decimated. This is especially critical because fear of deep cuts proposed by the Trump administration is prompting many qualified staff to leave the federal government.

Making Fast-41 Work

Additionally, we have all heard the President talk about launching a trillion-dollar infrastructure program. For this to succeed, the permitting board needs close to $30 million to get up and running. The House Committee's token appropriation to the board of $1 million is barely enough to hire a few staffers and very likely inadequate to carry out its statutory duties in hosting the Permitting Dashboard's tracking of projects.

The permitting board needs strong leadership to improve the permitting process and we applaud Senator Portman's and Senator McCaskill's letter urging the President to quickly appoint an executive director. The FAST Act gives the executive director significant authority. The person selected must have the political skills to bring together the siloed interests within the federal family—not just for the purpose of establishing a faster system, but also to ensure better environmental outcomes. Leaving in place an acting executive who is not a political appointee undercuts the permitting board's ability to get significant cooperation from department and agency leaders.

I would also note that the permitting process and NEPA involve complicated areas of scientific disciplines and the law. The executive director must have broad experience and sufficient qualifications in order to successfully lead in the implementation of this statute.

NEPA Attacks Continue

Despite the enactment of this legislation in 2015, this Congress has seen a large number of bills introduced in both houses that would further amend the NEPA process without regard for their impact on process changes already made in FAST-41. Rather than simplifying current processes, these bills would create new conflicts, sow confusion, and delay project reviews. And you can safely bet that these consequences would unfairly be blamed on NEPA.

Legislation has reached the House floor that would establish different and inconsistent permitting and NEPA processes for hydroelectric power projects, water supply projects, natural gas pipelines, international pipelines, fisheries management, and other project types.

The Senate has several similar bills in play. Adopting new measures now would exacerbate effective administration of existing law. For example, the Department of Transportation (DOT)'s Inspector General confirmed that the agency has been hamstrung by repeated policy changes in recent Congresses. Although DOT had completed most of the reforms mandated by MAP-21 in 2012, the Department was forced to delay implementation of others because they had to be revised to comply with additional requirements of 2015's FAST Act.[2]

The President Trump's first Infrastructure Permitting Executive Order – as Senators Portman and McCaskill wrote in a letter to the President – also contradicted authorities and responsibilities already in FAST-41, to the consternation of project sponsors that were already participating in the permitting board's existing process. Further revisions or regulatory changes as the Administration implements FAST-41 will only add confusion and delay implementation of it. If the objective is to improve infrastructure project reviews and permitting, then right now Congress' most important challenge is to exercise oversight over implementation. While we don't applaud everything in the law, its robust provisions were enacted less than two years ago. Adding to the law would exacerbate effective administration of it. The most valuable action by the Congress would be continued oversight and adequate funding of the administrative processes.

The President's revised Infrastructure Executive Order of August 15, 2017, ameliorated most of the inconsistences with the earlier order. However, it also gave a green light to wasteful

[2] Office of the Inspector General, *Vulnerabilities Exist in Implementing Initiatives Under MAP-21 Subtitle C to Accelerate Project Delivery*, March 6, 2017, available at: https://www.oig.dot.gov/sites/default/files/DOT%20Implementation%20of%20MAP-21%5E3-6-17.pdf

federal construction in areas susceptible to flooding by revoking an executive order (E.O. 13690) that previously updated flood protection standards. These standards would make sure that public schools, hospitals, military bases, water treatment plants — all public facilities and infrastructure built with federal funding — are constructed with a higher margin of safety for floods and future sea level rise. Revoking these standards will ensure that billions of dollars are wasted rebuilding vulnerable public facilities that could have been built more safely or in a safer location.

We Cannot "Streamline" Our Way Out of Lack of Funding

I cannot conclude without noting that the emphasis on "streamlining" seems to be a diversionary tactic from the real problem of our failing infrastructure. Our airports, our transportation system, our sewer and drinking water systems have been systematically underfunded since 1993, when the gas tax was last raised. Since that time, inflation has eroded the Transportation Trust Fund by over 40 percent. The funding for sewers and drinking water systems have suffered similar erosion. Any world traveler, and in fact, President Trump himself, has noted that the airports and roads of our country now suffer in comparison to other developed and even some developing countries. Again, this is because of a lack of adequate funding.

Rather than addressing the real issue of funding, Administration officials and Members of Congress complain about the requirement for federal permits and environmental reviews. Senators, we cannot streamline our way out of our infrastructure problem. Countries all over

the world — including those with better infrastructure than our own — have adopted statutes based on our NEPA statute; bullet trains, modern subways, and efficient airports around the world have been built subject to NEPA-like requirements. What these countries have that the United States currently lacks is a national commitment to adequately funding infrastructure to compete in the 21st century.

I want to thank Senator Portman and Senator McCaskill for working to find reasonable and responsible fixes to the NEPA process. We support your ongoing efforts to ensure that your legislation is fully implemented, and that it improves the quality of reviews and leads to better environment outcomes without unnecessary delays.

NRDC stands ready to assist this Committee in its further deliberations. Thank you again for the opportunity to participate in this hearing and I look forward to your questions.

TESTIMONY OF

JANET PFLEEGER
Acting Executive Director
Federal Permitting Improvement Steering Council

For a Hearing

BEFORE

U.S. Senate
Homeland Security and Governmental Affairs Committee
Permanent Subcommittee on Investigations

ON

"Cutting Through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"

September 7, 2017
Washington, D.C.

Chairman Portman, Ranking Member Carper, and distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the progress of the Federal Permitting Improvement Steering Council (the "Permitting Council") in improving the efficiency and timeliness of the Federal permitting process for infrastructure projects through increased transparency, predictability, and accountability.

The Permitting Council's work to create a more standardized, predictable permitting process that protects public health, safety and the environment focuses on: conducting project-specific coordination to ensure multi-agency collaboration for large and complex infrastructure projects; incorporating best practices identified by industry and government into the Federal permitting process; and establishing recommended performance schedules for use by agencies in developing permitting timetables with target completion dates.

The Permitting Council is actively working with the Administration to improve the permitting process for infrastructure projects. On August 15, 2017, President Trump signed Executive Order (E.O.) 13807, entitled "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," in which the Permitting Council has several prominent roles and responsibilities. This E.O. will further enhance the work of the Permitting Council through the establishment of a "One Federal Decision" policy for major infrastructure projects classified under the National Environmental Policy Act as requiring an Environmental Impact Statement. The framework for implementing "One Federal Decision" will be developed in consultation with the Permitting Council. The E.O. also requires agencies to establish an accountability and tracking system to ensure the project review schedules are met, the guidance for which will be issued in consultation with the Permitting Council.

Chairman Portman, as you emphasized in our June Council meeting, the Permitting Council is uniquely positioned to transform Federal permitting practices by implementing Title 41 of the Fixing America Surface Transportation Act (FAST-41). FAST-41 allows the Permitting Council to oversee the Federal permitting process for covered products in the U.S. that require authorization or environmental review by a federal agency, including National Environmental Policy Act (NEPA) reviews. The Council has had recent successes in both systematic and project-specific permitting process improvements.

Implementation of FAST-41 began soon after the law was enacted through recruitment of an Executive Director to oversee the permitting improvement process, designation of the General Services Administration as the agency to provide administrative support, initiation of enhancements to the Permitting Dashboard to address FAST 41 requirements, and establishment of a physical Permitting Council office. With initial funding from interagency contributions for Cross-Agency Priority (CAP) Goal funding, the Office of the Executive Director, in cooperation with Permitting Council agencies, has made significant progress in establishing the FAST-41 governance structure:

1. Permitting Council agencies have appointed both Council members and senior-level staff to serve as Chief Environmental Review and Permitting Officers (agency CERPOs). These agency leaders have taken a proactive role in FAST-41 implementation and success. With an eye toward enhanced transparency and accountability, the CERPO appointments have been posted on the publicly-available Permitting Dashboard.
2. In 2016, the Permitting Council released an initial inventory of 34 infrastructure projects considered to be "covered projects" under the requirements of FAST-41. FAST-41 covered projects may include large infrastructure projects such as roads, bridges, pipelines, and energy production, or projects which are likely to benefit from designation as "covered projects."
3. The inventory of all covered projects, including project specific permitting timetables with target completion dates, is posted on the publicly-available Permitting Dashboard for an unprecedented degree of transparency and accountability. The Dashboard serves as a key FAST-41 tool for tracking permitting timetables and keeping projects on schedule.
4. Permitting Council agencies have developed inter-agency Coordinated Project Plans (CPPs) for covered projects. CPPs promote inter-agency problem solving, accountability and predictability by identifying lead, cooperating, and participating agencies for the project; all Federal environmental reviews and authorizations required for the project and associated target completion dates; a discussion of potential avoidance, minimization, and mitigation strategies; and plans for public and tribal outreach and coordination.
5. In January of 2017, the Permitting Council Office of the Executive Director hired three full-time career federal staff and five contract support employees.

6. In January of 2017, the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ), in coordination with the Permitting Council, jointly issued guidance for agencies to carry out their responsibilities under FAST-41. In addition to addressing statutory requirements, the guidance introduced a framework for tracking covered projects on the Permitting Dashboard.
7. The Permitting Council participated in multiple tribal consultations conducted by the US Department of Justice, US Army, and US Department of the Interior to identify additional opportunities to improve the infrastructure permitting process. Following these consultations, a report called *Improving Tribal Consultation and Tribal Input in Federal Infrastructure Decisions* was produced in January of 2017.
8. Most recently, the Permitting Council received additional support and responsibilities from the President in E.O. 13807 of August 15, 2017. In addition to several prominent roles in the process enhancements required under the E.O., the General Services Administration (GSA), which was recently included as an official member agency to the Permitting Council, is identified as the agency to provide the necessary administrative and organizational support to the Permitting Council, unless otherwise determined by the Director of the Office of Management and Budget (OMB).

I was hired as Deputy Director in the Permitting Council's Office of the Executive Director in January of 2017 and have been serving as Acting Executive Director since January 20, 2017. From my first day, I have sought to improve the permitting process by focusing on four main areas: transparency and accountability; project specific coordination and dispute resolution; interagency coordination, collaboration, and technical support; and stakeholder outreach.

Transparency and Accountability: Permitting Dashboard and Coordinated Project Plans (CPPs)

The permitting timetable developed in every project's CPP is made public on the Permitting Dashboard. The Permitting Dashboard serves as a single point of reference for information on covered projects, where anyone can view the timetable schedule and status for all the environmental reviews and authorizations required for any covered project. The Office of the

Executive Director, in cooperation with the Permitting Council, is improving the quality and usefulness of the Permitting Dashboard in the following ways:

- Since the beginning of 2017, the Office of the Executive Director has worked with Permitting Council agencies to improve the data accuracy and completeness of permitting timetables to the Dashboard. Following the March and June 2017 quarterly updates, the Office of the Executive Director provided each agency with a data assessment from which to track agency progress in publishing the requisite data to the Dashboard, and now is ensuring Dashboard administrators fully understand the requirements and have the necessary training to meet these Dashboard requirements. Complete Dashboard data not only is key to transparency and accountability in the permitting process, but is essential for collecting two years of baseline data for use in developing recommended performance schedules that agencies can use in the future to establish their permitting timetables.
- The Office of the Executive Director continues to improve the Permitting Dashboard, with technical support from the Department of Transportation, through enhancements such as automated notifications to agencies when authorization deadlines are approaching or when a deadline is being changed.
- New dynamic reporting and visualization enhancements for the Dashboard are planned to better allow users to view criteria and learn how federal agencies are performing in critical areas. Project sponsors and the public will be able to track how projects are progressing through visualizations controlled by user-selected data fields. Agencies will be able to report on their effectiveness and every covered project's status will be displayed through a color-coded system.
- The Dashboard is a useful tool for Federal agencies, project sponsors, and interested members of the public to track the environmental reviews and authorizations required for large or complex infrastructure projects. The Dashboard currently tracks all covered projects under FAST-41 as well as projects subject to 23 U.S.C. 139 under the authority of the U.S. Department of Transportation (USDOT). E.O. 13807 reinforces this practice by the USDOT and requires milestone dates for all projects tracked on the Dashboard to be updated monthly, or on another appropriate timeline as determined by the Executive Director. The E.O. also allows for other projects or classes of projects to be tracked on the Dashboard at the discretion of the Executive Director.

In addition to being a tool for transparency and accountability, the Dashboard plays an important role in process improvements. FAST-41 requires Executive Director approval for certain modifications to the Permitting Dashboard timetables. These approvals help the agencies and Executive Director identify issues specific to a particular project, and with time, recurring bottlenecks for overlapping or contingent permitting processes.

The permitting timetable posted to the Dashboard is only part of the CPP, which establishes a concise plan for coordinating public and agency participation in, and completion of, any required Federal environmental review and authorization for the project. The CPP therefore serves as the foundation for interagency coordination, early identification of difficulties and issues that could delay Federal decision-making, and verification of implementation of best practices. To facilitate effective and timely decision-making, the Office of the Executive Director, in cooperation with the Permitting Council, is improving the quality and usefulness of CPPs in the following ways:

- A CPP template has been developed, primarily for use in new covered projects, but recommended and available for use for all current covered projects.
- The Office of the Executive Director is meeting with each agency serving in a lead and cooperating agency role on a covered project to discuss remaining work for CPPs to be deemed accurate and complete.
- The Office of the Executive Director reviews CPPs for ongoing projects in its FAST-41 oversight role and, when necessary, brings together Federal agencies to ensure that they are using the most efficient and effective permitting processes available that are then reflected in the CPPs. The Office of the Executive Director will also participate in the development of CPPs for new projects on an as needed basis to ensure that early coordination and potential issue identification takes place at the start of the FAST-41 process.

Project-Specific Coordination and Dispute Resolution

The Office of the Executive Director conducts project-specific agency and project sponsor coordination and implements the FAST-41 dispute resolution provisions to ensure successful

implementation of permitting timetables for covered projects. Initial examples of project-specific issues identified and addressed through the implementation of FAST-41 include:

- Project sponsors have contacted the Executive Director for help with project specific issues—for instance, when an agency did not respond to their questions, when different staff within an agency provided contradictory responses, and when different agencies working together on a project provided conflicting information. In these situations, my office has been able to intervene when communication within and among agencies breaks down to facilitate and resolve a misunderstanding, disagreement, or dispute.
- The Office of the Executive Director has facilitated conflict resolution between agency headquarters and field offices to coordinate and deliver consistent information to project sponsors.
- The Office of the Executive Director worked with an agency whose inefficient internal environmental review process did not comply with the agency's responsibilities under FAST-41. The corrected, more efficient review process resulted in a 6-8 week shorter environmental review period.
- Upon advice from our office, multiple field offices within a single agency performed a pre-meeting collaboration and, for the first time for a covered project, met with the project sponsor with one voice. Ensuring coordinated decision making among district and field offices facilitated information sharing and enhanced predictability for project sponsors.
- The Office of the Executive Director has convened meetings with agencies facing unusual circumstances outside of their control to identify and implement creative solutions to keep the permitting process on schedule while ensuring that those agencies' statutory responsibilities are not compromised.

Additionally, E.O. 13807 establishes new policies that will further enhance dispute resolution for all major infrastructure projects. The E.O. requires agencies to automatically elevate instances where a milestone is missed, or anticipated to be missed, to appropriate senior agency officials of the lead Federal agency and the cooperating and participating Federal agency or agencies to which the milestone applies. E.O. 13807 authorizes CEQ to mediate interagency disputes concerning Federal environmental review or authorization decisions upon the request of

a Federal lead, cooperating, or participating agency, except where dispute resolution processes are otherwise provided for in law, such as FAST-41. The Permitting Council Executive Director remains the established point of contact, or "one stop shop," for project sponsors and government agencies to request assistance in resolving an issue or initiating the formal dispute resolution process for covered projects under FAST-41. The E.O. further authorizes the Executive Director to, upon request of a project sponsor or Permitting Council member agency, work with the lead agency or any cooperating and participating agencies to facilitate the environmental review and authorization process for any infrastructure project, regardless of whether the project is a "covered project" under FAST-41.

Interagency Coordination, Collaboration, and Technical Support

The Permitting Council's Office of the Executive Director is leading the effort to implement one of the FAST-41 cornerstones for systematic change to the permitting process: best practices. This is accomplished through the Best Practices Report, in which the Permitting Council issues recommendations on best practices for environmental reviews and authorizations common to covered projects. It is through agency-wide implementation of these best practices that improvements in the permitting process will be realized.

- The Permitting Council's first Best Practices Report was published in January 2017, and provides a compendium of established best practices for each of the eight categories of best practices identified in FAST-41.
- Preparation of the Permitting Council's second Best Practices Report is underway and builds on the January 2017 Best Practices Report by identifying those best practices that can be implemented across agencies for maximum impact in addressing common stakeholder concerns. This report, to be published in December 2017, will serve as the roadmap for systematic permitting process improvement as Permitting Council agencies implement and institutionalize these best practices during fiscal year 2018 at all levels within their organizations, including critical field offices that interact with project sponsors on a regular basis.

The Office of the Executive Director submits an annual report to Congress every April assessing agency progress in making improvements consistent with best practices.

- The Office of the Executive Director's FY 2016 Annual Report to Congress was published in April of 2017.
- Preparation of the assessment tool to be utilized for the FY 2017 Annual Report to Congress (due in April 2018), is currently underway and will assess agency progress in implementing best practices identified in the January 2017 Best Practices Report.

Through weekly meetings of the Permitting Council Working Group, monthly CERPO meetings, and quarterly Council meetings, agencies collaborate and share lessons learned from best practices to help other agencies establish their own effective programs. Agencies also are able to share feedback from stakeholders on how to improve the permitting process. For example, the Advisory Council on Historic Preservation issued a report on Improving Tribal Consultation in Infrastructure Projects (May 2017) to provide recommendations for improving tribal consultation in the Section 106 of the National Historic Preservation Act review process for federal infrastructure decisions. This report is a companion to the January 2017 Improving Tribal Consultation and Tribal Input in Federal Infrastructure Decisions report.

E.O. 13807 reinforces the implementation of these best practices by directing agencies to implement appropriate best practices identified by the Permitting Council and to ensure that such implementation is established at the agencies' field level.

The Permitting Council continues to develop policies and procedures to govern the implementation of FAST-41. For example, when the Permitting Council received its first FAST-41 application from a Project Sponsor to become a covered project, there was no defined process to make the determination as to whether that project would be a covered project. The Office of the Executive Director, in cooperation with the Permitting Council, is nearing completion of a set of procedures that clarify how a project sponsor's application is processed and evaluated to meet the statutorily required 14 day deadline.

Stakeholder Outreach

The Permitting Council continues to engage in education and outreach efforts with stakeholders and to meet with groups and individuals representing state, local, and tribal governments engaged in the infrastructure permitting process. These efforts are building sustainable relationships and increasing engagement in the Permitting Council's efforts to improve the infrastructure permitting process. Specific outreach efforts include meetings with:

- Current and potential project sponsors - individual meetings with current project sponsors as well as outreach and education to potential project sponsors through industry and trade organization events, industry panels, and infrastructure-themed conferences;
- State government representatives - Environmental Council of the States (State Environmental Protection Meeting) and State Historic Preservation Officers (Permitting Dashboard Training; similar training planned for Tribal Historic Preservation Officers);
- Tribal entities - National Tribal Preservation Conference;
- Local government representatives - National Association of Counties Annual Conference, including meeting with the Western Interstate Region; and
- Non-Governmental Organizations - individual meetings and infrastructure-themed meetings, workshops, and conferences.

Conclusion

I am proud to say that the Permitting Council has made significant progress across the board in each of these priority areas. We are already beginning to observe improved transparency, predictability, and accountability in our covered projects in the form of avoided delays in the permitting process. As more projects elect to use the FAST-41 process, these benefits will increase substantially.

FAST-41 is not the first time the Federal government has tried to reform the permitting process, but this is the first time the framework to accomplish real reform is in place. Chairman Portman, because of your leadership, the Permitting Council Office of the Executive Director is positioned to truly change the siloed nature of the permitting process. Additionally, the Permitting Council is poised to play a major role in the Administration's Infrastructure Initiative, and is actively

working with the Administration on the implementation of FAST-41 and Executive Order 13807.

Going forward, in addition to the reforms and activities mentioned above, our office intends to be fully engaged with agencies and project sponsors to improve the process for permitting decision making. Our capacity and resources over the next year, including fully funding the FY 2018 President's Budget request of $10 million for the Environmental Review Improvement Fund in the General Services Administration appropriation, will determine our ability to scale up and provide the promised benefits to covered projects, including enhancement of the Permitting Dashboard. FAST-41 provides the authority to issue fee regulations and the Permitting Council is working together to take advantage of this important tool provided by statute.

I thank you for the opportunity to testify before the Subcommittee today, and I welcome your questions and the opportunity to further discuss how we can work with Congress to make this unprecedented opportunity for transformational change a reality.

Testimony of

Terry L. Turpin
Director, Office of Energy Projects

Federal Energy Regulatory Commission
888 First Street, N.E. Washington, DC, 20426

Committee on Homeland Security and Government Affairs
Permanent Subcommittee on Investigations
United States Senate

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

September 7, 2017

Chairman Portman, Ranking Member Carper, and Members of the Subcommittee:

My name is Terry Turpin and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission. The Office is responsible for taking a lead role in carrying out the Commission's responsibilities in siting infrastructure projects including: (1) licensing, administration, and safety of non-federal hydropower projects; (2) authorization of interstate natural gas pipelines and storage facilities; and (3) authorization of liquefied natural gas (LNG) terminals.

I appreciate the opportunity to appear before you to discuss federal infrastructure permitting and the Federal Permitting Improvement Steering Council (Council). As a member of the Commission's staff, the views I express in this testimony are my own, and not necessarily those of the Commission or of any individual Commissioner.

I will start by outlining the Commission's hydropower and natural gas programs and then turn to the Federal Permitting Improvement Steering Council.

I. The Commission's Hydropower Program

The Commission regulates over 1,600 non-federal hydropower projects at over 2,500 dams, pursuant to Part I of the Federal Power Act (FPA). Together, these projects represent about 56 gigawatts of hydropower capacity, which is more than half of all the hydropower capacity in the United States. Public and private hydropower capacity together total about 8 percent of U.S. electric generation capacity.

Under the FPA, non-federal hydropower projects must be licensed by the Commission if they: (1) are located on a navigable waterway; (2) occupy federal land; (3) use surplus water from a federal dam; or (4) are located on non-navigable waters over which Congress has jurisdiction under the Commerce Clause, involve post-1935 construction, and affect interstate or foreign commerce.

The FPA authorizes the Commission to issue licenses for projects within its jurisdiction, and exemptions (which are actually a simpler form of license) for projects that would be located at existing dams or within conduits as long as these projects meet specific criteria. Licenses are issued for terms of between 30 and 50 years and may be renewed. Exemptions are perpetual and do not need to be renewed.

The Commission also must ensure compliance with other statutes, each containing its own procedural and substantive requirements, including: the Coastal Zone Management Act; the Endangered Species Act; the Wild and Scenic Rivers Act; and the National Historic Preservation Act.

The Commission has established three licensing processes and allows an applicant to request the process that it believes to be best suited to its individual situation. All of these processes, which involve specified procedural steps, are transparent and involve extensive coordination among the applicant, Commission staff, Indian Tribes, state and federal agencies, and other stakeholders.

The integrated licensing process, which frontloads issue identification and decisions on information needs to the period before an application is filed, is suited to the more

complex or controversial cases. The alternative licensing process allows participants significant flexibility to tailor the licensing process in a manner that can work well in their particular case. The traditional licensing process typically works best for less complex or controversial projects and is the process used for exemptions.

The Commission's hydropower processes give stakeholders the opportunity to participate in collaborative, public proceedings, where all significant issues are identified and studied. Commission staff, consistent with the Commission's role as lead agency, develops detailed, thorough environmental analyses, pursuant to the FPA and the National Environmental Policy Act (NEPA). Stakeholders are afforded numerous opportunities to provide the Commission with information, comments, and recommendations. While the Commission's regulations establish detailed procedures, Commission staff may waive regulations or revise procedures where doing so will lead to the more efficient and cost-effective processing of an application.

Statutory requirements also give other agencies a significant role in the licensing process, limiting the Commission's control of the cost, timing, and efficiency of licensing. For example, if a project is located on U.S. lands such as a national forest, section 4(e) of the FPA authorizes the federal land managing agency to impose mandatory conditions to protect those lands. Section 18 of the FPA gives authority to the Secretaries of the Departments of the Interior and Commerce to prescribe fishways. With respect to exemptions, section 30(c) of the FPA allows federal and state agencies to impose conditions to protect fish and wildlife resources. In addition, section 401(a)(1) of the Clean Water Act precludes the Commission from issuing a final license for a hydroelectric project

until the project has first obtained a water quality certification, or a waiver thereof, and requires the Commission to adopt all conditions contained in the water quality certification. There are instances where Commission staff has completed its analysis of a hydroelectric project but final Commission action on the application has been delayed, sometimes for years, awaiting the issuance by a state, acting under delegated federal authority, of a water quality certification under the Clean Water Act.

In addition to licensing projects and issuing exemptions, the Commission is responsible for ensuring compliance with license and exemption conditions during the life of regulated projects. The Commission also maintains a strong, effective program of inspecting jurisdictional dams to ensure that human life and property are kept safe.

II. The Commission's Natural Gas Program

The Commission is responsible for authorizing the construction and operation of interstate natural gas pipeline and storage facilities under section 7 of the Natural Gas Act (NGA) and, under section 3 of the NGA, for authorizing the construction and operation of facilities necessary for either the import or export of natural gas by pipeline, or by sea as LNG. Authorizations for the import or export of the commodity of natural gas, including LNG, are issued by the Department of Energy.

As part of its responsibilities, the Commission conducts both a non-environmental and an environmental review of proposed natural gas projects. The non-environmental review focuses on a project's engineering design, market demand, costs, rates, and consistency with the Commission's regulations and policies. Under the NGA, the

Commission acts as the lead agency for the purposes of coordinating all applicable federal authorizations, including, but not limited to, those issued under the Endangered Species Act, National Historic Preservation Act, Clean Water Act, Clean Air Act, and Coastal Zone Management Act, as well as for the purposes of complying with NEPA. Congress has instructed each federal and state agency considering an aspect of an application for federal authorization to work with the Commission and to comply with the deadlines established by the Commission, unless a schedule is otherwise established by federal law. Commission staff establishes a publicly noticed schedule for all decisions or actions taken by other federal agencies and/or state agencies acting under delegated federal authority.

The environmental review, pursuant to NEPA, is carried out through a process that encourages cooperation from federal, state, and local agencies, and Indian Tribes and that provides for the input of other interested stakeholders. There are several distinct phases in the Commission's review process for interstate natural gas facilities under sections 3 and 7 of the NGA:

- Project Preparation: the project sponsor identifies customers and markets, defines a proposed project, and identifies potentially affected federal and state agencies and Indian Tribes in the project area, prior to formally engaging Commission staff;

- Pre-Filing Review: Commission staff begins working on the environmental review and engages with stakeholders, including agencies, with the goal of identifying and resolving issues before the filing of an application;

- Application Review: the project sponsor files an application with the Commission under NGA section 7 for interstate pipeline and storage facilities and/or under NGA section 3 for import or export facilities. Commission staff prepares an environmental review document, analyzes the non-environmental aspects of projects related to the public interest determination, and prepares an order for Commission consideration; and

- Post-Authorization Compliance: Following issuance of a Commission order approving a project, Commission staff works with the project sponsor and stakeholders, including agencies and Tribes, to ensure compliance during construction with environmental and other conditions included in the order.

The Commission's natural gas project review processes are thorough, efficient, and have resulted in the timely approval of interstate natural gas pipelines, LNG facilities, and facilities at our international borders for the import or export of natural gas. Since 2000, the Commission has authorized nearly 18,000 miles of interstate natural gas transmission pipeline totaling more than 159 billion cubic feet per day of transportation capacity, over one trillion cubic feet of interstate storage capacity, and 23 facility sites for the import and export of LNG. Over the past ten years, the Commission has also issued 15 NGA section 3 authorizations and Presidential Permits for border crossing facilities.

The Commission's practices allow for a systematic, efficient, and collaborative process, and have resulted in substantial additions to the nation's natural gas infrastructure.

III. FAST-41

The Fixing America's Surface Transportation Act was enacted on December 4, 2015. Title 41 of that act (FAST-41) established new coordination and oversight procedures for infrastructure projects being reviewed by federal agencies. FAST-41 is intended to:

- improve early consultation and coordination among government agencies;
- increase transparency through the publication of project-specific timetables with completion dates for all federal environmental reviews and authorizations; and
- increase accountability through consultation and reporting on delayed projects.

FAST-41 establishes a governance structure, including the creation of the Council, to deal with permitting issues on complex infrastructure projects and to establish best practices for the permitting process. The heads of various cabinet-level departments, as well as the Chairmen of the Commission and the Nuclear Regulatory Commission, are required to designate representatives to the Council. As of February 17, 2017, I have been the Commission's designated Councilmember and Heather Campbell, Senior Policy Advisor and the Commission's Federal Preservation Officer, has been the Commission's Chief Environmental Review and Permitting Officer (CERPO).

To be eligible for FAST-41, a proposal must meet the definition of a "covered project" under the statute. As relevant to the Commission, a covered project is one that: (1) involves the construction of a non-federal hydropower facility, interstate natural gas

pipeline, or LNG terminal that is subject to NEPA; and (2) is likely to require a total investment of more than $200,000,000.

To establish the initial inventory of FAST-41 projects, Commission staff identified all projects pending Commission review as of March 3, 2016 that met the definition of a covered project. The Executive Director of the Council then compiled a list of eligible projects from across the federal government and, on September 22, 2016, established an inventory of 34 covered projects, including 13 Commission-jurisdictional projects (4 hydroelectric projects, 7 natural gas pipeline projects, and 2 LNG terminal projects). Since the establishment of the inventory, the Commission has issued licenses for three of the hydroelectric projects and has issued certificates for two of the natural gas projects. For new projects to be added to the inventory, a sponsor must voluntarily submit a notice for consideration. To date there has been one FERC jurisdictional project that has requested and been approved to become a new covered project under FAST-41.

Since FAST-41 was enacted, Commission staff has attended all meetings of the Council and of agency CERPOs. In addition, staff has regularly participated in various FAST-41 working groups, including the Interagency Working Group, the Fees Working Group, and the Information Technology Working Group. Further, staff has assisted in the preparation of a number of FAST-41 related documents, including: OMB-CEQ Implementation Guidance (January 13, 2017); Best Management Practices Report (January 18, 2017); Performance Targets Report (January 18, 2017); and an Annual Report to Congress (April 15, 2017).

Commission staff has taken additional actions of consulting with other agencies to create a "Coordinated Project Plan" for each of the covered Commission projects; creating project-specific webpages that include timetables and other project information; and updating the Council on the status of projects pending before the Commission. Moreover, staff has met on a number of occasions with Council staff to discuss both general issues related to the implementation of FAST-41 and specific issues regarding individual projects.

To a great extent, the process established by FAST-41 mirrors the Commission's established transparent, collaborative procedures, resulting in consistency of the Commission's actions with FAST-41's requirements, including those associated with early coordination and consultation. Commission staff is committed to continuing to work with the Council to assist in the successful implementation of FAST-41 and to mesh the new FAST-41 procedures with the Commission's existing procedures, thereby ensuring the most efficient, effective possible processing of energy infrastructure matters before the Commission.

IV. Conclusion

This concludes my remarks. I would be pleased to answer any questions you may have.

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT OF

ROBYN S. COLOSIMO

ASSISTANT FOR WATER RESOURCES POLICY

OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS)

BEFORE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

UNITED STATES SENATE

ON

The Federal Permitting Process for Major Infrastructure Projects, Including the Progress Made by the Federal Permitting Improvement Steering Council

SEPTEMBER 7, 2017

Chairman Portman, Ranking Member Carper and distinguished member of the Subcommittee, I am Robyn Colosimo, Assistant for Water Resources Policy, in the Office of the Assistant Secretary of the Army for Civil Works. Thank you for the opportunity to discuss the U.S. Army Corps of Engineers (Corps) water resources infrastructure projects and the Regulatory Program within the context of Title 41 of the "Fixing America's Surface Transportation Act," (P.L. 114-94) (FAST-41).

The underlying objective of the FAST-41 provisions is to improve the Federal permitting process for infrastructure projects by integrating and streamlining Federal agency processes relevant to permits, approvals, determinations, and permissions. The Corps fully supports this objective.

The Corps strives to provide timely and efficient decision making both for the development of its water resources infrastructure projects and for applicants that may seek approval under one of its regulatory authorities with respect to the construction of an infrastructure project. The Corps fosters deliberate and open communication with applicants that request permits from the Regulatory Program under Section 10 of the Rivers and Harbors Act and/or Section 404 of the Clean Water Act or request permission to modify or alter authorized water resources development projects under Title 33 of the U.S. Code, Section 408. The Corps also engages early and often with its sister Federal agencies to seek their feedback and synchronize their review with its decision making process involving infrastructure project proposals.

For several years, the Corps has been sharing best practices from its Regulatory Program with other Federal agencies, including on the use of general permits, and on the synchronization of review processes, which was memorialized by the September 2015 release of the handbook entitled "Synchronizing Reviews for Transportation and Other Infrastructure Projects," also known as the Red Book. The Corps also has supported transparency and accountability, for example, by working with other agencies to provide permitting timelines for projects on the Infrastructure Permitting Dashboard.

Starting in 2016, the Corps has been actively working with the Federal Permitting Improvement Steering Council (FPISC) and its member agencies to provide information on its Regulatory Program tools, databases, and codified decision-making procedures. The Regulatory Program utilizes a streamlined efficient permitting process for the majority of activities it reviews. GPs are available where the proposed activity is minor, in terms of its anticipated impacts on aquatic resources. GPs reduce the time and therefore cost to the applicant of preparing an application and reduce the time and cost to the Corps of reviewing the application. In FY 2016, 94% of the Corps permit workload was processed by GPs, and 87% of GPs were issued in 60 days or less. GPs enable the Corps districts to focus on proposed activities that are more likely to have the potential for substantial adverse environmental impacts on aquatic resources, and therefore to require a more detailed project specific review. For applicants proposing such activities, the process involves submitting an individual permit (IP). Of the activities requiring IPs, 58% were issued within 120 days of receipt of a complete application.

The Corps has actively engaged with FPISC and other member agencies in the development of the implementation guidance for FAST-41. It is important to note the scope of covered projects under FAST-41 generally applies only to certain infrastructure proposals that are subject to the National Environmental Policy Act (NEPA), likely to require an investment of more than $200 million, and do not qualify for abbreviated authorization or environmental processes under any applicable law (the objective category); or are subject to NEPA and the size and complexity, in the opinion of the FPSIC Council, make the projects likely to benefit from enhanced oversight and coordination, including projects likely to require authorization from or environmental review involving more than two Federal agencies or the preparation of an environmental impact statement under NEPA (the discretionary category). Based on the experience of the Corps with the additional cost to the government for compliance with the FAST-41 coordination and procedures, an expansion in the applicability of FAST-41 could have the unintended consequence of degrading the level of service provided to the rest of the regulated public. The Corps processes approximately 80,000 permit actions per year.

The Corps staff at all levels of the organization have worked expeditiously in the implementation of FAST-41. We are continuing to work at further improvements to facilitate implementation of the Act such as automating data entry to the extent possible by making the Federal Infrastructure Dashboard compatible with existing agency websites that track some of the data required on the dashboard.

It may also help to clarify that FAST-41 is most beneficial to those projects where the Federal government has a substantial role in permitting or approving the project, but which does not already qualify for abbreviated authorization or environmental review processes under other statutes. For example, there may be large infrastructure projects that meet FAST-41 criteria for listing as a covered project, but the Federal government may only have a role in the review of an ancillary component of the larger infrastructure project, the review of which is already abbreviated, using existing authorities such as the Corps Nationwide Permits Program under the Clean Water Act.

Thank you for the opportunity to share the Corps experience and perspectives on implementation of FAST-41. We look forward to continuing to support FPISC and other member agencies on sharing of best practices and greater efficiency and transparency in our review of infrastructure projects.

Testimony of Gary Frazer, Assistant Director for Ecological Services,
U.S. Fish and Wildlife Service, Department of the Interior
before the Senate Committee on Homeland Security and Governmental Affairs,
Permanent Subcommittee on Investigations
"Cutting Through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"

September 7, 2017

Good morning Chairman Portman, Ranking Member Carper, and Members of the Subcommittee. I am Gary Frazer, Assistant Director for Ecological Services at the U.S. Fish and Wildlife Service (Service). I appreciate the opportunity to testify today on the Service's work in the implementation of Title 41 of the Fixing America's Surface Transportation (FAST) Act.

Background

The FAST Act includes provisions aimed at improving the transparency, predictability, and timeliness of Federal environmental review and permitting processes for major infrastructure projects. Specifically, Title 41 of the Act (FAST-41) addresses improvements to the Federal permitting process for certain types of projects, including large and complex energy production, electricity transmission, water resource, pipeline, and transportation projects, among others. FAST-41 focuses on improved coordination between Federal agencies and created the Federal Permitting Improvement Steering Council (Council) to oversee the agency coordination process for covered infrastructure projects. The FAST Act was signed into law on December 4, 2015 and is still in the initial phases of implementation. The Service is committed to carrying out our responsibilities under the law and fulfilling Secretary Zinke's priority of making environmental review and permitting processes more efficient.

U.S. Fish and Wildlife Service's Role Under FAST-41

The Service is responsible for reviewing and permitting projects under a number of statutory authorities, including the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and Fish and Wildlife Coordination Act. The Service's role is to facilitate the development and approval of environmentally sound infrastructure projects. The Service works with project proponents and partner agencies to help avoid and minimize harm to fish and wildlife, and to offset those impacts that are unavoidable. The goal is to facilitate these important projects while ensuring that each complies with Federal law.

The Service typically carries out these activities in the field as a participating or coordinating agency under FAST-41, working with the lead agency for a project in reviewing and commenting or consulting on the project plan within set deadlines. We engage at the national level to advise the Council in identifying and implementing best practices and policies related to FAST-41.

The overwhelming majority of the Service's actions are carried out at the field level. The Service's local field staff have in-depth knowledge of the ecosystems in which they work and the species that inhabit them, bringing expertise to project reviews to facilitate efficient, project-specific analyses. Larger and more complex projects, like those covered by FAST-41, may fall under the jurisdiction of multiple field or regional offices. As we move forward with the implementation of FAST-41, we will be reviewing our processes to maximize our effectiveness in conducting consultations and project evaluations spanning multiple field and regional offices. Our objective is to provide project proponents and partner agencies with consistent and efficient processes and, where feasible, a single point of contact.

The Service is either a cooperating or participating agency in the majority of projects covered under FAST-41, and all eight of the Service's regions are engaged in the review of covered projects. Two of those projects are highlighted below:

NEXUS Gas Transmission Project and Texas Eastern Appalachian Lease Project
The Service was able to conclude formal consultation under the ESA in less than two months on NEXUS Gas Transmission LLC's proposed pipeline in Ohio and Michigan, largely thanks to early and robust discussions between the Service and NEXUS. In this case, NEXUS initiated discussions with the Service early in the process, actively sought and implemented Service recommendations, and drafted detailed and innovative conservation measures. Coordination between the Service, NEXUS, and our partner agencies was smooth as a result of early consultation, voluntary avoidance of important resources, and cooperative discussion and analysis.

Gateway West Transmission Line Project
The Gateway West project is a proposed interstate transmission line between Idaho and Wyoming, spanning two Service regions and field offices; segments 8 and 9 of the project are covered by FAST-41. The Service's Wyoming Fish and Wildlife Office coordinates our role as a participating agency working with the project's lead agency, the Bureau of Land Management (BLM), to provide reviews under the ESA and other statutes within BLM's mandated timelines. Project meetings include many stakeholders, increasing transparency and allowing engaged agencies and project proponents to build consensus when considering changes to the proposed project to minimize impacts to fish and wildlife resources. The Service continues to work with BLM to facilitate the permitting processes for segments 8 and 9 of this project.

Conclusion
As discussed above, FAST-41 provides a platform for more efficient and effective review and permitting of large and complex infrastructure projects. The Service is focused on building efficiencies into our review and permitting processes that will improve and expedite consideration of many projects, regardless of whether a project is covered under FAST-41.

The Service is committed to improving the environmental review process to facilitate environmentally sound infrastructure development through timely, transparent, and predictable reviews, while ensuring the conservation of our nation's fish and wildlife resources. We view FAST-41 as a constructive framework for arriving at more timely decisions. In addition to facilitating increased coordination, FAST-41 increases the accountability of all parties involved

by designating priority projects, ensuring commitment to agreed upon timelines, and helping to identify and elevate potential issues earlier in the process. FAST-41 is a positive step in helping integrate various reviews and facilitating efficient processes across the Federal government.

Thank you for the opportunity to discuss the Service's work in implementing FAST-41. I would be happy to address any questions that you may have.

Federal Permitting Improvement Steering Council - Office of the Executive Director (FPISC-OED)
Capabilities Based on Level of Funding

FPISC-OED Capability	$4.25 Million[1]	$15 Million	$30 Million[2]
Project-Specific Support and Oversight of FAST-41 Covered Projects	✓ Capability for project-specific oversight and support is very limited – Core staff, 5 contractors ✓ **Limited** support to lead agencies on developing coordinated project plans and timelines to synchronize cross-agency permitting activities	✓ Dedicated project management staff at FPISC HQ **to oversee a portfolio** of FAST-41 covered projects. (8 FTE, 12 contractors) ✓ Dedicated staff to support agencies with FAST-41 facilitation – *1 FTE at each agency responsible for **coordinating internal** FAST-41 responsibilities* ✓ Training and support for best practices implementation – ***general support** to agencies including webinors and non-agency specific publications* ✓ Trained mediators to provide **limited** meditation and conflict resolution support to agencies. ✓ **Targeted** support to lead agencies on developing coordinated project plans and timelines to synchronize cross-agency permitting activities	✓ Dedicated HQ and regional project management staff **to provide on-site, in-person** technical assistance and resolve bottlenecks for specific projects (70 positions split between contractors and staff—aligns with CBO estimate) ✓ Dedicated staff to support agencies with FAST-41 implementation - *1 FTE and contractor support at agencies to coordinate internal FAST-41 responsibilities **and address** any permitting and authorization backlogs* ✓ Training and support for best practices implementation – ***targeted support** to agency headquarters and regional staff and key stakeholders* ✓ Trained mediators to provide **direct** meditation and conflict resolution support to agencies and stakeholders ✓ **Comprehensive** support to lead agencies on developing coordinated project plans and timelines to synchronize cross-agency permitting activities
Policy Oversight and Inter-agency Integration	✗ .5 FTE dedicated policy staff – Majority of time spent on execution of Congressionally-mandated reporting	✓ Dedicated policy staff to focus on: - Completing Congressionally-mandated reports - Working with the Council to **develop policies** that maximize permitting process improvements - Interface with White House and senior agency leadership	✓ Dedicated policy staff to focus on: - Completing Congressionally-mandated reports - Working with the Council to **develop and implement government-wide** policies that maximize permitting process improvements - Interface with White House and senior agency leadership

[1] Current Funding Level
[2] Congressional Budget Office Cost Estimate for S. 280 (July 28, 2015).

Permitting Dashboard	✓ General Maintenance – licensing, permission management ✗ Dashboard Enhancements – Limited. *FPISC will continue to enhance the dashboard in order to achieve the minimal statutory requirements for permitting timeline data and performance schedules*	✓ General Maintenance – licensing, permission management ✓ Dashboard Enhancements – Partial - Enhanced reporting, tracking and scheduling capabilities - Some visual enhancements	✓ General Maintenance – licensing, permission management ✓ Dashboard Enhancements – Full - State of the Art professional interface that highlights agency success and failure in real-time - Automated interface with council agencies - Data analytic capabilities
Fixed Costs	✓ Office Costs (Rent, Supplies, Overhead) ✓ FPISC Executive Director ✓ 4 FTE - Serve as **core staff** and leadership team	✓ Office Costs (Rent, Supplies, Overhead) ✓ FPISC Executive Director ✓ 4 FTE - Serve as leadership team	✓ Office Costs (Rent, Supplies, Overhead) ✓ FPISC Executive Director ✓ 4 FTE - Serve as leadership team

Statement for the Record

by

The Associated General Contractors of America

to the

U.S. Senate

Committee on Homeland Security & Governmental Affairs' Permanent Subcommittee on Investigations

For a hearing on

"Cutting Through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"

September 7, 2017

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 26,000 firms, including America's leading general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, levees, locks, dams, water conservation projects, defense facilities, multi-family housing projects, and more.

2300 Wilson Boulevard, Suite 300 • Arlington, VA 22201 • Phone: (703) 548-3118

Statement for the Record
The Associated General Contractors of America
Committee on Homeland Security & Governmental Affairs
Permanent Subcommittee on Investigations
United States Senate
September 7, 2017

AGC represents more than 26,000 construction contractors, suppliers and service providers across the nation, through a nationwide network of 92 chapters in all 50 states, DC, and Puerto Rico. AGC contractors are involved in all aspects of nonresidential construction and are building the nation's public and private buildings, highways, bridges, water and wastewater facilities, locks, dams, levees and more.

As such, our members know first-hand how to build infrastructure in a safe, effective and efficient manner. Similarly, they know the many challenges to doing just that. The federal environmental review and permitting process is such a challenge, repeatedly echoed by AGC members across the country; it's a process that is circuitous, costly and time-intensive for many infrastructure projects.

AGC and its members appreciate the legislative efforts of this Committee in the enactment of Title 41 of the Fixing America's Surface Transportation (FAST-41). The creation of the Federal Permitting Improvement Council and the Permitting Dashboard are a positive, first step in addressing the excessive permitting delays hampering the ability to deliver needed infrastructure projects that help our nation remain globally competitive and help mitigate the impacts of natural disasters. However, there remain opportunities to build upon FAST-41 as well as reduce duplication in and improve the efficiency of the federal environmental review and permitting process. Improving environmental approval processes alone while maintaining the integrity of those processes to mitigate environmental impacts could generate project cost savings. In addition, such improvements could allow the public to receive and benefit from infrastructure projects in a timelier fashion.

Enclosed with this written statement is AGC's comprehensive proposal entitled "*Reforms for Improving Federal Environmental Review and Permitting*." I will briefly highlight several reforms from that proposal.

I. Why Further Improving the Environmental Review and Permitting Process is Necessary

Again, AGC must note its appreciation for the work this Committee has untaken in helping enact environmental reforms in FAST-41. But, more work can to be done and improvements upon those enacted reforms can be made.

AGC members have pointed to a host of technical and procedural problems that government agencies face, in general, during document preparation and interagency reviews: they inevitably lead to inconsistencies in the environmental approval process, schedule delays and costs overruns. Such uncertainty spurs legal challenges, which can ultimately threaten the viability of the project.

Based on AGC's first-hand experiences, technical and procedural risks typically stem from:

- Poor interagency communication (leads to missed deadlines and conflicting agency requests and responses);
- Inability of the lead agency to make timely decisions, particularly where projects are "political" or controversial;
- Lack of qualified government staff to conduct reviews (leads to delays in document review/publication and resource-agency comments that are conflicting, redundant, repetitive, or inconsistent);
- Confusion during National Environmental Policy Act (NEPA) reviews with joint lead agencies (federal and state) because not all agencies have the same directives/thresholds;
- Disagreement over the project's "Purpose and Need;"
- Insufficient "Alternative Analysis;"
- Ineffective stakeholder outreach and engagement;
- Uncertainty over the level of analytical scrutiny to apply in reviewing projects (agencies are risk averse and often choose not to pursue streamlined options out of concern that such "short-cuts" will increase litigation); and
- Complex overlay of laws and regulations that apply to infrastructure projects – *in addition to NEPA* – complicates the permitting process (e.g., number of species listed and the breadth of critical habitat identified under the Endangered Species Act grows every year).

Current law provides steps for the lead agency of a project to coordinate and establish schedules with participating agencies and other interested stakeholders. But, importantly, as the "deficiencies" column on AGC's Current Environmental Streamlining Programs & Deficiencies Chart (see page 4 through 7) shows, the lead agency must consult with, and obtain the concurrence of, each participating agency before establishing or shortening a "schedule for completion of the environmental review process" AND there is no deadline for the government to complete the NEPA review process, from start to finish. In addition, where current law does set deadlines for agency actions under NEPA, or for issuing permits and permissions, those deadlines are missed because the list of exceptions is as long as the list of approvals you need to be in compliance with the 30-plus federal environmental statutes that may apply to any given project (see AGC's Federal Environmental Review and Permitting Flowchart, dated June 14, 2017 – on page 8).

Current law (per the Moving Ahead for Progress in the 21st Century Act (MAP-21)) does go so far as to impose penalties on federal agencies that fail to meet deadlines. Even so, these deadlines are not being met and the fines have never been levied. It is not happening because the lead agency can certify, for example, the permit application was not complete – or that the participating agency is waiting on another entity to make "some" decision before it can move forward with its permit, license or approval; and there is apparently a reluctance to elevate disputes. This also is clearly shown on the "deficiencies" column on AGC's Current Environmental Streamlining Programs & Deficiencies Chart (see pages 4 through 7).

In addition, the "deficiencies" column on AGC's Environmental Streamlining Chart (beginning on page 4) brings to light the following missed opportunities:

- The government also is not conducting federal and state permitting reviews concurrently, and together with NEPA. It is not happening because the law states that agencies do not need to

carry out their obligations concurrently if it would impact their ability to conduct any analysis or meet any obligation;

- Current law requires the lead agency to provide the participating agencies and public the opportunity for "involvement" in determining the project's Purpose and Need and Range of Alternatives; however, the participating agencies are not required to engage in any meaningful way or to ensure these procedural steps produce information to satisfy other federal approvals and/or permits required for the project;
- The "Planning and Environmental Linkages" provisions in current law intend to use the information, analysis, and products developed during transportation planning to inform the environmental review process. But there are 10 conditions spelled out in statute -- and participating agencies, the lead agency, and project sponsors must all concur that these conditions have been met; and
- The lead agency must develop an "environmental document" sufficient to satisfy federal permits, approvals or other federal action required for the project, but only "to the maximum extent practicable," per the current law.

In the face of this statutory and regulatory reality, the delays add up and it's clear that Congress can do more. For example, a National Association of Environmental Professionals (NAEP) review of the 194 Environmental Impact Statements (EIS) published in 2015 found that the average time to complete an EIS was five years and only 16 percent were prepared in two years or less. Meanwhile, 2015 report by Common Good, a non-profit government watchdog, finds that a six-year delay in starting construction on public projects costs the nation more than $3.7 trillion in lost employment and economic gain, inefficiency, and unnecessary pollution. That is a staggering amount of statutory and regulatory inefficiency that needs to be addressed.

AGC's Current Environmental Streamlining Programs & Deficiencies Chart

	MAP-21 + Title I FAST ACT *23 U.S. Code Chapter 1, §139, 168-69*[1]		**FAST-41** *42 U.S.C. Chapter 55, SubCh. IV §§4370m – 4370m-12* [2]	
CATEGORY	**WHAT'S IN THE LAW**	**DEFICIENCIES**	**WHAT'S IN THE LAW**	**DEFICIENCIES**
Early Coordination/ Collaboration	**FAST Act §1304** AFTER NOI, LEAD MUST: • Identify other agencies w/in 45d • Coordination plan w/in 90d; incl NEPA completion schedule • Dev chklist w/ partic. agencies to help proj sponsor identify all resources • Respond comments from partic. agencies • Dev enviro doc sufficient to satisfy all proj permits/approvals PARTIC AGENCIES MUST: • Provide updates in "searchable internet website" ... connect to Fed Permitting Dashbd **MAP-21 §1305** Requires **concurrence** of partic. agencies for enviro review schedules	*No increased authority of lead agency over other partic. agencies* *Partic. agencies must "concur" on proj. schedule in coordination plan and modifications to shorten it; can lengthen schedule for "good cause"* *Obtaining concurrence is a challenge, esp for controversial projects* *Lead agency can extend deadline for agencies/public to comment NEPA docs for "good cause"*	Project sponsor applies to be "covered project" Federal Permitting Improvement Council Early consultation (w/in 60d proj sponsor request), coordinated project plans (w/in 60d entry on Dashbd), project timetables, public Dashbd tracking...	*Def of "covered proj" excl MAP-21 + WRRDA projects* *Limited application – MORE THAN $200M* *Proj sponsor must "opt in"* *President must appoint ED; each of 13 agencies must appoint member to council (Deputy Sec. or higher) ... positions remain vacant*
Deadlines **Conflict Resolution**	**MAP-21 §1306** • 30d after DEIS – lead <u>may</u> convene schedule check • *POST-NEPA* 180-day deadline – for permits, licenses, & other approval decisions	***NEPA:*** *No deadlines* ***PERMITTING:*** *No increased authority of lead over partic. agencies – agencies decide when applic. "complete"*	180-day window for fed agency decision on enviro review or authorization – starts from date agency has all info needed **Disputes re: Timeline**	*Does not set specific NEPA review or permitting schedule* *Completion date in recommended performance schedule for each category cannot exceed the avg time to complete an*

[1] Provisions apply to all federally aid surface transportation projects for which an environmental impact statement is prepared under NEPA and may apply to other projects reviewed under the National Environmental Policy Act (NEPA), as determined by the Secretary.

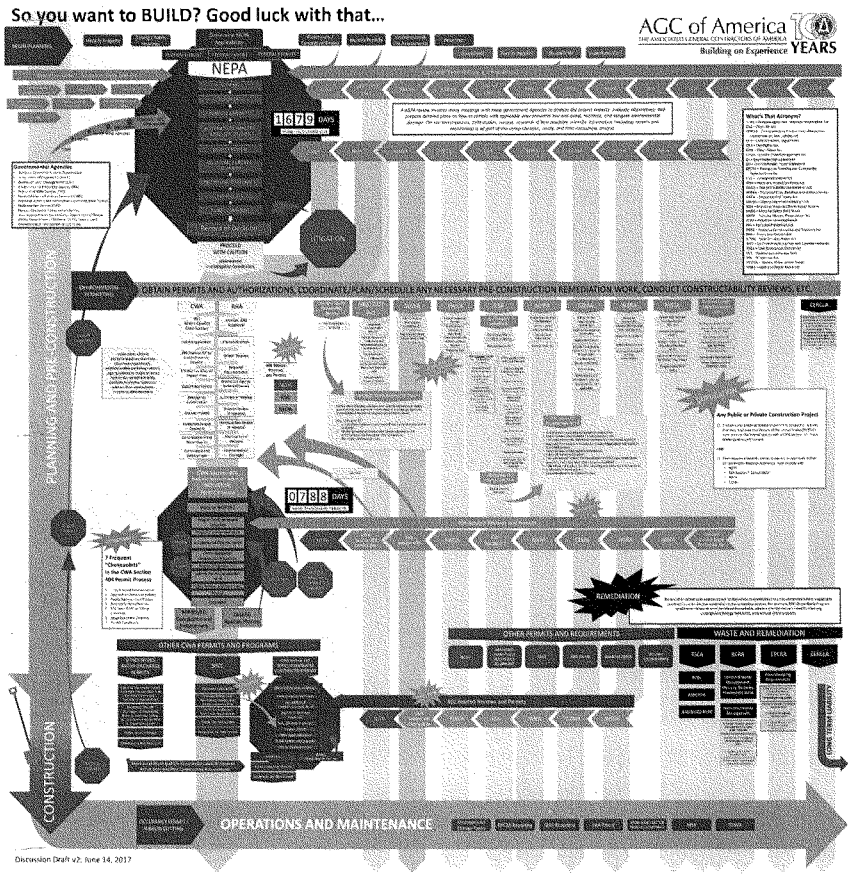
[2] Projects *may* be eligible for coverage under FAST-41 if they: involve construction of infrastructure; require authorization or environmental review by a Federal agency; are subject to NEPA; are likely to require a total investment of more than $200 million; and do not qualify for an abbreviated environmental review and authorization process.

	MAP-21 + Title I FAST ACT *23 U.S. Code Chapter 1, §139, 168-69*[1]		**FAST-41** *42 U.S.C. Chapter 55, SubCh. IV §§4370m – 4370m-12* [2]	
CATEGORY	**WHAT'S IN THE LAW**	**DEFICIENCIES**	**WHAT'S IN THE LAW**	**DEFICIENCIES**
	(clock starts aft applic complete) • Disputes – Go to head disputing agency, CEQ, then President Penalty if Miss Deadline: 180 days after (1) lead agency has issued final decision + (2) complete permit app filed... Funds rescinded from office of head of agency, or head of office to which permit decision was delegated. Amount: per week after 180-day deadline passes – $20k if project requires a financial plan (Major Project) / $10k for all other projects Exceptions: No funds rescinded if lead agency concurs that delay is not the fault of the permitting agency. **MAP-21 §1309** If EIS underway 2+ yrs, USDOT provide addt'l assistance, establish permitting/approval schedule .... need **concurrence** – FINISH w/in 4 years of start date	*Partic. agencies can say **application not complete** or can't move ahead until another entity makes a decision...* *Eg, Federal permit, license, or approval dependent on:* ✓ *401 CWA Water Qual Cert;* ✓ *NHPA - no effect;* ✓ *CZMA determination;* ✓ *NPDES sw permit;* ✓ *Floodplain permit by the local floodplain mgmt. administrator;* ✓ *FWS/NMFS Section 7 consult; and* ✓ *Tribal concurrence* *Reluctance to elevate dispute or exercise penalties – Partic. agency self-polices* *Concurrence*	Go to ExDir Fed Perm Impr Council – if 30d pass then OMB + CEQ facilitate a resolution by day 60. Action taken by Dir. OMB is final and conclusive and not subject to judicial review	*environmental review or authorization for projects within that category. Calculation based on analysis of time req'd to complete item (for projects within the relevant category of covered projects) during the preceding two calendar years.*
Concurrent Reviews	**MAP-21 §1305** Agencies coordinate and carry out activities concurrently, instead of sequentially, and in conjunction with the NEPA review ——— **FAST Act §1313** Coordinated/concurrent reviews + permitting for **Title 49 projects**, ALSO	*Waived if it "would impair the ability" of any agency to meet obligations*	Requires that state/federal permitting reviews run concurrently for a "covered project"	*So long as doing so does not impair a federal agency's ability to review the project*

	MAP-21 + Title I FAST ACT *23 U.S. Code Chapter 1, §139, 168-69*[1]		**FAST-41** *42 U.S.C. Chapter 55, SubCh. IV §§4370m – 4370m-12* [2]	
CATEGORY	**WHAT'S IN THE LAW**	**DEFICIENCIES**	**WHAT'S IN THE LAW**	**DEFICIENCIES**
	• Purpose and Need (P&N) and Range of Alternatives must be suff to provide resource agencies w/ needed info • P&N issues must be resolved during scoping – all other "issues" resolved expeditiously			
Alternatives Analysis	**FAST Act §1304** Lead agency must provide partic. agencies and public opportunity for "involvement" in defining P&N and determining Range of Alternatives – used for fed enviro reviews/permits req'd for project	*As early as practicable in the review process* *Partic agencies not required* *To the max extent practicable ... unless alternatives must be modified to address sign new info/ circumstances or to do NEPA in timely manner*	N/A	N/A
Use of Planning Products in Enviro Reviews **Programmatic Approaches**	**MAP-21 §1310; FAST Act §1305** USDOT integrate "planning products" in NEPA (e.g., mitigation needs) ... narrows **concurrence** reqm't **MAP-21 §1305** Use programmatic approaches for enviro reviews, eliminate repetition **MAP-21 §1318; FAST Act §1315** Programmatic Agreement (PA) Template • PA w/ States – state can make NEPA categorical exclusion (CE) determinations **FAST Act §1303; 1311** • Waive case-by-case Section 106 + 4(f)	*"Planning & environmental linkages" – far from simple: 10 conditions and need concurrence*	Adoption, incorporation by reference, and use of state documents	*Must meet complex process/procedural standards*

	MAP-21 + Title I FAST ACT *23 U.S. Code Chapter 1, §139, 168-69*[1]		**FAST-41** *42 U.S.C. Chapter 55, SubCh. IV §§4370m – 4370m-12* [2]	
CATEGORY	**WHAT'S IN THE LAW**	**DEFICIENCIES**	**WHAT'S IN THE LAW**	**DEFICIENCIES**
	review certain bridges/culverts • Adopt/incorp. by ref another Federal or state agency's docs **MAP-21 §1311** Allows "programmatic mitigation plans" to be developed in transp planning process (by state or MPO).			
Accelerate Review **Reduce Paperwork**	**MAP-21 §§1319; FAST Act §1304** Codifies use of errata sheets and FEIS/ROD as single document _____ **FAST Act §1311** Expanded provision to **Title 49 projects**	*Unless FEIS makes substantial changes to proposed action or significant new circumstances*	N/A	N/A
Single Enviro Document	**FAST Act §1304** LEAD AGENCY MUST: Develop "enviro document" sufficient to satisfy fed permits, approvals, etc.	*Only to the maximum extent practicable*	N/A	N/A
Modernize NEPA	**FAST Act §1317** Explore electronic and other innovative technology options	Report to Congress in one year	N/A	N/A
Limits on Lawsuits	**MAP-21 §1308** 150 days after notice in *Fed. Reg.* announcing permit, license or approval is final, for parties to file lawsuits that challenge agency enviro decisions re: surface transportation projects	*Most NEPA challenges brought well before deadline* *Prep + announcement of a "supplemental" EIS, when required, restarts the 150-day clock*	• 180-day SOL • NEPA – "get in or get out" Prelim Inj – consider harmful economy impacts (already was done when "balance equities")	*NEPA challenges brought well before deadline* *Prep + announcement of a "supplemental" EIS, when required, restarts to 150-day clock*

AGC's Federal Environmental Review and Permitting Flowchart



(Full file version submitted separately from this statement and available upon request to AGC's Director of Environmental Services Melinda Tomaino at tomainom@agc.org)

II. Opportunities for Improving Efficiency, While Maintaining Process Integrity

The ripe, high-level opportunities for improving the efficiency of the environmental review and permitting processes rest in the ability of Congress to: (A) merge sequential and duplicative federal environmental reviews; (B) mandate the use of previously completed environmental review and study information to avoid duplicative reviews; and (C) consider a reasonable and measured approach to citizen suit reform designed to prevent misuse of environmental laws.

A. Sequential and Duplicative Reviews Add Hurdles to Infrastructure Approvals

The current process of performing sequential and often duplicative environmental reviews and permits on the same project – performed by all levels of government following the NEPA approval process – is presenting massive legal hurdles to infrastructure approvals (see AGC's Federal Environmental Review and Permitting Flowchart, dated June 14, 2017 – on page 8). A builder of infrastructure—whether a contractor or government agency—must seek approval not from "the government," but from a dozen or more different arms of the government. According to bonding companies that finance large public works projects, two environmental approvals are critical in rating a project's risk for bond financing. Those are the NEPA review (1,679 days, on average, to complete an EIS) and Clean Water Act (CWA) Section 404 permit authorization (788 days, on average, to obtain an individual permit). Obtaining these approvals prior to bonding greatly reduces risk and achieves a higher bond rating to the benefit of the project sponsor.

Due to the inability of project owners (e.g., state departments of transportation or private developers) to obtain Section 404 permits quickly following NEPA approval, 404 permitting risk is often transferred to the construction contractor.

AGC REFORM:

Several states have merged their NEPA and CWA Section 404 permitting processes; this should be the national standard and the U.S. Army Corps of Engineers' (USACE) current regulations already point in this direction but do not go far enough. Across the nation there is considerable variation in the usage and emphasis of merger processes. In an integrated process, the project sponsor would submit the 404-permit application to USACE simultaneously with the publication of the draft EIS. USACE would be required to issue the 404 permit at the end of the NEPA process based on the information generated by NEPA.

Both the NEPA and Section 404 processes involve the evaluation of alternatives, the assessment of impacts to resources, and the balancing of resource impacts and project need. Conducting two processes simultaneously (or allowing the former to satisfy the latter) would greatly expedite project decision-making and avoid duplication and process inefficiencies. The federal funding agency should assume a lead role in shaping the project "purpose and need" and "range of alternatives" during the NEPA review. To simplify the review process, and reduce the potential for impasses over minor changes, Congress should modify any existing requirements for lead agencies to obtain participating agencies' "concurrence" in project schedules or the adoption/use of "planning products."

More generally, it should be a requirement for all government agencies involved in the issuance of a federal permit for any given project to complete concurrent reviews (in conjunction with the NEPA review process) within established time periods. From the perspective of the permit applicant, a coordinated concurrent review under all major federal and state authorities avoids duplication and delays and helps to avoid potentially conflicting permit conditions or limitations (e.g. differing mitigation requirements). There must be timelines and deadlines for completing the environmental permitting process as well as NEPA review deadlines.

B. Redoing Permit Documentation and Analyses Wastes Time and Money

Time and money is wasted on redoing project analyses and reviews and on collecting duplicative information from permit applicants. Challenges with environmental documentation and permitting processes are root causes for delays on infrastructure projects. The environmental permit approval process generally entails sequential reviews by multiple agencies and various requests for project-specific information. Even though each agency has slightly different forms and different information requirements, some of the information (like project descriptions) is duplicated across applications. This means that there can be multiple forms requesting the same information in different ways.

MAP-21 allows the use of errata sheets, rather than rewriting the draft EIS, when minor modifications are needed in a final EIS. Also, the lead agency should use a single document for the final EIS and ROD, as much as possible, unless there are substantial changes or there are significant new circumstances or information changes. By preventing the needless production of multiple additional documents, MAP-21 significantly reduces the amount of time involved in EISs. MAP-21 also encourages the use of "programmatic" mitigation plans and makes it somewhat easier to use previous planning work to meet NEPA requirements. Notably, MAP-21 also calls for the lead agency to develop a NEPA ROD that is sufficient to satisfy any other federal approvals/permits that the project may require; however, the duty to use a "single document" is void if its use would be impracticable, e.g., impair the ability of any federal agency to conduct needed analyses or meet any obligations.

AGC REFORMS: The monitoring, mitigation and other environmental planning work performed during the NEPA process, and included the final EIS/ROD, must satisfy federal environmental permitting requirements, unless there is a material change in the project.

- Implement an integrated "one-stop" permitting system by creating a single form that collects all information needed for major permits. That way, applicants only need to provide information once (and to fill out one long form and file it once);
- Also, build an online database of technical information (e.g., on distributions of endangered species, critical habitat, or previous permit requirements) so that new information does not have to be gathered anew for every project operating in a similar watershed or geographic area;
- Allow environmental reviews to adopt material from previously completed environmental reviews from the same geographic area; and
- Require federal agencies to use regional- or national-level programmatic approaches for authorizations and environmental reviews, for frequently occurring activities as well as those activities with minor impacts to communities and the environment.

To cite a program worthy of replication: Once a natural gas infrastructure project under the Federal Energy Regulatory Commission (FERC) jurisdiction is authorized, project sponsors can request changes as "variances." FERC will consider approval of variances upon the project sponsor's written request, if it agrees that a variance:

- provides equal or better environmental protection;
- is necessary because a portion of this Plan is infeasible or unworkable based on project specific conditions; or
- is specifically required in writing by another federal, state, or Native American land management agency for the portion of the project on its land or under its jurisdiction.[3]

AGC recommends that all federal and state agencies regulating approved publicly-needed infrastructure have a clearly defined variance process to follow to efficiently make project changes while maintaining environmental protection.

C. Judicial Review Reforms in Current Law Are Limited and Not Likely To Provide Significant Relief

The citizen suit provisions in 20 environmental statutes are being used to challenge all types of projects, land restrictions and permit requirements relating to the projects. These lawsuits can take years to resolve and the delay not only impacts the ability to secure the necessary environmental approvals and the financing of the project, but – in far too many cases – impedes projects that are vital to the renovation and improvement of our nation's municipal water supplies, wastewater treatment facilities, highway and transit systems, bridges and dams.

As currently written, the FAST Act's judicial review changes are limited and not likely to provide significant relief. FAST-41 reduced the statute of limitations (SOL) for NEPA challenges from six to two years; however, most NEPA lawsuits already are filed well within two years. FAST-41 also provides that in any action seeking a temporary restraining order or preliminary injunction of a covered project, the court shall "consider the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction" and shall not presume that such harms are reparable. However, most courts already consider an injunction's negative impact when balancing the harms and equities. Another FAST-41 provision dictates that NEPA challenges can only be brought by those who commented on an EIS and did so with sufficient detail to put the lead agency on notice of the claims. With regard to standing, many courts have limited NEPA challenges to comments raised within the public review period on the EIS (others allow plaintiffs to file suit as long as they can show "injury in fact").

MAP-21 reduced the time limit to 150 days after publication of a notice in the *Federal Register* announcing that a permit, license or approval is final, for parties to file lawsuits that challenge agency environmental decisions regarding surface transportation projects. However, the preparation and announcement of a "supplemental" EIS, when required, restarts to 150-day clock.

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[3] Variances are not specifically mentioned in FERC's regulations but rather in its standard best management practices for operators found in the "UPLAND EROSION CONTROL, REVEGETATION, AND MAINTENANCE PLAN" and "WETLAND AND WATERBODY CONSTRUCTION AND MITIGATION PROCEDURES." Note that these plans are referenced in the regulations at 18 C.F.R. 380.12(i)(5) and 380.12(d)(2) – but not the details of the plans. Both plans were updated in 2013, but the variance process has been in place since at least 2003. *See* Sections I.A., *Applicability* in these online documents: https://www.ferc.gov/industries/gas/enviro/plan.pdf; https://www.ferc.gov/industries/gas/enviro/procedures.pdf.

AGC REFORMS: Citizen suit reforms are necessary to prevent their abuse.

- Further shorten and standardize the SOL for challenges to final NEPA RODs or claims seeking judicial review of an environmental permit, license or approval issued by a Federal agency for an infrastructure project;
- Require interested parties to get involved early in a project's review process to maintain standing to sue later;
- Require bonds be posted by plaintiffs seeking to block activities to reduce abuse and delay tactics that harm private parties and taxpayers; and
- Require that the enforcement of federal environmental rules on a construction site be enforced only by trained staff of government agencies -or-
    - Limit citizen suit penalties to violations of objective, numeric limitations rather than subjective, narrative standards;
    - Extend "notice period" beyond the current 60 days (giving regulatory agencies more time to review notice of intent letters and initiate formal actions);
    - Clarify definition of "diligent prosecution" of alleged violations, thereby allowing federal/state authorities to exercise their primacy in enforcement and preventing unnecessary citizen suit intervention.

III. Conclusion

As noted, AGC appreciates the previous efforts this Committee has taken to reduce the duration of the federal environmental review and permitting processes. But, again, more reforms must be enacted to address the significant bottlenecks and redundancies in the environmental process.

We believe that the reforms suggested here and additionally enclosed below would both shorten the process while maintaining the integrity of the overall process that helps ensure infrastructure project impacts on the environment are mitigated.

Thank you again for the opportunity to submit this statement and considering AGC's views.

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Building on Experience 100 YEARS

Reforms for Improving Federal Environmental Review and Permitting

PROBLEM

The Federal Government is a steward of the public trust and the timeliness of its decisions can have major implications for the environment and the economy. Delays in environmental review and permitting decisions, as well as lengthy procurement processes, often derail the efficient delivery of needed infrastructure projects by many years. These processes are bureaucratic, lengthy, complex and duplicative. They involve multiple interrelated approvals within a labyrinth of numerous agencies. Throughout these processes, too often, litigation abounds. Delays deny the public the substantial benefits that come from a construction project: improving our economy, our competitiveness, and our quality of life.

GOAL

AGC hopes this document will help frame the problems that are playing out on public projects and demonstrate the need for reform. The sections that follow identify ways to lessen the time and costs associated with environmental review and permitting – with a focus on integrating the processes to avoid sequential and duplicative reviews, minimize redoing permit documentation and analyses, foster innovation, reduce litigation, and mitigate the unreasonable contractual risks that are unnecessarily driving up costs for infrastructure projects. AGC offers specific reforms that seek to offset lengthy National Environmental Policy Act review schedules and avoid the Clean Water Act Section 404 permitting lag that follows.

Prepared by:
The Associated General Contractors of America
2300 Wilson Boulevard, Suite 300
Arlington, Virginia 22201
Main Phone Number: (703) 548-3118

Date: Discussion Draft v2 - July 24, 2017

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Building on Experience 100 YEARS

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I. Executive Summary

Most large infrastructure projects must receive environmental reviews and approvals that involve many federal agencies and multiple levels of government. What is more, these projects generally do not qualify for efficient general permitting procedures and must obtain extremely costly and time-consuming individual permits, on a project-by-project basis. AGC, in this document, is focused on reforming the National Environmental Policy Act (NEPA) and the federal environmental permitting process to eliminate delays, unnecessary duplication, and frivolous litigation, and give worthy projects a timely green light.

Specifically, Congress should strengthen and expand the time-limited schedules and other meaningful "streamlining" reforms in current law and impose action-forcing mechanisms as well as incentive programs to ensure agency-wide compliance. To avoid sequential and duplicative reviews that slow down many large infrastructure projects, Congress should require the issuance of Clean Water Act Section 404 permits in conjunction with the NEPA Record of Decision. To this end, it is critical that Congress require agencies to allow the monitoring, mitigation and other environmental planning work performed during the NEPA process, and included the final Environmental Impact Statement, to satisfy federal environmental permitting requirements.

AGC also points out why undisclosed environmental risk – as for managing and remediating unforeseen hazardous material – can unnecessarily drive up construction costs, particularly on public works projects, (due to added cost contingencies) and limit the universe of qualified, responsible construction firms (due to contractors dropping out of the procurement). Congress should require the government to bear such unquantifiable risk on public works projects and/or provide contractual relief through cost sharing mechanisms.

Importantly, the threat of endless litigation (with regard to environmental justice, climate impacts and other issues) is forcing agencies to try to make their NEPA analyses litigation-proof so they survive judicial challenges under NEPA's well worn "hard look" standard. AGC herein makes the case for why Congress should work to remove the incentives for frivolous and obstructive litigation that are delaying, and sometimes defeating, proposed projects.

AGC also offers specific reforms to the NEPA process that would help to expedite project construction at a reduced price, while supporting the innovation needed to our nation's infrastructure, include prohibiting the initiation of procurement prior to the NEPA approval and exempting *de minimis* changes formal NEPA re-evaluation. Specific to the 404-permitting process, reforms are needed to encourage advance mitigation planning and investment.

II. Introduction to Federal Review and Permitting

A. The Use of NEPA

NEPA is a procedural "planning" statute with two primary aims. First, it obligates federal agencies to consider every significant aspect of the environmental impact of an action along with alternatives before proceeding with it. Second, it ensures that the agency responsible for the action will inform the public of what the action is, and that it has considered environmental concerns in its decision-making process. In this capacity, NEPA has become one of the primary mechanisms through which the public can participate in the federal decision-making process.

There are three triggers for NEPA's procedural requirements:

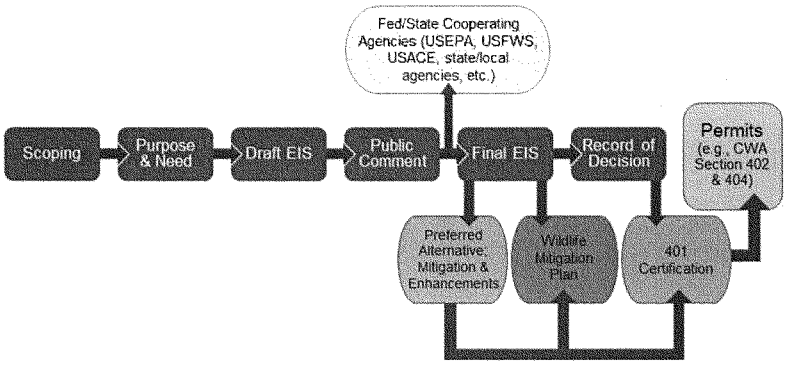
- One or more project components will occur on federal lands, such as national forests or Bureau of Land Management lands (e.g., building powerlines, drilling for oil, logging, installing renewable energy projects).[1]
- The project or its components will be funded in part or whole by federal funds.
- The project will require a federal permit or license.

Federal actions to which NEPA applies involve the participation of a "lead agency" and "cooperating agencies." The lead agency is the federal agency that takes responsibility for preparing the NEPA documentation.[2] A cooperating agency is any federal agency, other than a lead agency, that has jurisdiction by law or special expertise regarding any environmental impact involved in a proposal. A tribal, state, or local agency may also be a cooperating agency.[3] As explained below, there are a host of environmental statutes that may apply to a given federal action and, as such, numerous federal agencies may be required to participate in the NEPA process.

NEPA covers the full range of potential environmental impacts, including but not limited to water quality impacts, wetlands impacts, air quality impacts, endangered species impacts, and historic resources impacts. NEPA establishes procedural and planning practices for federal agencies but it does not replace (or conflict with) other substantive environmental laws (e.g., Clean Air Act, Clean Water Act, Endangered Species Act) and the additional permitting and process procedures required therein.[4] See Section II.B below.

If the environmental consequences of a proposed federal action may be significant, the federal agency prepares an Environmental Impact Statement (EIS). An EIS is a detailed evaluation of the proposed action and alternatives. As soon as possible after determining that an EIS is needed, the agency is required to determine the scope of the project (including any environmental laws, regulations, or executive orders, in addition to NEPA, that will apply to the project). Once the agency determines the scope of the action, EIS preparation can begin. The action's "purpose and need statement" is the foundation on which subsequent sections of the EIS are built.[5]

EISs and supporting technical studies often run a thousand pages or more. The public, other federal/state cooperating agencies, and outside parties provide input into the preparation of an EIS and then comment on the draft EIS when it is completed.[6] After a final EIS is prepared, a federal agency will prepare a public Record of its Decision (ROD) that addresses how the agency incorporated the findings of the EIS, including consideration of alternatives, into the decision-making process.[7]



B. The Interplay between NEPA and other Federal Requirements

NEPA forms the framework to coordinate compliance with other environment-related statutes and regulations, many of which impose permit requirements. On the positive, the NEPA process serves to provide decision-makers with a more comprehensive view of the major environmental issues and potential conflicts among the environmental components of proposed projects. However, NEPA does not give the lead agency (or for that matter, the Council on Environmental Quality (CEQ)) regulatory authority and oversight of the agencies charged with implementing the regulations and permitting programs that are required to adequately ensure the federal activity is conducted to avoid and minimize potential impacts. In current practice, project proponents are generally proceeding with piecemeal permit applications after NEPA to advance the project to construction.

Construction projects, such as bridge and highway construction, pipelines, water resource projects, renewable or conventional energy production may require compliance with literally dozens of federal, state, tribal, and local laws.

Federal environmental legal requirements potentially applicable to federal actions include; but may not be limited to:

- Archaeological and Historical Preservation Act
- Clean Air Act
- Clean Water Act (CWA)
- Coastal Zone Management Act
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- Emergency Planning and Community Right to Know Act (EPCRA)
- Endangered Species Act (ESA)
- Executive Order 12898 (Environmental Justice)
- Farmland Protection Policy Act

- Fish and Wildlife Coordination Act
- Historic Sites, Buildings and Antiquities Act
- Marine Mammal Protection Act
- Migratory Bird Treaty Act
- National Historic Preservation Act
- Pollution Prevention Act
- Resource Conservation and Recovery Act (RCRA)
- Rivers and Harbors Act
- Safe Drinking Water Act
- Section 4(f) of USDOT Act (49 USC 303)
- Title VI of the Civil Rights Act
- Wild and Scenic Rivers Act
- Wilderness Act

These federal statutes are administered by a variety of different federal agencies that could all potentially become "cooperating agencies" in any given NEPA evaluation; including but not limited to:

- Advisory Council on Historic Preservation
- Army Corps of Engineers (USACE)
- Bureau of Land Management
- Environmental Protection Agency (USEPA)
- Federal Energy Regulatory Commission (FERC or Commission)
- Fish and Wildlife Service (USFWS)
- Forest Service
- National Marine Fisheries Service (NMFS)
- National Park Service
- Natural Resources Conservation Service of U.S. Department of Agriculture
- Tribal Consultation

Indeed, the NEPA process requires the lead agency to coordinate extensive reviews, documentation and analysis with other federal agencies including the ones listed above, as well as various state regulatory and review agencies. One of the challenges for project sponsors is to align all the different agency approvals that are needed for a project.

In addition to the NEPA process, the project sponsor/operator will need to complete separate environmental federal permit processes or analyses, as the final version of the project may warrant. CEQ's NEPA regulations require a draft EIS to "list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal."[8]

The CEQ has formally sought to streamline the NEPA process, and in 2011 it issued a Memorandum for Heads of Federal Departments and Agencies that touted the benefits of "integrating environmental reviews, coordinating multi-agency or multi-governmental reviews and approvals ..."[9] CEQ regulations encourage agencies to integrate these multiple reviews into a single, comprehensive EIS that is prepared concurrently and integrated with the requirements of other federal environmental laws.[10] Several agencies have issued guidance[11] on how to accomplish such streamlining with regard to substantive (and not merely procedural) environmental laws. But multi-year approval processes remain the norm and delay perpetuates the bottlenecks and inefficiencies that impede competitiveness and cause pollution.

C. Federal Review and Permitting in Action

There are a multitude of statutes, implementing regulations, agency policies, and court decisions that affect what permits are required on construction projects, what agencies look for during a permitting process, and what activities or discharges they can authorize. Duplicative environmental reviews and permits are often required on the same project by federal, state, and local governments. A builder of infrastructure must seek approval not from "the government," but from a dozen or more different arms of the government.

The process of issuing a federal environmental permit almost always involves a complex web of related permissions, approvals and certifications that are all interdependent. For example, if the USACE determines that a project requires federal authorization under a CWA Section 404 permit before it can proceed, the project sponsor/operator can expect a lengthy and costly process during which a host of separate agencies will enter the fray: the USFWS (and/or the NMFS) will likely be engaged through consultation on endangered species or essential fish habitats; the state environmental agency will be involved pursuant to the Section 401 water quality certification process; other state historic preservation offices may be involved depending on their role in their respective state and the nature of the project; the pertinent tribal government is involved if any tribal leads or interests are impacted by the project. See Section V – At-A-Glance Look at the CWA 404 Individual Permit Process and 'Chokepoints.'

Looking just at the federal environmental permitting scheme, in addition to the potential need for Section 404 permit coverage, a manufacturing or stationary-source plant would likely also need the following permits from the USEPA or from its delegated state authority:

- National Pollution Discharge Elimination System (NPDES) permit under CWA Section 402 ;
- Title V Clean Air Act operating permit for a "major source" of pollutants (certifying compliance with the applicable requirements of their permits at least annually);
- New Source Review and Prevention of Significant Deterioration Clean Air Act permit prior to construction to ensure that the anticipated "release of pollutants [does not] exceed federal standards for the region;"
- Additional CWA and CAA permits may apply – as well as Safe Drinking Water Act, RCRA and EPCRA requirements – depending on the types of materials the manufacturing facility uses and the waste streams it generates.

D. Federal Review and Permitting Costs

The cost to prepare an EIS is often borne by project sponsors. For public projects, this means the government and, ultimately, taxpayers.

- Per a National Association of Environmental Professionals (NAEP) review of the 194 EISs published in 2015, the average time to complete an EIS was five years and only 16 percent were prepared in two years or less.[12]
- A U.S. Government Accountability Office (GAO) report stated that the average completion time for an EIS in 2012 was 4.6 years.[13]

- Between 2003 and 2012, the U.S. Department of Energy paid consultants an average fee of $6.6 million, and as much as $85 million, to prepare EISs.[14]

The opportunity cost also can be significant:

- The 2015 report by Common Good, a non-profit government watchdog, finds that a six-year delay in starting construction on public projects costs the nation more than $3.7 trillion in lost employment and economic gain, inefficiency, and unnecessary pollution.[15]
- Delay also dramatically increases the cost of construction.
- That projected total is more than double the $1.7 trillion needed through the end of this decade to modernize and upgrade the crumbling U.S. infrastructure, according to projections of the American Society of Civil Engineers.

The procurement process for large projects is moving to design-build. These procurements expedite construction; however, these efficiencies may be offset by lengthy procurement processes.

- A $1.3 billion procurement of a 60-mile segment of high speed rail took 15 months from RFQ (request for qualifications) to award.
- A $860 million procurement of a 30-mile tollway took 21 months from RFQ to award.
- An RFQ for a $1.3 billion procurement for a reconstruction of a highway in a major city has spanned over two years and has yet to award.

III. General Recommendations to Improve Federal Review and Permitting Efficiency

A. Streamlining Reforms in Current Law Have Limited Applicability; Fail to Mandate Schedules

Currently the environmental streamlining reforms in current law have limited application and, in some cases, miss the mark. MAP-21 (The Moving Ahead for Progress in the 21st Century Act),[16] the Water Resources Reform and Development Act (WRRDA) of 2014,[17] and the FAST Act (Fixing America's Surface Transportation Act) included a great deal of new authority designed to streamline project review and approval. See Appendix 1: Expedited Environmental Review of Infrastructure Projects – FAST-41 Highlights. See also the Energy Policy Act of 2005 (EPAct 2005),[18] a law intended to streamline and expedite federal authorizations for interstate natural gas pipeline projects and electric transmission infrastructure projects. **Still, more reforms are needed, and on a more comprehensive basis, to improve our delivery of important infrastructure projects across the nation.**

REFORM: Rather than creating brand new processes, Congress should expand the meaningful reforms included in Title 41[19] of the FAST Act (FAST-41) (coordinated and time-limited environmental review and permitting schedule and enhanced procedural transparency) more broadly so that they cover more projects (i.e., projects with total investment of LESS than $200 million). FAST-41's definition of "covered project" leaves room for confusion and does not include most federal transportation projects or federal water resource development projects – see Appendix 1. What is more, the language appears to give developers the option not to participate in the new process: Infrastructure projects may be become "covered projects" under FAST-41 only after the project sponsor submits "an initiation notice for inclusion" under the Act.[20] To expedite the delivery of projects, Congress should ensure that the

"streamlining" process applies to all NEPA reviews for the "construction of, and infrastructure for" federally funded infrastructure projects.

A significant deficiency with the FAST-41 language is that the "deadlines" are flexible and non-binding. FAST-41 does not set specific review/permitting schedules.[21] FAST-41 sets a 180-day window for a federal agency decision on an environmental review or authorization – starting from the date the relevant agency receives all information needed to complete the review.[22] But the law gives agencies discretion in determining when they have sufficient information to make a decision on a project. Therefore, time limits are likely to fluctuate if an agency determines more information is needed or demonstrates a reason for missing the completion date (theoretically an agency could continue to ask for more information and/or propose alternative completion dates). See Appendix 1: Expedited Environmental Review of Infrastructure Projects – FAST-41 Highlights.

MAP-21 addressed environmental delays in the delivery of federal-aid transportation projects. Specifically, the law requires federal agencies to act on a decision to issue any permit, license, or approval within 180 days of either the lead agency's final NEPA decision or the receipt of the application by the participating agency, whichever is later. Failure to meet the deadline established in MAP-21 will result in financial penalties to the offending federal agency.[23] For complex projects, MAP-21 requires the U.S. Department of Transportation to provide additional technical assistance to establish a schedule for completing permits, approvals, etc., within four years of formal announcement of intent to prepare an EIS, as defined in CEQ NEPA regulations at 40 C.F.R. § 1508.22.[24]

REFORM: Congress should strengthen the time-limited schedules in FAST-41 to make them truly mandatory. Any objections that are not raised or resolved within a definite timeframe should be waived and the procedure deemed complete --- and you would move on to the next step. There should also be a hard deadline for the completion of NEPA review. (For example, the RAPID Act[25] proposed deadlines of 18 months for an Environmental Assessment (EA) and 36 months for an EIS.) An action-forcing mechanism should deem a project approved within a definite timeframe. Also, consider a broader application of MAP-21's provision that imposes financial penalties on agencies that fail to render permitting decisions within the deadline.

With the passage of EPAct 2005, Congress amended the Federal Power Act of 1935, the Natural Gas Act of 1938, and the Public Utility Regulatory Policies Act of 1978 and granted the Federal Energy Regulatory Commission (FERC or Commission) with significant responsibilities and authority over energy projects. EPAct included three principal policy goals for the Commission:

1. reaffirmed a commitment to competition in wholesale power markets as national policy;
2. strengthened the Commission's regulatory tools, recognizing that effective regulation is necessary to protect the consumer from exploitation and ensure fair competition; and
3. provided for development of stronger energy infrastructure.

For electric transmission infrastructure, the Commission signed a Memorandum of Understanding with the U.S. Department of Energy and other federal resource agencies with authority to issue federal authorizations for electric transmission facilities to establish a coordinated federal review and permitting process. As part of EPAct, Congress also gave three or more contiguous states the opportunity to enter an interstate compact to establish regional transmission siting agencies to:

1. facilitate siting of future electric energy transmission facilities within those states; and
2. carry out the electric energy transmission siting responsibilities of those states.

The regional transmission siting agencies "shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States)." The Commission shall have "no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement" and the Secretary makes the requisite finding.[26]

REFORM: Congress should review the initial success of EPAct with respect to regional transmission siting agencies and the effectiveness for timely development of electric transmission infrastructure projects.

For natural gas infrastructure projects, FERC became responsible for the coordination, environmental review, and the processing of all federal authorizations relating to proposals for interstate projects under its jurisdiction (pipelines, storage fields, compressor stations, liquefied natural gas facilities, etc.).[27] Subsequently in late 2006, FERC issued a Final Rule (Order 687)[28] and regulations[29] establishing the process by which it would exercise its responsibilities under Section 313 of EPAct, including the requirement to set expeditious schedules for all federal and state agencies acting under federal delegated authority, to reach a final decision on requests for federal authorizations necessary for natural gas infrastructure projects. In its final rule, the Commission established a 90-day deadline for other federal decisions upon the issuance of FERC's final EA or final EIS, unless a specific schedule is otherwise formally noticed by FERC.[30] However, if a federal or state agency does not comply with the FERC schedule for federal authorizations, EPAct 2005 only provides an enforcement option for the applicant, not FERC. Section 313 allows an applicant to file a petition with the United States Court of Appeals for the District of Columbia Circuit, which is given original and exclusive jurisdiction over any civil action for review of an alleged failure of an agency to issue, condition, or deny any permit required under federal law.[31] But this provision has rarely been used, allowing agencies to miss the required federal authorization deadline without consequence.

REFORM: Congress should review the initial success of EPAct in regard to interstate natural gas infrastructure projects and the more recent (last 3 years) project schedule delays and declining applicant certainly in regard to NEPA and permitting timelines. Further, Congress should clarify with the Commission why the FERC 90-day deadline for other federal decisions upon the issuance of a final EA or final EIS is not consistently upheld.

B. Sequential and Duplicative Reviews Add Hurdles to Infrastructure Approvals

The current process of performing sequential and often duplicative environmental reviews and permits on the same project – performed by all levels of government following the NEPA approval process – is presenting massive legal hurdles to infrastructure approvals. A builder of infrastructure—whether a contractor or government agency—must seek approval not from "the government," but from a dozen or more different arms of the government. According to bonding companies that finance large public works projects, two environmental approvals are critical in rating a project's risk for bond financing. Those are the NEPA review (1,679 days, on average, to complete an EIS) and CWA Section 404 permit authorization (788 days, on average, to obtain an individual permit). Obtaining these approvals prior to bonding greatly reduces risk and achieves a higher bond rating to the benefit of the project sponsor.

FAST-41 requires that state and federal permitting reviews run concurrently for a "covered project" so long as doing so does not impair a federal agency's ability to review the project.[32] The law does not specify the permits and approvals required to be included in the schedule. Again, as stated above, there is no penalty or regulatory consequence for missed deadlines. MAP-21 directs cooperating agencies to coordinate and carry out activities concurrently, instead of sequentially, and in conjunction with the NEPA review, and expanded the use of categorical exclusions.[33] (Notably, the "concurrent review" requirement under MAP-21 is waived if it "would impair the ability" of any agency to conduct any analysis or meet any obligation.) WRRDA similarly requires agency coordination and concurrent action on environmental reviews to accelerate project delivery.[34]

REFORM: For federal transportation projects, several states have merged their NEPA and CWA Section 404 permitting processes; this should be the national standard and USACE's current regulations already point in this direction but do not go far enough.[35] (Across the nation there is considerable variation in the usage and emphasis of merger processes.) In an integrated process, the project sponsor would submit the 404-permit application to USACE simultaneously with the publication of the draft EIS. USACE would be required to issue the 404 permit at the end of the NEPA process based on the information generated by NEPA.

Both the NEPA and Section 404 processes involve the evaluation of alternatives, the assessment of impacts to resources, and the balancing of resource impacts and project need. Conducting two processes simultaneously (or allowing the former to satisfy the latter) would greatly expedite project decision-making and avoid duplication and process inefficiencies.[36] NOTE: The federal funding agency should assume a lead role in shaping the project "purpose and need" and "range of alternatives" during the NEPA review. To simplify the review process, and reduce the potential for impasses over minor changes, Congress should modify any existing requirements for lead agencies to obtain participating agencies' "concurrence" in project schedules or the adoption/use of "planning products."[37]

More generally, it should be a requirement for all government agencies involved in the issuance of a federally required permit for any given project to complete concurrent reviews (in conjunction with the NEPA review process) within established time periods. From the perspective of the permit applicant, a coordinated concurrent review under all major federal and state authorities avoids duplication and delays and helps to avoid potentially conflicting permit conditions or limitations (e.g. differing mitigation requirements). There must be timelines and deadlines for completing the environmental permitting process as well as NEPA review deadlines (see above).

C. Redoing Permit Documentation and Analyses Wastes Time and Money

Time and money is wasted on redoing project analyses and reviews and on collecting duplicative information from permit applicants. Challenges with environmental documentation and permitting processes are root causes for delays on infrastructure projects. The environmental permit approval process generally entails sequential reviews by multiple agencies and various requests for project-specific information. Even though each agency has slightly different forms and different information requirements, some of the information (like project descriptions) is duplicated across applications. This means that there can be multiple forms requesting the same information in different ways.

On the positive side, MAP-21 allows the use of errata sheets, rather than rewriting the draft EIS, when minor modifications are needed in a final EIS. Also, under current law the lead agency should use a single document for the final EIS and ROD, as much as possible, unless there are substantial changes or there are significant new circumstances or information changes.[38] By preventing the needless production of multiple additional documents, MAP-21 significantly reduces the amount of time involved in EISs. MAP-21 also encourages the use of "programmatic" mitigation plans[39] and makes it somewhat easier to use previous planning work to meet NEPA requirements.[40] Notably, the FAST Act also calls for the lead agency to develop a NEPA ROD that is sufficient to satisfy any other federal approvals/permits that the project may require; however, the duty to use a "single document" is void if its use would be impracticable (e.g., impair the ability of any federal agency to conduct needed analyses or meet any obligations.)[41]

REFORM: The monitoring, mitigation and other environmental planning work performed during the NEPA process, and included the final EIS/ROD, must satisfy federal environmental permitting requirements, unless there is a material change in the project.[42] Implement an integrated "one-stop" permitting system by creating a single form that collects all information needed for major permits. That way, applicants only need to provide information once (and to fill out one long form and file it once). Also, build an online database of technical information (e.g., on distributions of endangered species, critical habitat, or previous permit requirements) so that new information does not have to be gathered anew for every project operating in a similar watershed or geographic area. Allow environmental reviews to adopt material from previously completed environmental reviews from the same geographic area. Require federal agencies to use regional- or national-level programmatic approaches for authorizations and environmental reviews, for frequently occurring activities as well as those activities with minor impacts to communities and the environment.[43]

D. Environmental Justice and "Not in My Backyard" (NIMBY) Principles Are Being Used to Stop Infrastructure Growth

As our communities get more crowded and congested, it has become more difficult to site major facilities for transportation, waste management, water supply, sewage treatment, mass transit, manufacturing, energy, etc. The transition to a more sustainable, renewable resource based economy requires new water infrastructure, coastal resiliency projects, mass transit and other types of development.

REFORM: The public at large (government officials, community groups, landowners, builders/developers) is provided meaningful opportunities to participate in the environmental review process. In addition, federal agencies must consider environmental justice in their activities under NEPA and in issuing permits.[44] Environmental justice should not be a legal basis for challenging RODs or approved environmental permits.

E. Citizen Suits Are the 800-Pound Gorilla

Citizens are famously litigious in attempting to impede government approvals of development or to control land use. All federal environmental statutes, except the Federal Insecticide, Fungicide, and

Rodenticide Act, allow "any citizen" to bring a "civil action on his own behalf" against "any person" (including the government) who is alleged "to be in violation" of a standard or order issued under the statute. While NEPA does not have a citizen suit provision per se, an agency's failure to follow NEPA's required procedures can be challenged under the Administrative Procedures Act.

Even on projects where an EIS is not required, officials spend years "working through every detail" for fear of being sued sometime in the future.[45] There is a high rate of turnover among the government career staff carrying out the NEPA procedures, and it is not uncommon for the new person on the team to "waste" $50,000 in printing fees and many months redoing documents just to make minor edits (e.g., date changes). Still, private plaintiffs who seek to delay or halt a controversial construction project will file a lawsuit against the government alleging noncompliance with the NEPA procedures or against the project owner or operator for an alleged failure to comply with (or secure coverage under) and environmental permit. **Many lawsuits begin with an injunction requiring immediate stoppage of work and may take considerable time, effort and cost in attorney fees and court costs to resolve.**

> **EXAMPLE:** When Maryland, Virginia and the District of Columbia agreed that the Woodrow Wilson Bridge (I-95 between Oxon Hill, Maryland and Alexandria, Virginia) *needed to be replaced and widened*, a long and detailed EIS process had to be followed, even though the proposed new (and wider) bridge was replacing an old and inadequate crossing. Once the EIS was complete, the Sierra Club filed suit in federal court for the District of Columbia to remand the document for more work, and Sierra won at the district court (trial court) level, but the trial court's remand was reversed by the U.S. Court of Appeals for the District of Columbia. All of this litigation took several years to complete.

As currently written, the FAST Act's judicial review changes are limited and not likely to provide significant relief. FAST-41 reduced the statute of limitations for NEPA challenges from six to two years to provide more certainty for applicants; however, most NEPA lawsuits already are filed well within two years, because project challengers generally want to sue before the targeted project is constructed to avoid mootness arguments. FAST-41 also provides that in any action seeking a temporary restraining order or preliminary injunction of a covered project, the court shall "consider the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction" and shall not presume that such harms are reparable. However, most courts already consider an injunction's negative impact when balancing the harms and equities. Another FAST-41 provision dictates that NEPA challenges can only be brought by those who commented on an EIS and did so with sufficient detail to put the lead agency on notice of the claims. With regard to standing, many courts have limited NEPA challenges to comments raised within the public review period on the EIS (others allow plaintiffs to file suit as long as they can show "injury in fact").

MAP-21 reduced the time limit to 150 days after publication of a notice in the *Federal Register* announcing that a permit, license or approval is final, for parties to file lawsuits that challenge agency environmental decisions regarding surface transportation projects.[46] However, the preparation and announcement of a "supplemental" EIS, when required, restarts to 150-day clock.

REFORM – Part 1: Further shorten and standardize the statute of limitations for challenges to final ROD or claims seeking judicial review of a permit, license or approval issued by a Federal agency for an infrastructure project (see Section III.A and III.B). The Portman-McCaskill Senate bill, Federal Permitting Improvement Act, that was reportedly supported by environmental and business groups would have

lowered the statute of limitations from six years to 150 days for all major projects across all sectors. In addition, interested parties should be forced to get involved early in a project's review process to maintain standing to sue later (RAPID Act proposed a "get-in or get-out" rule). Eliminate the risk of being sued when you reopen the ROD for minor changes to the construction contract. Another way to control the litigious environment that is delaying (and often stopping) critical infrastructure work may be to require any party who brings a challenge against a project's final EIS/ROD, and causes the work to stop, to put up a bond[47] that covers the cost of delay; legal fees also should be awarded if the project proponent prevails.

REFORM – Part 2: Federal environmental rules and regulations that apply to construction site owners and operators are complex and cumbersome and should be enforced only by trained staff of government agencies. Alternative potential reforms include: limiting citizen suit penalties to violations of objective, numeric limitations rather than subjective, narrative standards; extend "notice period" beyond the current 60 days (giving regulatory agencies more time to review notice of intent letters and initiate formal actions); clarify definition of "diligent prosecution" of alleged violations, thereby allowing federal/state authorities to exercise their primacy in enforcement and preventing unnecessary citizen suit intervention.[48]

F. Permitting Risk Remains Key Barrier to Infrastructure Investment

Over the past 15 years, the growth in the use and performance of alternative contracting methods procurement of large projects has brought to light some specific environmental risks that need to be addressed when design-build is used as the project delivery system. Regarding risk, it is customary for the contractor to take on additional reasonable cost and schedule risk related to design, utility relocation and environmental compliance. (Reasonable risks are those that can be quantified for cost and time, where contractual compensation is provided to contain risk or for which insurance coverage can be obtained.) However, recently design-build agreements have included unquantifiable contractor risk, such as for managing and remediating pre-existing third-party site contamination.[49] This has resulted in the contractor assuming unreasonable cost and schedule risk, and in the case of site contamination, potential CERCLA liability. Since this risk is unquantified, insurance coverage is difficult if not impossible to obtain.[50]

Owners and contractors respond to this risk through the contract vetting process during the procurement stage where the contractor attempts to clarify through a question/answer process to gain owner approval for amendments to mitigate risk. This process usually generates multiple contract addendums causing a protracted and costly procurement process. The contractor addresses any remaining unreasonable/unquantifiable risk by adding cost contingencies resulting in higher construction costs to the owner or responsible contractors dropping out of the procurement process due to excessive risk.

Compounding this uncertainty is the lack of testing data to accurately characterize contamination for disposal, which forces the contractor to speculate on remediation requirements. Contractor responsibilities for managing and remediating and arranging for transport of contaminated materials creates exposure to long-term CERCLA liability.

REFORM: Where the public owner is unwilling to compensate the designer/builder for unforeseen events or circumstances, particularly related to encountering hazardous materials, negative consequences follow: limited universe of competitive bidders because some will walk away from such extreme risk scenarios; shut out of highly-qualified, environmentally-sophisticated firms; inflated contract prices because bidders are pricing risk into the contract that is going back to the owner (and ultimately being borne by the taxpayer).

Government is in the best position to bear the following risks:

- Environmental risk associated with unforeseen hazardous material that was not disclosed pre-bid; and
- Environmental risk associated with finding out after the contract has been awarded that a part of the project site, or any property or waterbody to which the project site drains runoff, is a newly-listed "Superfund" site.

On all federally funded projects, Congress should: 1) prohibit the transfer of CERCLA liability for pre-existing contamination to the contractor by requiring the public owner (e.g., Departments of Transportation (DOT)) to retain generator and arranger status and 2) require the public owner (e.g., DOT) to provide contractual relief through cost sharing mechanisms, such as allowances and schedule relief through delay clauses that compensate the contractor for responding to site contamination.

IV. Recommended Reforms Specific to the NEPA Process

A. NEPA Process Issues Compromise Efficient Delivery of Infrastructure Projects

1. Initiating Design-Build or P3 Procurement Prior to Conclusion of NEPA Process Drives Up Cost

In the case of highway work, state DOTs often will initiate the proposal process before they have a finalized NEPA ROD.[51] The costs of pursuing these projects is inflated when general contracting firms (taking both design and construction responsibility) are brought in before NEPA is complete. Design-build procurements for large projects are costly. Owner costs include fees for legal counsel, technical and procurement consultants. The contractor incurs costs as he advances the project design from the schematic stage (provided by the owner) to a preliminary design for cost estimating, performs value engineering, reviews the voluminous owner references and contract documents, and engages fully in the contract vetting process. Procurement delay of six to 12 months due to NEPA issues is not uncommon. This delay extends overhead, labor and consultant costs to owner and contractors and is particularly costly to contractors because the level of effort remains steady due to continuation of the contract vetting process, continued release of owner documents, and redesign in response to evolving owner expectations. Procurement delay results in owners and contractors absorbing substantial added procurement costs. [These costs are lost should a NEPA challenge effectively force reopening the NEPA process for additional study. Addressing court-ordered NEPA revisions typically takes one or more years to complete and usually results in termination of the procurement process, or the owner terminating the contract and compensating the contractor awarded the work for mobilization and delay costs. Owners, upon satisfying court order NEPA requirements, initiate a new procurement process from the beginning.]

Under the Federal Highway Administration (FHWA) regulations, prior to NEPA completion, a private design-build contractor cannot complete the final design or proceed with construction (23 C.F.R. § 636.109(b)). If the contracting agency awards a contract prior to NEPA completion, FHWA's authorization and obligation (of preliminary engineering and other pre-construction funds) is limited to preliminary design (23 C.F.R. § 636.109(b)(1)) and early acquisition of the right of way in accordance with 23 U.S.C. § 108. The contract must include termination provisions if the NEPA process concludes by selecting the "no-build" or "no action" alternative (23 C.F.R. § 636.109(b)(9)).[52]

REFORM: For projects involving "federal action," the project sponsor should not initiate procurement until the ROD is issued that closes the NEPA process. Such a change will substantially decrease procurement costs and increase the integrity of the NEPA process by removing any notion that the NEPA outcome was pre-determined. Another means to reduce owner and contractor costs would be to simplify the procurement process by standardizing the design-build agreement for federally funded projects. Owners incur sizable legal fees for outside counsel and consultants to draft, contractor vet and re-draft design-build agreements for each project. Contractors incur high legal and staff costs as well in the vetting process.

2. Even Minor Construction Changes Cause Major Delay When It Re-Opens NEPA; Stifling Private Sector Innovation

Even minor changes or adjustments to the project design or location – such as small additions or changes to right-of-way, small temporary or permanent easements or drainage pond features to accommodate schematics – will trigger another round of lengthy coordination at the federal and state level and public review and possibly a supplemental EIS. It is common for the project limits, as defined during preliminary design and used to establish the NEPA project foot print, to be inadequate to accommodate all project aspects – such as drainage features, utilities and construction access. Therefore, minor changes to the NEPA footprint are required to construct the project. Because of the overarching fear of litigation brought by advocacy groups alleging noncompliance with NEPA's procedural requirements, agencies are overzealous in producing a "litigation-proof" EIS. This attitude results *not just* in the over documentation of minor changes (that should not trigger NEPA), but it also impacts value engineering the contractor performs during a design-build procurement by stifling innovation of design changes capable of capturing larger cost savings.

Per FHWA regulations, under no circumstances may a private entity have any decision-making responsibility in the preparation of any NEPA document (23 C.F.R. § 636.109(b)(6)). After the NEPA process is complete, project sponsors may only accept alternative technical concepts (ATCs) if they do not conflict with the criteria agreed upon in the environmental decision-making process. (23 C.F.R. § 636.209(b)). This also is hindering project sponsors' ability to take advantage of private sector innovation.

REFORM: Minor changes to a project should NOT result in reevaluation of the project under NEPA. *De minimis* impacts do not need a formal reevaluation, but could undergo a review with the owner to prove *de minimis*. The *de minimis* threshold could be based the definition of Section 4(f) properties codified in 49 U.S.C. § 303 and 23 U.S.C. § 138, as implemented by the Federal Highway Administration (FHWA) through the regulation at 23 C.F.R. § 774. Also, amend FHWA regulations at 23 C.F.R. § 636109(b)(6) and 23 C.F.R. § 636.209(b). In addition, if the project sponsor accepts a change (i.e., ATC) as proposed by the designer/builder, and it results in project delay, due to the need for further environmental reviews,

then the costs associated with that delay should be equally shared by the owner and the general contractor.

To cite a program worthy of replication: Once a natural gas infrastructure project under the Federal Energy Regulatory Commission (FERC) jurisdiction is authorized, project sponsors can request changes as "variances." FERC will consider approval of variances upon the project sponsor's written request, if it agrees that a variance:

1. provides equal or better environmental protection;
2. is necessary because a portion of this Plan is infeasible or unworkable based on project-specific conditions; or
3. is specifically required in writing by another federal, state, or Native American land management agency for the portion of the project on its land or under its jurisdiction.[53]

AGC recommends that all federal and state agencies regulating approved publicly-needed infrastructure have a clearly defined variance process to follow to efficiently make project changes while maintaining environmental protection.[54]

B. Inefficient Bureaucratic Processes Force Reevaluation of Previously Approved NEPA Documents, Decisions

A final EIS is only valid for up to three years following the last major approval. If no action to advance the project has occurred in the last three years, a *written reevaluation* is required. This may be a case where a project has been "shelved" due to lack of funding or simply put aside due to changes in statewide or regional priorities.[55] The scope and breadth of the reevaluation generally is dependent on: the type and degree of public controversy, possibility or reality of litigation, and the original and anticipated types of environmental resources and project impacts.

REFORM: Congress should require agencies to report to congressional committees on the expiration of various environmental reviews/permits. Projects that have completed environmental reviews should be prioritized for federal funding. An adequate source of funding should be available before a public sponsor initiates any additional environmental reviews or studies. In addition, to avoid inefficiencies and costly delays, it is imperative that the environmental reviews (see related reform recommendations Section III.A) and permitting processes (see reforms in Section III.B) for capital projects be time-limited.

C. Disagreements Loom Over Role Coordinating Agencies Play in NEPA Process

Some projects are held up by the push-and-pull between the lead agency and the other coordinating agencies regarding the scope of decision-making authority afforded to individual agency leaders.

REFORM: Even with the positive reforms of the FAST-41 (see Section III.A), there remains a failure to delineate clear decision-making authority; rather, recent changes create more processes rather than empowering key decision-makers to move projects forward. Congress should: (1) empower the lead agency and CEQ to really make decisions and (2) empower the Office of Management and Budget (OMB) to resolve disputes.[56]

D. USEPA Plays Commanding Role in NEPA Review Process

Section 309 of the Clean Air Act empowers **USEPA to review other federal agencies' EISs and to make those reviews public.**[57] USEPA's reviews generally focus on identifying and recommending appropriate mitigation measures for the project, which can lead to lengthy back-and-forth negotiations between USEPA and the responsible federal agency(ies). If USEPA finds the draft EIS "inadequate," USEPA will recommend the draft EIS be formally revised and made available for a second period of public comment. USEPA also reviews final EISs to ensure that the lead agency has taken USEPA's comments into account. If the "lead agency" does not make sufficient revisions (and USEPA finds the project to be environmentally unsatisfactory), USEPA may refer the matter to CEQ for mediation.[58]

Notably, USEPA plays a very powerful role in the NEPA review process during project development by serving as a formal "cooperating agency" (see Section II above) and by providing wide-ranging review and comment on EISs and other federal NEPA related activities. USEPA also has veto authority for CWA Section 404 permit process and may elevate specific cases for further evaluation culminating with the Assistant Administrator of the USEPA and an Assistant Secretary of the Army (see Section V.C below).

REFORM: A firm "deadline" should apply to all USEPA Section 309 reviews.[59] USEPA should be required to participate in all meetings as requested by the lead agency. CEQ should have the power to ultimately resolve any disputes (including those referred by other departments or agencies).[60] In addition, CEQ should issue guidance to delineate the scope and parameters for USEPA's Section 309 reviews to ensure consistency across USEPA Regional Offices. Key points related to information/data:

- Request only information that is relevant to better decision-making
- Be realistic about the availability of data
- Agree at scoping (or earlier) on the tools for analyzing impacts

E. Agencies Struggle with Climate-Change Impacts Analyses

Federal agencies are – and will continue to – struggle with the level of analysis required when assessing climate-change impacts under NEPA. On March 28, 2017, President Trump released an "Executive Order on Promoting Energy Independence and Economic Growth" that effectively rescinds CEQ's Greenhouse Gas NEPA Guidance – "Final Guidance for Federal Departments & Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate."[61] However, the President's Order does not remove the need for agencies to consider climate change in NEPA reviews.

Agencies and courts reviewing agency actions have long struggled with precisely how to address climate impacts. Some agencies include quantitative calculations, some provide only qualitative and other still decline to include any analysis on a project-level basis (on the basis that climate change is a global phenomenon. Plaintiffs challenging agency NEPA analysis will continue to pursue claims that analysis of climate impacts was not done in sufficient detail, or not at all. Courts will remain the driver here, and thinner administrative records could be more vulnerable to NEPA-based challenges by project opponents.

REFORM: The analysis of climate impacts will always vary by agency and by project. It is not clear what level of "hard look" is sufficient, particularly because climate change is a global phenomenon. A court-by-court standard on how to address climate is not conducive to efficient project reviews.[62] Congress should prohibit climate change reviews in NEPA environmental assessments and impact statements.

V. Federal Permitting Example: The Clean Water Act Section 404 Permit Process

Projects that cross wetlands, streams and other features deemed "Waters of the United States" (WOTUS) generally require USACE permits and must mitigate their impacts under CWA Section 404. Since the 2006 U.S. Supreme Court *Rapanos* decision, the USACE (and USEPA) have been asserting jurisdiction over any wet areas that have a "significant nexus" to downstream navigable waters.[63] This test has been met with very little nexus or significance between the actual wetland at issue and navigable waters.

The average applicant for an individual permit spends 788 days and $271,596 to complete the process.[64] (And if the process is beginning with an EIS, it may take three to six years (or longer) until the environmental reviews are complete. See Section II.D above.) Following are details of the various chokepoints the project proponent may encounter during the permit issuance process.

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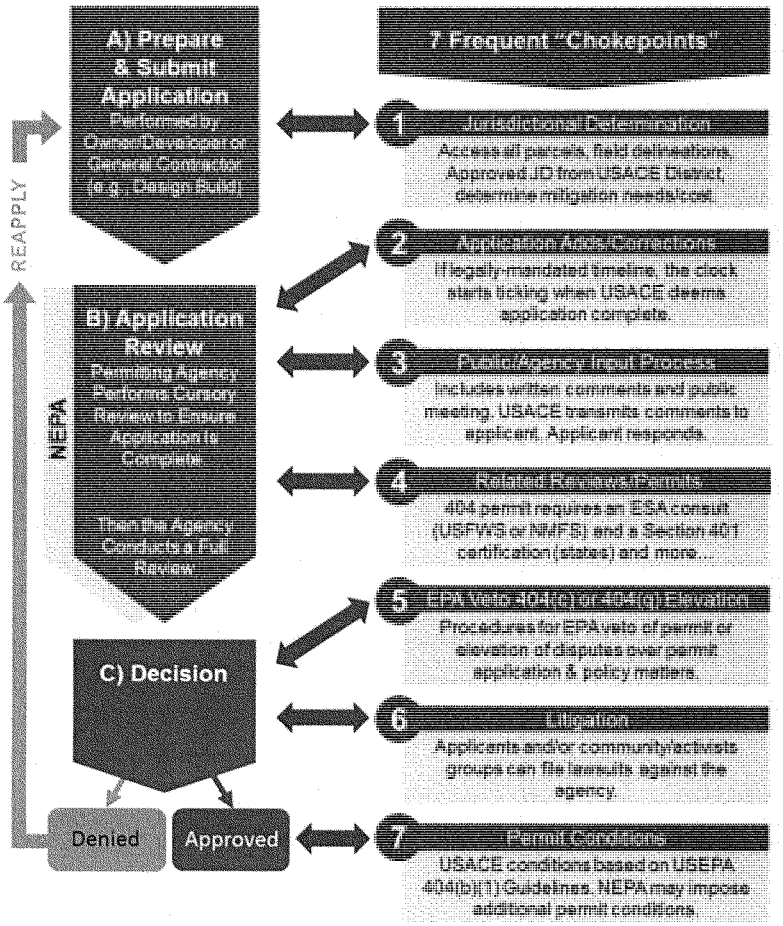
A. At-A-Glance Look at the CWA Section 404 Permit Process



B. 'Chokepoint' Details in CWA Section 404 Individual Permit Process

Following is a description of the various chokepoints the project proponent may encounter during the permit issuance process.

1. *Jurisdictional Determination*

For public design-build (or P3) construction projects – where the government is placing responsibility on the general contractor for environmental permitting – it is increasingly common for USACE to require 100 percent ground surveying and full delineation – along with field verification by a USACE District Engineer – before USACE will issue an Approved JD (jurisdictional determination). USACE staff will not accept NEPA analysis findings. More and more, USACE will not approve 404 permit without the Approved JD and final comprehensive mitigation plan. The USACE's insistence on better delineation data is holding up the permit issuance process because the general contractor does not have access to the entire project area to perform field studies until well into the construction process (for example, approval of right-of-way acquisitions). As a result, it is impossible to manage cost/risk due to the unknowns regarding project schedule and mitigation responsibilities.

2. *Application Adds/Corrections*

Applications for major projects requiring 404 permits rarely, if ever, are processed within the time limits set forth in the standard procedures. Agencies can work around strict timelines, including being able to start and stop the clock. If the agency's decision is that an application is incomplete or denied without prejudice, the applicant will need to resubmit it, which starts a new countdown. Added together, these many sequential clocks can create a long process.

USACE's increasingly high standards for field data/delineations before it will issue a decision on an application is bringing the permitting process on some large highway projects to a standstill (see #1). Limited access on design-build projects where the contractor is required to purchase the right of way severely limits a contractor's ability to conduct field delineations in a timely manner – causing excessive delay to the project.

Deadlines also can serve as a negative reinforcement, arguing that some agency staff sit on an application until their allotted time is almost up before looking at it regardless of how minor or simple the task.

3. *Public/Agency Input Process*

Notice must also be sent to all parties who have specifically requested copies of public notices and to the appropriate officials at USEPA, the FWS, the NMFS, and state historic preservation officers. When Section 404 (or CWA 401 – see below) applications are submitted, the agencies accept public comments regarding the applications for at least thirty days. If, during the initial comment period, someone requests a public hearing regarding the applications, the agencies must issue another public notice scheduling a public hearing at least thirty or forty-five days into the future.

Public notice requirements allow project opponents another opportunity beyond NEPA to challenge and stop projects, for which (generally) no contractor relief is provided. Oftentimes, even individuals who are not directly affected by the project become involved. This is presenting an opportunity to voice tangentially related concerns, or pursue political goals or no-growth agendas, thereby forcing the

permitting agencies to spend time and resources processing these concerns that ultimately do not have bearing on their permit decision.

4. Related Reviews/Permits

When a Section 404 permit application is submitted to the USACE, the agency typically routes the application to numerous other agencies for review and comment. Section 404 permit applications are routed to USEPA, the USFWS, the state environmental agency, and the state office of historic preservation. The commenting agencies have vast and varied concerns that must be addressed by the applicant. Each requires a slightly different type of alternatives analysis, and demands a somewhat distinct conditions, limitations and mitigation approach.

If the concerns of the commenting agencies are not adequately addressed, one or more of the commenting agencies may recommend against issuance of the requested permit.

Section 404 is a single permit, but it encompasses several other authorizations in a timeline of review:

- Need CWA 401 certification from state before a federal agency can issue a permit or license for an activity that may result in a discharge to WOTUS; state must certify that activity will not violate the water quality standards, or other applicable authorities, of the state (or waive Section 401 certification). [This process, in effect, allows for state control of dredge and fill activities. A state's review of the proposed construction activity will typically address feasible alternatives to the activity, initial and secondary impacts of the proposed activity, mitigation, compliance with water quality standards, stormwater/wastewater impacts, flood management, protection of rare resources, and other factors that would affect water quality.[65]]
- May need Section 408 authorization (permission from USACE under 33 U.S.C. 408 because project will alter or temporarily or permanently occupy or use a USACE-authorized civil works project).
- USACE consults with the USFWS and/or NMFS (Consultation / Biological Opinion) – Endangered Species Act (ESA) Section 7 consult – if project might affect endangered species. Under the ESA, any project with federal involvement or subject to federal oversight may not adversely affect federally listed species and habitat – otherwise mitigation strategies to minimize the impacts are required. With more than 1,400 species on the list and vast portions of the landscape designated as critical habitat, and many more species and areas of land awaiting listing and designation decisions, USFWS and NMFS are taking an ever-increasing role in the regulation of infrastructure projects.
- National Historic Preservation Act must account for potential impacts to historical and cultural resources (SHPO Consultation / Antiquities Permits)
- Fishery Conservation and Management Act (Essential Fish Habitat Consultations)
- Depending on location, Coastal Zone Management Act (CZMA Consistency Determination) and Wild Scenic Rivers Act
- Migratory Bird Treaty Act
- Bald and Golden Eagle Protection Act

5. USEPA Veto 404(c) or 404(q) Elevation

The U.S. Environmental Protection Agency (USEPA) has the authority to prohibit, deny, or restrict the use of any defined area as a disposal site under section 404(c), may elevate specific cases for further evaluation under Section 404(q), and enforces Section 404 provisions.

6. Litigation

Agencies are risk-averse, and sometimes choose not to pursue streamlined options out of concern that such "short-cuts" will increase litigation risk. Agencies/projects that face scrutiny from stakeholder groups want to minimize risk by gathering information, at the least to demonstrate due diligence. However, the burden of providing this political protection means asking information that applicants may not be able to obtain, or may be unwilling to share (in the case of proprietary information).

7. Permit Conditions

Section 404(b) authorizes USEPA to set the environmental standards that must be met by each permit, for the disposal of dredged or fill material; USEPA's Section 404(b)(1) guidelines set out at 40 C.F.R. § 230 establish the environmental criteria for evaluating 404 permit applications. Under the guidelines, permittees must complete an alternatives analysis describing how all the practicable alternatives to the proposed project were studied, weighed, and presumably rejected for the preferred project. The agencies regularly request more data, analyses of more sites, and/or other additional information regarding the proposed project and other (presumably) available business opportunities that the applicant could pursue in lieu of the project for which a permit has been requested. The Section 404(b)(1) guidelines also establish a "mitigation sequence" used by USACE: avoid, minimize and compensate impacts.

USEPA's guidelines often are applied in a rigid one-size-fits-all manner, failing to distinguish between different types of uses or between projects with net habitat gains—despite some damage to existing low-quality habitat—from projects that were simply destructive of habitat.

C. Recommended Reforms Specific to the 404 Program

As illustrated by the preceding "chokepoints" analysis, the *general* reforms discussed in Section III of this document would serve to improve the efficiency of the 404 program. In particular, a mandatory merger of the NEPA and Section 404 permit processes would greatly expedite project decision-making and avoid duplication and procedural inefficiencies (see Section III.B). In addition, AGC recommends the following reforms that are *specific* to the 404 program.

1. USEPA's Authority to Veto a Duly Issued Permit Casts Uncertainty on Development

Courts have upheld USEPA's authority under the CWA to change, if not revoke, Section 404 "dredge-and-fill" discharge permits that have already been approved and issued by USACE if it determines that the discharge will have an "unacceptable adverse effect" on identified environmental resources. This creates uncertainties for Section 404 permittees, their lenders, and others in business with them, which drives up financing and construction costs. USEPA has adopted regulations setting forth the process for implementing Section 404(c).[66]

REFORM: Amend CWA Section 404(c) and - as needed - direct USEPA to revise its "unacceptable adverse effect" regulations.

2. Permitting Authorities Are Thwarting Advanced Mitigation, Mitigation Banking, and Future Mitigation Investments

Permitting Authorities Are Thwarting Advanced Mitigation, Mitigation Banking, and Future Mitigation Investments. Complex procurement strategies, construction schedule risks, habitat alteration, and competition for potential mitigation sites can encumber the already difficult task of mitigating for "like" value and function and reinforce the need for project proponents to examine mitigation strategies as early as possible. There is a shortage of wetland mitigation banking credits in some parts of the country and many USACE Districts are unwilling to accept in-lieu fee arrangements. President Trump's Executive Order 13778 directing the USEPA and USACE to modify or rescind the 2015 Waters of the United States (WOTUS) is likely to stall the establishment of any new mitigation banks because it's likely that the federal government will eventually relinquish control over work in remote streams and isolated waters/wetlands.

What is more, federal permitting agencies generally will not accept preliminary jurisdictional determinations resulting from the NEPA process and will hold up project approvals until they have data collection (field surveys/delineation) from the entire project site. The project may be well underway before the design-build contractor has access to 100% of the parcels (e.g., right-of-way acquisition goes well into the project). As such, in the pursuit phase of the project, mitigation costs are unquantifiable because the quantity of WOTUS impacts and the quality of the waters impacted is unresolved. This unknown, combined with the lack of wetland bank capacity, requires contractors to speculate on mitigation costs – which can reach in the hundreds of thousands of dollars per project.

These uncertainties inhibit efforts to optimize construction phasing, schedules and to minimize cost and delay. What is more, design-build contracts that transfer the obtaining of Section 404 permits to the contractor generally provide no contractor cost or schedule relief for permitting delays or mitigation costs at the outset of a procurement. This forces contractors to add cost contingencies resulting in higher construction costs to the owner and/or responsible contractors dropping out of the procurement due to untenable risk.

REFORM: The use of remote sensing, geographic information systems (GIS) mapping software, and decision support systems for evaluating conservation strategies have made it possible to evaluate areas where WOTUS impacts must be avoided and identify areas for mitigation investments very early in the environmental planning process. Federal permitting agencies should accept NEPA planning-level decisions to support advance mitigation strategies that are both more economical and more effective from an environmental stewardship perspective. Revise the "2008 Mitigation Rule"[67] at 33 C.F.R. § 332.3(b)(2) and (3) and USACE's Regulatory Guidance Letter (RGL) 16-01 on the procedures for determining what geographic areas on a project are WOTUS.

To address the lack of mitigation banking capacity in many regions of the country, USACE should develop a national in-lieu fee mitigation option whereby sponsors of large projects may contribute funding, at mitigation market rates, to a national account when bank credits are unavailable at the time the USACE/USEPA is in position to issue the permit. The funding from the national account would be apportioned among the seven USACE Districts base on where impacts were taken and applied toward habitat preservation and promoting banking opportunities.

3. Delay on the RHA Section 408 Side Puts Off the CWA Section 404 Review Process and Further Delays Construction

Construction projects are being delayed because of Section 408 burdens.[68] USACE will *not even begin* to process many CWA Section 404 Nationwide and individual permits until the 408 permission is granted. This means that delay on the River and Harbors Act (RHA) Section 408 side puts off the CWA Section 404 review process and further delays construction. And, many of the reviews required under RHA Section 408 may be reviewed, yet again, under the CWA Section 404 process.

RHA Section 14[69] provides that the Secretary of the Army may grant permission for the alteration or use of works built by the United States when such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work. As a result, USACE requires that applicable construction projects are reviewed to determine if any of the proposed activities may affect a federal easement, right of way, property, levee, etc. Construction projects possibly subject to this process may include but are not limited to highways crossing Corps' property, bridges built over USACE flood control projects, and simply modification of existing Corps' projects—e.g., levees—by state and local entities.

USACE has recently undertaken action to more rigorously ensure compliance with Section 408, setting forth nine steps to obtain the 408 permission.[70] Those steps include pre-coordination, written request, required documentation (including environmental compliance, if applicable), district-led Agency Technical Review (ATR), Summary of Findings, division review, HQUSACE review, notification, and post-permission oversight.

Not all steps are applicable to every RHA Section 408 request, such as Division or Headquarters offices review. That stated, the Corps requires the RHA Section 408 requester to provide all information that the district identifies as necessary to satisfy all applicable federal laws, executive orders, regulations, policies, and ordinances. In addition, the Corps needs to review the relevant project area under the requirements of NEPA and other environmental statutes (e.g., the Endangered Species Act) where applicable. USACE must also consider factors that may be relevant to the public interest depend upon the type of USACE project being altered and may include, but are not limited to, such things as conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. And, the evaluation must consider information received from the interested parties, including tribes, agencies, and the public. **AGC is concerned that with such rigor has come redundant, administratively burdensome and inefficient 408 permission processes, especially in the broader context of federal environmental review and permitting.**

REFORMS: AGC recommends that USACE undertake the issuance of a new regulation or guidance allowing for the concurrent processing of the RHA Section 408 permission and CWA 404 permit.

As recommended by the National Waterways Conference, AGC agrees that the Corps should clarify the application of Section 408 to "works," and not undeveloped land or other features of a project, even if owned by the Corps and within the project's boundaries.

- According to the statute, the Corps' permission is required with respect to activities that may affect various "works" that are "built by the United States . . . for the preservation and improvement of any of its navigable waters or to prevent floods." The Circular states that it applies in the case of any "alteration or occupation or use of the *project*" (EC 1165-2-216, ¶ 6.a)

(emphasis added).[71] The language could be and seemingly has been interpreted to suggest 408 applies to any proposal that would alter or occupy any portion of a Corps project, which in turn suggests anything within the project's property boundaries.[72] However, that is not what Section 408 says, nor is it what Congress intended in enacting Section 14 of the Rivers and Harbors Act.[73]

- A broad reference to a Corps "project" without additional clarification can lead to a District office to require the 408 process for any proposal that involves any real estate within a Corps project.[74] A common example would be a highway or pipeline that crosses Corps' property.[75] To be clear, the Corps has a right to review and approve that proposal as property owner and potentially as a regulator under Clean Water Act Section 404 or other authorities.[76] However, if the project does not touch or affect the "works" regulated under Section 408, then the Corps should not overlay additional 408 requirements beyond whatever other procedure may be required.

Specifically concerning local flood control protections, like levees, AGC agrees with the Section 408 Coalition and the Mississippi Valley Flood Control Association: Congress through legislation and/or the Corps via regulation or guidance should clarify that the jurisdiction of RHA Section 408 does not extend to alterations or improvements made or allowed by the local sponsor (non-Federal interests) to the flood control projects for which they are responsible for operation and maintenance.

VI. AGC Staff Contacts

- Jeff Shoaf, Senior Executive Director, Government Affairs, (202) 547-3350 or (202) 215-2124, shoafj@agc.org
- Leah Pilconis, Senior Counsel, Environmental Law and Policy, (703) 837-5332, pilconisl@agc.org
- Jimmy Christianson, Regulatory Counsel, (703) 837-5325, christiansonj@agc.org
- Melinda Tomaino, Director, Environmental Services, (703) 837-5415, tomainom@agc.org
- Scott Berry, Director, Utility Infrastructure Division, Environment, and Trade, (703) 837-5321, berrys@agc.org
- Sean O'Neill, Director, Congressional Relations/Infrastructure Advancement, (202) 547-8892, oneills@agc.org
- Brian Deery, Senior Director, Highway and Transportation Division, (703) 837-5319, deeryb@agc.org

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[1] Since "Waters of the United States" are under the jurisdiction of the Federal Government, projects such as constructing pipelines across rivers are a federal action.
[2] 40 C.F.R. § 1508.16.
[3] 40 C.F.R. § 1508.5.
[4] Note that some states (e.g., North Carolina, Massachusetts and Washington) have requirements that are like the requirements established for federal agencies by NEPA. Therefore, if your construction project is entirely or partly financed, assisted, conducted, regulated, or approved by a state agency in one of these states, you should consult with state agency officials to ensure that these requirements have been met.
[5] No hard-and-fast regulatory definition of "purpose and need" exists. However, as it has been interpreted, the statement cannot be so narrow that it effectively defines competing "reasonable alternatives" out of

consideration. The "purpose" of an action may be a discussion of the goals and objective of an action. The "need" may be a discussion of existing conditions that call for some improvement.

[6] The draft EIS should be prepared in accordance with the scope of the project and, to the fullest extent possible, meet requirements of § 102(2)(C) of NEPA. The CEQ regulations specify requirements for inviting and responding to comments on the draft EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1503.

[7] The final EIS should respond to any participating agency comments and address any inadequacies in the draft EIS.

[8] 40 C.F.R. § 1502.25(b) (2014).

[9] Memorandum from Nancy H. Sutley, Chair, Council on Envtl. Quality, to Heads of Federal Departments and Agencies on Improving the Process for Preparing Reviews under the Nat'l Envtl. Policy Act (Oct. 2011).

[10] 40 C.F.R. § 1502.25(a) (2014). In the agency's much-cited "Frequently Asked Questions," the CEQ clarified that project proponents who will need permits under other environmental laws are to "integrate the NEPA process into other planning at the earliest possible time to [e]nsure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." See "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 *Fed. Reg.* 18,026, 18,029 (Mar. 23, 1981). These FAQs have not received equal deference from courts as the CEQ regulations.

[11] USEPA's National Hardrock Mining Framework, U.S. Envtl. Prot. Agency app. C-2 and C-3 (Sept. 1997) ("NEPA offers the opportunity to identify permit conditions, including those needed to avoid or minimize impacts or to mitigate for unavoidable impacts."). *See infra* note 30.

[12] NAEP annually reports information on EIS time frames by analyzing information published by agencies in the *Federal Register*, with the Notice of Intent to complete an EIS as the "start" date, and the Notice of Availability for the final EIS as the "end" date. However, AGC members' experiences show that it's common for large and controversial projects to take even longer than these numbers reflect. *See e.g.,* Federal Highway Administration, "Estimated Time Required to Complete the NEPA Process," online at - https://www.environment.fhwa.dot.gov/strmlng/nepatime.asp and U.S. Department of Energy, "Record of Decision (ROD)" online at https://energy.gov/nepa/record-decision-rod.

[13] U.S. Gov't Accountability Office (GAO), GAO-14-370, *Natianal Environmental Policy Act: Little Information Exists on NEPA Analyses*, at 14 (2014).

[14] *Id. See also* 2014 GAO report noting that "there is no government wide mechanism [for agencies to track] the cost [or time] of completing NEPA analyses ... However, the Department of Energy (DOE) tracks limited cost data associated with NEPA analyses."

[15] Although large projects often take a decade or longer to permit, the Common Good report assumes that the avoidable delay on major projects is six years.

[16] Pub. L. No. 112-141, 126 Stat. 405 (2012).

[17] Pub. L. No. 113-121, 128 Stat. 1193 (2014).

[18] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005) (EPAct 2005).

[19] 42 U.S.C. § 4370(m); https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf.

[20] 42 U.S.C. § 4370m-2(a).

[21] FAST Act Pub. L. No. 114-94, 129 Stat. 1312 (2015); *Id.* § 41002(c)(1)(C)(ii)(II)(aa), (bb). The final completion date in the recommended performance schedule for each category cannot exceed the average time to complete an environmental review or authorization for projects within that category. The benchmark time periods for decisions on environmental reviews and approvals are to be calculated based on an analysis of the time required to complete them for projects within the relevant category of covered projects during the preceding two calendar years.

[22] *Id.* § 41002(c)(1)(C)(ii)(II)(cc).

[23] Pub. L. No. 112-141, § 1306, 126 Stat. 405, 537-38 (2012) (creating 23 U.S.C. § 139(h)(6)). Failure to meet this deadline results in a financial penalty: rescission of funding from the relevant office at the delinquent agency at a weekly rate ranging from $10,000 to $25,000. 23 U.S.C. § 139(h)(6)(B).

[24] Pub. L. No. 112-141, § 1309, 126 Stat. 405, 539-40 (2012).
[25] Responsibly and Professionally Invigorating Development Act of 2014, S. 2641, 113 Cong. (2014).
[26] 16 U.S.C. § 824(p) - Siting of interstate electric transmission facilities.
[27] See "Guidance for Federal and State Agencies for the Processing of Federal Authorizations in Cooperation with the FERC" online at https://www.ferc.gov/industries/gas/enviro/epact-gas-guidance.pdf.
[28] https://www.ferc.gov/whats-new/comm-meet/101906/C-2.pdf.
[29] 18 C.F.R. § 157.22.
[30] *Id.* With respect to the federal-authorization deadline provision, FERC's regulations also provide that, for certificate applications requiring an EA or an EIS, "notice of a schedule for the environmental review will be issued within 90 days of the notice of the application, and subsequently will be published in the *Federal Register*. 18 C.F.R. § 157.9(b).
[31] EPAct 2005 § 313(a)(3), (b), codified at 15 U.S.C. §§ 717n(c)(2); 717r(d)(2).
[32] 42 U.S.C. § 4370m-4(a), paraphrased.
[33] Pub. L. No. 112-141, §§ 1305, 1314, 126 Stat. 405, 535, 547 (2012).
[34] Pub. L. No. 113-121, § 1005, 128 Stat. 1193, 1203 (2014). Section 1005 also promoted project acceleration through the following measures: encouraging the establishment of new categorical exclusions from environmental review requirements, enhancing transparency and public reporting requirements on the status and progress of environmental reviews, and facilitating the acceptance of environmental review documents approved by another agency.
[35] *See* 32 C.F.R. § 651.14(e) (2014) ("Several statutes, regulations, and Executive Orders require analyses, consultation, documentation, and coordination, which duplicate various elements and/or analyses required by NEPA and the CEQ regulations; often leading to confusion, duplication of effort, omission, and, ultimately, unnecessary cost and delay. Therefore, Army proponents are encouraged to identify, early in the NEPA process, opportunities for integrating those requirements into proposed Army programs, policies, and projects. Environmental analyses required by this part will be integrated as much as practicable with other environmental reviews, laws, and Executive Orders (40 C.F.R. § 1502.25). Incorporation of these processes must ensure that the individual requirements are met, in addition to those required by NEPA.").
[36] The "2015 (update) Red Book -- Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects" describes a process that satisfies the NEPA requirements and synchronizes environmental permitting for all agencies involved. It includes examples of successful NEPA/404 merger process agreements whereby the documentation and coordination conducted comply with NEPA and any preferred alternative selected under the joint process comply with CWA Section 404(b)(1) guidelines.
[37] 23 U.S.C. § 168; 23 U.S.C. § 139(g). *See infra* note 32.
[38] MAP-21 § 1319; 23 U.S. C. § 139(n). *See* https://www.fhwa.dot.gov/map21/guidance/guideaccdecer.cfm.
[39] MAP-21 §§ 1305, 1318 (amending 23 U.S.C. § 139(b)).
[40] The federal lead agency may adopt and use "planning products" in proceedings for any class of action in the environmental review process. "Any planning product adopted by the Federal lead agency in accordance with this section **may** be incorporated directly into an environmental... document." However, 10 conditions are spelled out in statute -- and participating agencies, the lead agency, and project sponsors must all concur that these conditions have been met. MAP-21 § 1310.
[41] FAST Act § 1304; 23 U.S.C. § 139(d)(8).
[42] The "Environmental Consequences" section of the EIS describes the impacts of project alternatives on the environment and documents the methodologies used in evaluating these impacts. Information in this section is used to compare project alternatives and their impacts. This section should describe in detail both the impacts of the proposed action and the potential measures that could be taken to mitigate these impacts. Mitigation must be considered for all impacts, regardless of their significance. Environmental impacts should be discussed in terms of their context and intensity.
[43] In late 2016, FHWA and the U.S. Fish and Wildlife Service developed and deployed a first of its kind Rangewide Programmatic Consultation for the Indiana and Northern-long eared bat.

[44] To meet the requirements of the Environmental Justice (EJ) Executive Order (EO) 12898, the DOT Order 5610.2(a), and the FHWA revised EJ Order 6640.23A, a project involving Federal action must consider the potential for "disproportionately high and adverse" effects on minority and low-income populations. CEQ has guidance for agencies on how to address environmental justice under NEPA: https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf. In addition, USEPA has guidance affirming its commitment to consider EJ in environmental permitting: http://www.epa.gov/environmentaljustice/plan-ej/permitting.html.

[45] A project sponsor is generally mindful of previous judicial interpretation when preparing NEPA documentation in an attempt to prepare a "litigation-proof" EIS. CEQ has observed that such an effort may lead to an increase in the cost and time needed to complete NEPA documentation, but not necessarily an improvement in the quality of the documents ultimately produced. Council on Environmental Quality, "NEPA Study of Effectiveness After Twenty-five Years," p. iii.

[46] MAP-21 § 1308; 23 U.S.C. § 139(l).

[47] Possible bonding calculation methods/factors to consider: (i) Transportation agencies typically assess liquidated damages based on "end user cost," per hour or per day. (ii) DOTs and FHWA have a good understanding of their assigned project teams daily overhead and engineering costs to maintain the team during delays – this cost could be calculated on a per day basis. (iii) If a contract team is already under contract, there is usually a daily rate for the jobsite overhead costs. (iv) It may also be appropriate to consider the costs associated with a state acquiring specific project funding through a public bond. (v) And, finally, the loss of federal funds committed and not used within the determined funding period. These cost factors could be combined, based on the project and the impact of delays.

[48] All environmental statutes which authorize citizen suits bar such suits if the federal or state government is "diligently prosecuting" an action against the same violator. *But see Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, Case No. 1:14-cv-753 (M.D.N.C. Oct. 20, 2015) (a government enforcement action must not only be brought, but also managed, in good faith, to be a compliance bar to a CWA citizen suit).

[49] Recently, more owners are attempting to transfer this risk to the contractor through provisions that limit the contractor's compensation for "unknown" contamination (i.e., any contamination not disclosed by owner or reasonably ascertainable by contractor due diligence). Disclosures normally contain a Phase I ESA that includes a federal, state and local regulatory database search that lists and provides cursory information addressing all recorded site contamination within and adjacent to the project. This places the contractor on notice of every documented occurrence of contamination, such as reportable spills.

[50] Contamination risk is often unquantifiable, due to inadequate site investigation/testing data provided by the owner, or unavailable through contractor due diligence. Sampling and testing areas of suspect contamination within the proposed project right-of-way may be the only means to reasonably assess these risks. Owner testing (if it's even performed) is often limited and inadequate to allow the contractor to adequately and reliably price his risk or obtain insurance.

[51] In 2007, FHWA issued a final rule revising FHWA's regulation in 23 C.F.R. §§ 630, 635, and 636 for design-build contracting. The rule allowed contracting agencies to issue design-build RFPs, to award contracts, and to issue notices-to-proceed for preliminary design work prior to the conclusion of the NEPA process.

[52] The contract must also include provisions preventing the contractor from proceeding with final design or construction activities prior to the completion of the NEPA process (23 C.F.R. § 636.109(b)(3) and 771.113(a)). FHWA may only issue additional authorization for final design and construction once the NEPA process concludes and selects a build option (23 C.F.R. § 636.109(d)).

[53] Variances are not specifically mentioned in FERC's regulations but rather in its standard best management practices for operators found in the "UPLAND EROSION CONTROL, REVEGETATION, AND MAINTENANCE PLAN" and "WETLAND AND WATERBODY CONSTRUCTION AND MITIGATION PROCEDURES." Note that these plans are referenced in the regulations at 18 C.F.R. 380.12(i)(5) and 380.12(d)(2) – but not the details of the plans. Both plans were updated in 2013, but the variance process has been in place since at least 2003. *See* Sections I.A., *Applicability* in these online documents: https://www.ferc.gov/industries/gas/enviro/plan.pdf; https://www.ferc.gov/industries/gas/enviro/procedures.pdf.

[54] Variances are not specifically mentioned in FERC's regulations but rather in its standard best management practices for operators found in the "UPLAND EROSION CONTROL, REVEGETATION, AND MAINTENANCE PLAN" and "WETLAND AND WATERBODY CONSTRUCTION AND MITIGATION PROCEDURES." Note that these plans are referenced in the regulations at 18 C.F.R. 380.12(i)(5) and 380.12(d)(2) – but not the details of the plans. Both plans were updated in 2013, but the variance process has been in place since at least 2003. *See* Sections I.A., *Applicability* in these online documents: https://www.ferc.gov/industries/gas/enviro/plan.pdf; https://www.ferc.gov/industries/gas/enviro/procedures.pdf.

[55] Reevaluations are not required under the National Environmental Policy Act (42 U.S.C. § 4321) or Council on Environmental Quality (CEQ) regulations (40 C.F.R. §§ 1500-1508). They are, however, required by the FHWA/FTA regulations, (23 C.F.R. § 771.129).

[56] Unlike other environment-related statutes, no individual agency has the final say with regard to NEPA's environmental review requirements. This absence of enforcement authority is sometimes cited as the reason that litigation has been chosen as an avenue by individuals and groups that disagree with how an agency meets NEPA's mandate or EIS requirements for a given project. (For example, a group may charge that an EIS is inadequate or that the environmental impacts of an action will in fact be significant when an agency claims they are not). Currently, CEQ is charged with providing oversight and guidance to agencies with regard to EIS preparation. USEPA is required to review and comment publicly on the environmental impacts of proposed federal activities, including those for which an EIS is prepared. EPA is also the official recipient of all EISs prepared by federal agencies. However, neither agency has enforcement authority with regard to an agency's environmental review requirements.

[57] 42 U.S.C. § 7609(a).

[58] *See* CEQ's regulations at 40 C.F.R. § 1504.

[59] Pursuant to USEPA's revised guidelines on NEPA reviews, since October 2012 the agency has accepted electronic EIS filings only – using e-NEPA, an online system for submitting EISs in .PDF format. This paperless process should facilitate a faster review and response timeline.

[60] *See* supra note 15. The head of the department or agency must make the referral to CEQ within 25 days after the notice of availability of the FEIS (final Environmental Impact Statement). CEQ determines whether to take the referral based on several criteria, including a determination of whether the issue is of national importance. If the CEQ takes the referral, several options currently are available for resolution, including making recommendations to the President. The most typical outcome is the publication of Findings and Recommendations. The referral process focuses on the underlying proposed action and how it does/does not meet the policy goals of NEPA, rather than procedural compliance with NEPA.

[61] NEPA requires an assessment of the impact on the environment of a proposed Federal action including rulemakings, permitting, overarching programmatic decisions, and specific projects – including some construction projects. The August 2016 guidance, which the White House has rescinded, encouraged agencies to quantify direct and indirect GHG emissions for construction projects (and other actions) where NEPA applies, as well as, short-term and long-term effects, cumulative effects and impacts from connected actions—as well as for all the alternative options being evaluated, including the option of taking no action.

[62] *See e.g., Wild Earth Guardians v. Jewell*, 2015 WL 4886082, slip op. (D. Wyo. 2015) (court simply required that the climate issue be identified and discussed). But other recent cases have found a much more comprehensive review of climate impacts to be deficient.

[63] *Rapanos v. United States*, 547 U.S. 715 (2006).

[64] *Id.*

[65] The level of state responsibility, and autonomy of the state review, vary greatly, from cursory review or waiver of review (with USACE carrying most of the responsibility), to in-office review of draft USACE permits, to a full blown independent technical review by the state, assuming a significant component of program responsibility.

[66] *See* 40 C.F.R. § 231.1 *et seq.*

[67] In 2008, USACE and USEPA published compensatory mitigation rules (2008 Mitigation Rule). *See* 73 *Fed. Reg.* 19,594 (Apr. 10, 2008). While USACE makes the final determination regarding the mitigation conditions included in the permit, USEPA retains the authority to veto the permit if it concludes that the mitigation is not adequate.

[68] *See* http://www.nola.com/environment/index.ssf/2017/05/corps_attempting_to_speed_coas.html; http://www.journalscene.com/news/waiting-on-the-final-leg-of-berlin-g-myers-parkway/article_72b28f28-1309-11e7-a986-1f5ecfa794a9.html.

[69] 33 U.S.C. § 408.

[70] USACE Policy - Engineering Circular 1165-2-216.

[71] https://waterways.org/wordpress2/wp-content/uploads/2014/10/NWC-Comments-WRRDA-Webinar-III.pdf.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

Appendix 1: Expedited Environmental Review of Infrastructure Projects – FAST-41 Highlights

Title 41 of the Fixing America's Surface Transportation Act of 2015 (FAST-41)
PL 114-94 (42 U.S.C. §§ 4370m – 4370m-12)

- Project sponsors can apply to a new federal oversight entity, the Federal Permitting Improvement Steering Council (Council), for expedited environmental review as a "covered project"

- Statutory definition of the term "covered project" dictates scope: Any activity in the United States that requires authorization or environmental review by a federal agency involving construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, or any other sector as determined by a majority vote of the Council that—
  - Subject to NEPA, likely cost >$200M, doesn't qualify for streamlining under any applicable law** or
  - Subject to NEPA, size/complexity warrant enhances oversight and coordination (opinion of Council) – e.g., projects subject to approvals by more than two federal agencies and/or need EIS

**Transportation projects subject to MAP-21 and water resources projects subject to the Water Resources Reform and Development Act of 2014 benefit from expedited permitting and environmental review procedures.

- Federal Permitting Improvement Council: Includes an Executive Director appointed by the President and representatives from 10 federal departments (Agriculture, Army, Commerce, Defense, Energy, Environmental Protection Agency, Housing and Urban Development, Homeland Security, Interior, Transportation), three independent agencies (Federal Energy Regulatory Commission, Nuclear Regulatory Commission, Advisory Council on Historic Preservation), the Office of Management and Budget (OMB) Director, and the Council on Environmental Quality (CEQ) Chairman

- Streamlining Measures: Coordinates NEPA review across federal agencies and coordination of state environmental review with federal NEPA process; improved and early communication with federal agencies re: necessary permits, content, and review timelines; standardized, enforceable schedules for environmental review and permitting; processes for resolving issues and modifying timetables; shortened timeframes for legal challenges; increased transparency/accountability in the federal environmental review process by requiring posting of specific info on "covered projects" to online federal permitting dashboard (includes status reports explaining project status, delays)
  - REVIEW & PERMITTING TIMELINES: Agencies must issue decisions on environmental review or authorizations not later than 180 days after the date on which *all necessary information* is in the agency's possession. Pub. L. No. 114-94, § 41002(c)(1)(C)(ii)(II)(cc).
  - PROBLEM: THESE DEADLINES ARE NOT STRICT OR ENFORCEABLE: The Act states that "each agency shall conform" to these dates. But the Act further provides for specific next steps if the schedule is not met by an agency; the consequences for failure to act on a project is to publish "an explanation of the specific reasons for failing or significantly risking failing to conform to the

completion date and a proposal for an alternative completion date," and monthly updates thereafter. Pub. L. No. 114-94, § 41007(c)(2)(f). The Act also gives agencies discretion in determining when they have sufficient information to make a decision on a project, and issuance of a final decision must occur no later than 180 days thereafter. See Part 41002(c)(1)(A)(ii)(II)(cc). It appears that time limits may vary if an agency determines more information is needed or demonstrates a reason for missing the completion date (theoretically could just keep asking for more info and/or proposing alternative completion dates – which is what happens without expedited review). **See also OMB & CEQ Guidance referenced below, Section 4.3 "What happens if an agency fails to conform to the permitting timetable?" on page 50.**

- REFORM: TIMELINE/SCHEDULE SHOULD BE MANDTORY, NONDISCRETIONARY DUTY. Any objections that are not raised or resolved by the deadlines are waived and the procedure is deemed complete --- and you move on to the next step.

OMB and CEQ Guidance – *Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects* (Jan. 13, 2017)
https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/Official%20Signed%20FAST-41%20Guidance%20M-17-14%202017-01-13.pdf

- Addresses the statutory requirements of FAST-41
- Explains the federal Permitting Dashboard – online framework for tracking covered projects, https://www.permits.performance.gov/
- Builds on an Executive Order and two Presidential memoranda issued during the Obama administration

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Excerpt From Guidance – Page 50

E. Coordinated Project Plans (CPPs) and Permitting Timetables

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4.36. What happens if an agency fails to conform to the permitting timetable?

Agencies should always try to meet the agreed upon completion dates as originally proposed or as modified using the procedures described above. However, if a federal agency fails to conform to a completion date for agency action on a covered project or is at significant risk of failing to conform with such a completion date, the agency shall take the following actions.

- First, as soon as the agency misses the date or becomes aware that it is at substantial risk of missing the completion date, **consult with the facilitating or lead agency, as applicable, to establish an alternative completion date**. It may not always be possible to establish an alternative completion date. For example, a completion date may not be modified within 30 days of the completion date; nor may such date be modified without undergoing the consultative process outlined in Section 4.31.
- Second, "[p]romptly submit to the Executive Director for **publication on the Permitting Dashboard an explanation** of the specific reasons for failing or significantly risking failing to conform to the completion date and a proposal for an alternative completion date." [198] OMB and CEQ

recommend that the agency send this explanation and alternative completion date to the Executive Director within 3 business days of the missed completion date or when the agency becomes aware of the risk.

- Third, "[e]ach month thereafter until the agency has taken final action on the delayed authorization or review, submit to the Executive Director for **posting on the Permitting Dashboard a status report** describing any agency activity related to the project." [199]

[198] 42 U.S.C. § 4370m-2(c)(2)(F)(ii)(I)-(II).
[199] 42 U.S.C. § 4370m-22(c)(2)(F)(ii)(III).

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Trump Executive Order – *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects* (Jan. 24, 2017)
https://www.whitehouse.gov/the-press-office/2017/01/24/executive-order-expediting-environmental-reviews-and-approvals-high

- Provides for the designation of "high priority" infrastructure projects, to be made by the Chairman of CEQ in response to requests from state governors or the heads of federal departments/agencies
  - For any project so designated, CEQ is directed to coordinate with the relevant federal agency and establish expedited procedures and deadlines for completing environmental reviews and approvals "in a manner consistent with law"
  - If the deadlines are not met, the agency head must provide a written explanation to CEQ
  - Order does not mention FAST-41 or the OMB/CEQ guidance document

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Building on Experience 100 YEARS

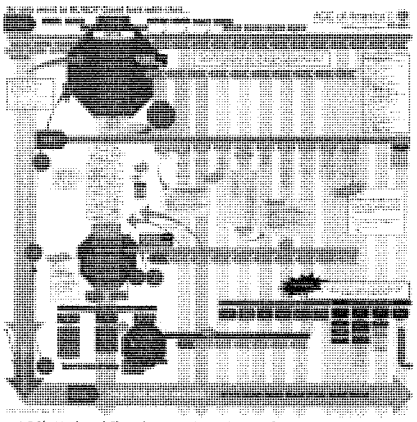
BACKGROUNDER

AGC's Flowchart of Environmental Approvals for Infrastructure Projects

- AGC of America created this poster-sized flowchart to diagram and describe the environmental review and permitting process for a federally-funded or federally-permitted infrastructure project in the United States.[i]
  - So you want to BUILD? Good luck with that...

Overview

- Before breaking ground, most large infrastructure projects must receive *many* environmental approvals pursuant to *many* environmental laws administered by *many* different regulatory agencies and program offices.
  - These projects generally do not qualify for efficient general permitting procedures and must obtain extremely costly and time-consuming individual permits, on a project-by-project basis.



AGC's Updated Flowchart – Discussion Draft v2: June 14, 2017

- From top to bottom, AGC's flowchart walks you through the environmental aspects that need to be considered at each stage of a project:
  - **BEGIN PLANNING** ***[Grey Boxes - Top]***: identify property, perform preliminary engineering and environmental site assessments and studies.
  - **NEPA PHASE** ***[Red Sign - Top]***: identify the project's purpose and need, study environmental impacts and alternatives, conduct public/agency outreach, publish a final environmental impact statement (EIS), including mitigation plans.[ii] NEPA is an "umbrella" statute because other environmental laws, policies, executive orders, and guidance are considered as part of the review process ***[Red Arrows - Top]***.
  - **ENVIRONMENTAL PERMITTING** ***[Gold Bar - Middle]***: meet the specialized *pre-construction* requirements that apply to the project, each directed at a specific environmental medium or concern (*i.e.,* air ***[Yellow Path]***, water ***[Blue Path]***, wildlife habitat ***[Green Path]***, cultural and aesthetic resources ***[Pink Path]***, waste and other aspects ***[Light Grey Path]***. Dozens of federal statutes, and innumerable implementing regulations – that are ancillary to NEPA – apply to construction activities.
  - **DURING CONSTRUCTION**: meet environmental commitments, permit terms and conditions, and other environmental requirements – *e.g.,* maintain management plans, inspect, monitor, report, take corrective action, fulfill mitigation measures, manage waste streams, etc.
  - **OPERATIONS AND MAINTENANCE** ***[Grey Footer]***: occupy and operate or transfer property; perform required environmental follow-up – be aware of long-term legal risk and liability associated with the disposal and clean-up of hazardous substances.

Problem

- Congress needs to address the staggering statutory and regulatory inefficiency that currently exists. The average time to complete one EIS, under the NEPA process, is five years and costs $6.6 million (Nat'l Assoc. of Environmental Professionals review, 2015). An individual Clean Water Act (CWA) Section 404 permit applicant spends 788 days and $271,596 to obtain coverage, on average (*Rapanos v. United States*, 2006). What is more, a six-year delay in starting construction on public projects costs the nation more than $3.7 trillion in lost employment/economic gain, inefficiency, and needless pollution (Common Good report, 2015).
- The current practice of performing sequential and often duplicative environmental reviews, following the NEPA record of decision, is presenting massive schedule, budget and legal hurdles to project delivery.
  - Project proponents are being forced to repeat: analyses and studies; mitigation and management planning; as well as interrelated "authorizations" (*i.e.,* certifications, consultations, consistency determinations, etc.) – all before they can submit their permit applications and receive the necessary approvals to proceed with construction.
- Legal challenges to environmental documentation and permitting procedures are root causes for delays on infrastructure projects.

AGC Recommended Reforms

Both Congress and the White House have turned to AGC for common-sense recommendations on streamlining the federal environmental review and permitting processes.[iii] In part, AGC has recommended the following:

1. The NEPA review and the regulatory permitting processes must be coordinated, and advanced concurrently, and *not* sequentially. There must be timelines and deadlines for completing the environmental approvals needed for infrastructure work.

   Specifically, AGC supports a nationwide merger of the NEPA and CWA 404 permitting processes, with the U.S. Army Corps of Engineers (Corps) issuing a 404 permit at the end of the NEPA review, based on the information generated by NEPA process. Data show these processes take the longest, are the costliest, and are subject to the most disagreements (see above).

2. To reduce duplication, the monitoring, mitigation and other environmental planning work performed during the NEPA review must satisfy federal environmental permitting requirements, unless there is a material change in the project.

3. A reasonable and measured approach to citizen suit reform to prevent misuse of environmental laws.

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[i] Additional details:

- Not all these permits and related "authorizations" (i.e., certifications, consultations, consistency determinations, etc.) are required to start work on every project. The scope of the environmental review process will depend on the location/nature of the project.
- AGC's flowchart displays federal requirements only; it does not include the additional state and local requirements that "go beyond" the national baseline to address region-specific needs and concerns.
- U.S. EPA has authorized states to administer some of the fed. programs depicted on this chart (e.g., stormwater permits).

[ii] If the federal action may *or may not* cause a significant impact the "lead agency" can first prepare a shorter Environmental Assessment (EA) to determine whether an EIS is required. If the EA indicates that no significant impact is likely, the agency can release a finding of no significant impact (FONSI) and proceed. A limited number of federal actions may avoid the EA and EIS requirements under NEPA if they meet the criteria for a categorical exclusion (CATEX).

[iii] In its May 2017 testimony before Congress, AGC presented reforms included in its comprehensive paper: "Reforms for Improving Federal Environmental Review and Permitting," April 30, 2017 Discussion Draft. AGC also testified before Congress in March 2017 on how to reduce environmental permitting paperwork. AGC has met and shared its reforms with the U.S. Environmental Protection Agency (EPA) and the Army Corps, among others. In addition, the association submitted detailed proposals at the request of the U.S. Department of Commerce, which was covered in the Washington Post. And, the House Natural Resources Committee sought and received AGC's advice on reforming the Endangered Species Act.

Post-Hearing Questions for the Record
Submitted to Brent Booker
Secretary-Treasurer
North America's Building Trades Union
From Ranking Member Tom Carper
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

1. I understand that the President has proposed more than doubling the Federal Permitting Improvement Steering Council's budget from just over $4 million to $10 million. The House, meanwhile, has proposed a much smaller budget of $1 million.

   You were involved in building consensus around the reforms that Senators Portman and McCaskill were able to get enacted. Do you think the Council can accomplish what we intended it to accomplish with its current budget, or the smaller one proposed by the House? What do you think it needs to be able to achieve what you and other stakeholders hoped it would achieve?

   Senator, we believe the answer to this question, from a budgetary perspective, is that in order for the Council to function as Congress intended it to function, it must be provided with the resources necessary to carry out its mission. As to what specific funding level that entails, I do not have an answer to that. What is important is that the Council be provided every opportunity to succeed, and should not be needlessly undercut by budgetary constraints. If the Council is not appropriately funded to the level necessary to carry out its mission, what purpose will it ultimately serve? It should be provided the resources that it requires, as determined by the Council and Administration at large, in consultation with the Congress.

2. I understand that President Trump at one point had issued an Executive Order that may have duplicated or contradicted the permitting reforms in the law we're discussing today. That Order has since been revised to address the concerns many originally had. In addition, members of the House and Senate have put forward a number of legislative proposals in recent years that attempt some degree of permitting or regulatory reform. What advice would you give to us and the Administration as we seek to clarify how agency coordination in this area will work?

   Senator, I think it is important to first differentiate between permitting reform and regulatory reform. There are many regulations that, quite frankly, ensure the health and safety of construction workers across the country while they are on the job site. When looking at permitting reform, we believe that the permitting process can always be improved without jeopardizing existing regulations that protect our workers. We believe there should be internal clarity as to who, within each individual agency, is the point of contact, and who is accountable, for decision making. This would ensure that timelines are adhered to and there is a clear chain of command in the decision making process.

Questions for the Record from Hearing Entitled
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
U.S. Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations

Responses from William L. Kovacs
Senior Vice President
Environment, Technology, and Regulatory Affairs Division
U.S. Chamber of Commerce

September 7, 2017

Questions from Ranking Member Tom Carper

1. *I understand that the President has proposed more than doubling the Federal Permitting Improvement Steering Council's budget from just over $4 million to $10 million. The House, meanwhile, has proposed a much smaller budget of $1 million.*

   You were involved in building consensus around the reforms that Senators Portman and McCaskill were able to get enacted. Do you think the Council can accomplish what we intended it to accomplish with its current budget, or the smaller one proposed by the House? What do you think it needs to be able to achieve what you and other stakeholders hoped it would achieve?

Answer: The President's FY18 budget proposed $10 million in appropriations for the Federal Permitting Improvement Steering Council ("FPISC"), while the House FY18 budget included only $1 million for FPISC. As FPISC ramps up implementation of FAST-41, its budget will determine how quickly the council is able to scale up operations to the levels planned for in the FAST Act. The level of permitting that FAST-41 was designed to accommodate is best reflected in the CBO's scoring of S. 280, the bill that became Title 41 of the FAST Act. CBO estimated that the funding needed to run FPISC would be determined by the number of projects, and that at full implementation FPISC would handle 200 to 300 projects annually and that volume would necessitate an operating budget of $30 million.[1]

[1] Congressional Budget Office Cost Estimate, S. 280 Federal Permitting Improvement Act of 2015 (July 28, 2015). See p. 2 at https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/s280.pdf.

The FAST-41 legislation included three sources of funding available to the FPISC: 1) budget appropriations, 2) fund transfers from agencies that are part of the council, and 3) application fees collected from project sponsors that apply for participation in FAST-41. At present, however, the FPISC is still undertaking a rulemaking to establish application fees, and it will likely be at least until FY19 before the fee system is established and FPISC begins collecting fees. Therefore, at present the FPISC is wholly dependent upon appropriated funds and transferred funds as it undertakes the crucial process of implementing and scaling up the FAST-41 permit streamlining structure. For that reason, the Chamber believes that it is crucial that the FPISC he funded at the full $10 million level requested in the President's budget. If the FPISC is funded at less than that level, it will result in a slower roll out and delay full implementation of the FAST-41 program.

2. *I understand that President Trump at one point had issued an Executive Order that may have duplicated or contradicted the permitting reforms in the law we're discussing today. That Order has since been revised to address the concerns many originally had. In addition, members of the House and Senate have put forward a number of legislative proposals in recent years that attempt some degree of permitting or regulatory reform. What advice would you give to us and the Administration as we seek to clarify how agency coordination in this area will work?*

Answer: The Federal Permitting Improvement Steering Council ("FPISC") continues to implement FAST-41 while meeting all of the law's mandates with a small budget and staff. The FPISC has completed each of the congressional mandates imposed on it such as the establishment of the permitting dashboard as well as the release of its guidance document on how to carry out responsibilities under the statute and its Best Practices Manual and Annual Report. There are 35 projects on its online dashboard (8 completed) (2 cancelled) (25 in progress). The program is working well; it should not be amended until Congress finds problems in need of correction in the operation of FPISC or how other agencies work with FPISC.

FAST-41 covers large infrastructure projects over $200 million and can be expanded to cover complex projects involving multiple agencies performing environmental reviews. Also, under Executive Order 13807 the Council on Environmental Quality can refer all projects deemed "major" under Executive Order 13766 to FPISC. Therefore, the universe of infrastructure projects is covered between FAST-41, MAP-21 (the Moving Ahead for Progress in the 21st Century Act) for surface transportation and WRDA (the Water Resources Development Act) for water infrastructure projects. Since all complex projects can be covered under these statutes there is simply no need for additional substantive permit streamlining legislation unless Congress finds gaps or deficiencies with current statutes. One of the key ways of ensuring that no streamlining gaps exist is for Congress to fully fund permit streamlining programs.

The essential strength of FAST-41 is that Congress came to a bipartisan agreement that achieves the goals of both the environmental and business communities by preserving the substantive provisions of the National Environmental Policy Act ("NEPA") with the recognition that NEPA must operate within time limits so that it is not used as a vehicle for indefinite delay of major and complex projects. To achieve this goal, Congress established a very clear governance structure for FPISC that provides early consultations on projects, clear procedures for decision making, the development of project schedules, coordinating and undertaking concurrent agency reviews, mechanisms for state participation, a dashboard to ensure transparency, and a reduction of the statute of limitations for legal challenges to final agency decisions from six years to two.

FAST-41 also addressed the issue of project opponents raising new issues at the near-end of the review process as a delay tactic, by requiring that parties must file comments, which put the agency on notice, in order to be eligible to later on raise them as part of any legal challenge. The purpose of this provision is that by giving the agency notice of the problem, the agency can have an opportunity to address it before the completion of the environmental review. This provision coupled with the early consultation allows the agency and the parties to address concerns very early in the process and hopefully avoid litigation.

In summary, in the development of FAST-41, Congress very skillfully wove together the ideas of many committees to develop a structure that preserves environmental protections in NEPA with a process that allows early public input, agency coordination, notice to agencies of problems, and dispute resolution procedures, along with a shorter statute of limitations and requirements that courts also review the impact on jobs when issuing injunctions. For these reasons Congress should not prematurely alter the substance of FAST-41 other than to remove the statute's seven-year sunset provision.

Post-Hearing Questions for the Record
Submitted to Scott Slesinger
Legislative Director
Natural Resources Defense Council
From Ranking Member Tom Carper
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

1. I understand that the President has proposed more than doubling the Federal Permitting Improvement Steering Council's budget from just over $4 million to $10 million. The House, meanwhile, has proposed a much smaller budget of $1 million.

You were involved in building consensus around the reforms that Senators Portman and McCaskill were able to get enacted. Do you think the Council can accomplish what we intended it to accomplish with its current budget, or the smaller one proposed by the House? What do you think it needs to be able to achieve what you and other stakeholders hoped it would achieve?

I am not a federal budget expert. However, it is clear that $1 million isn't enough to run the website, let alone carry out the incredible other responsibilities the council has to do if we are seriously going to try to improve the permitting and environmental review process. The president talks about the need for a trillion dollar infrastructure program; trying to expedite approvals with a million dollars is a joke. Congress cannot continue to blame delay on the permitting and NEPA processes when it won't fund either the projects or the necessary project reviews.

We would also suspect, that it would be possible, because this council is within the White House, for the President to use general White House funds to support the mission of the council. Funding now is important so that the council can use the authority under FAST-41, to pay for staff to in agencies to conduct their those permitting and reviewing functions.

2. I understand that President Trump at one point had issued an Executive Order that may have duplicated or contradicted the permitting reforms in the law we're discussing today. That Order has since been revised to address the concerns many originally had. In addition, members of the House and Senate have put forward a number of legislative proposals in recent years that attempt some degree of permitting or regulatory reform. What advice would you give to us and the Administration as we seek to clarify how agency coordination in this area will work?

Congress has passed changes to the NEPA process in the 2005 Energy Bill, Water Resources Bill of 2014, SAFE T-LU, T-21, MAP-21, and this committee, in FAST-41. In addition, piecemeal changes in disaster legislation as well as California water bills, oil

and natural gas pipeline bills have sacrificed the public input and poject review process to expedite controversial and questionable projects. Members of the Congress has introduced over 200 bills over the past few years that also contradict FAST-41 or try to create parallel processes that will, unintentionally, confuse project sponsors and further delay project approvals as companies and agencies question which law applies.

We think it is time for Congress to take a time out of NEOA changes and use its oversight authority to evaluate the multiple changes to NEPA approved over the past years. If the congress really wants to expedite the process, they will need to fund infrastructure not pretend that the problem is project reviews.

Response to the Question from Senator Carper on Hydropower
Page 50 of Transcript
Submitted by Scott Slesinger
Legislative Director
Natural Resources Defense Council
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

1. Large scale hydropower projects have had significant adverse effects on our nation's rivers, native fish populations, and the fishing jobs and Native American tribes that depend on their health. In many cases hydropower projects involve dams that completely block rivers, impeding the natural migration patterns of fish and wildlife. Poorly designed projects can entrain and kill fish in the hydropower intakes. They can cause or contribute to water quality impairments downstream, including higher water temperatures, that result in significant mortality of native fish species. Hydropower projects can and have harmed Native American tribes, commercial and recreational fishing jobs, and communities that depend on healthy fish populations for sustenance, economic development.
    a. http://www.habitat.noaa.gov/protection/hydro/impacts.html (NMFS webpage summarizing impacts to habitat and fish from the more than 1,000 hydropower dams licensed by FERC)
    b. http://www.hydroreform.org/abouthydro/impacts-on-rivers (Hydropower Reform Network webpage summarizing hydropower impacts to fish and rivers, with link to webpage summarizing improvements to reduce impacts)

2. Many of the nation's largest hydropower projects were licensed before adoption of the Nation's modern environmental laws in middle of the 20th century, and the relicensing is an opportunity to ensure that these adverse impacts on the environment, jobs, and communities are mitigated through adoption of revised instream flow and water quality requirements, installation of fish ladders and other infrastructure to ensure safe fish passage, habitat restoration, and other infrastructure improvements.

3. Most of the best sites to build dams and hydropower projects have already been developed, particularly in the west. The Energy Department's 2015 hydropower vision report identified the potential to significantly increase hydropower production through upgrading technology and infrastructure at existing facilities, adding hydropower to non-powered dams, developing pumped storage projects, and potentially adding new instream hydropower projects. However, new projects made up the smallest fraction of the increase in hydropower production in light of environmental considerations. The report notes that new instream hydropower dams "is the most costly and environmentally challenging class of hydropower to develop." (ES-18) In contrast, new pumped storage hydropower capacity is identified in the report as having the largest potential increase in hydropower production.
    a. https://energy.gov/sites/prod/files/2016/07/f33/Hydropower-Vision-Executive-Summary.pdf

4. In conduit hydropower, in contrast, avoids many of these adverse impacts on communities and the environment because hydropower is generated by the passage of water in pipelines, canals, and other conduits. Congress has recently adopted modifications to the licensing process for these projects that may help to spur additional development of these kinds of projects.

5. Pumped storage projects also have the potential to produce hydropower while reducing or avoiding many of the harmful impacts on communities and fisheries from large scale hydropower dams, although these projects may face challenges due to siting concerns and loss of habitat, water availability, and other factors.

Post-Hearing Questions for the Record
Submitted to Janet Pfleeger
Acting Executive Director
Federal Permitting Improvement Steering Council
From Ranking Member Tom Carper
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

1. *In May, the EPW Committee heard from Leah Pilconis of the Associated General Contractors, that better shared databases on natural resources, and other such tools could help improve coordination between agencies. Do you agree that this could be helpful, and are there other digital tools or technologies that could help agencies review projects more quickly and effectively?*

   The Permitting Council's Office of the Executive Director (OED) is a strong advocate for shared databases for natural and historic resources. Shared databases, and other similar technological tools, help agencies review projects effectively by supporting good planning and efficient decision making. Such shared electronic information systems provide access across agencies to pertinent data about known natural and historic resources. This shared access to information has the potential to prevent redundant surveys, better focus attention on areas where more information is needed, and reduce the time needed to perform an initial assessment of an area potentially impacted by a proposed project.

   The Permitting Council OED is working closely with the Permitting Council agencies to promote the development and early use of shared databases and other tools to assist agencies in identifying potential community, historical, and environmental resources in proposed project areas. This will help ensure agencies have access to the best available science and information to support fully informed and sound decision-making. The Permitting Council OED is accomplishing the promotion of shared databases and other tools in the following ways.

   Under Title 41 of the Fixing America's Surface Transportation Act (FAST-41), the Permitting Council issues recommendations on best practices for environmental reviews and authorizations for infrastructure projects in December of each year. One of the categories identified in FAST-41 for which the Permitting Council develops these recommended best practices is "developing and making available to applicants appropriate geographic information systems (GIS) and other tools" that simplify and expedite permitting and project planning efforts.

   The Permitting Council OED is working with the agencies to coordinate identification and implementation of such best practices to maximize agency effectiveness and provide the greatest return on investment. Specifically, the Permitting Council is:

(1) Determining how agencies are developing and integrating GIS tools and data sets (or databases) to benefit or potentially benefit covered projects through timely and efficient decision-making processes;
(2) Identifying tools agencies are utilizing that have been developed by other agencies, including which are used most frequently and have been deemed the most helpful to agencies during the environmental reviews and authorizations of proposed projects;
(3) Identifying what stage during the proposed project review process agencies are using these tools (*i.e.*, early coordination, pre-application, National Environmental Policy Act (NEPA) documentation, and/or individual authorizations); and
(4) Identifying needs that could be addressed with an electronic information system that are currently unmet.

The Permitting Council OED monitors best practices implementation within and among individual agencies through: (i) OED review of Coordinated Project Plan (CPP) quarterly updates to ensure agency use of best practices for project specific environmental reviews and authorizations and (ii) the FAST-41 Annual Report to Congress due in April each year, in which the Executive Director assesses agency performance in making improvements consistent with best practices.

2. *One goal of the reforms we're discussing today is to encourage agencies to review projects they have a role in vetting concurrently to the maximum extent possible so that necessary reviews take less time. What progress has the Council made since it began its work in achieving this goal? What obstacles might prevent agencies from coordinating their work so that reviews can be done at the same time rather than back to back?*

Concurrent rather than sequential reviews have been identified and promoted as a best practice during previous permitting process improvement efforts. As identified in the 2015 Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects Handbook (the Red Book), developed by the U.S. Army Corps of Engineers (USACE), the Federal Highway Administration (FHWA), the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (USFWS), the National Oceanic and Atmospheric Administration (NOAA), the U.S. Coast Guard (USCG), and the Federal Railroad Administration (FRA), concurrent reviews such as concurrent NEPA compliance and Section 404 (Clean Water Act) were identified as a tool to improve project reviews. The Red Book, along with other tools and techniques, encourages increased use of synchronization and other tools to reduce permitting timelines and impacts to the environment.

Concurrent rather than sequential reviews are also strongly encouraged in the Permitting Council's January 2017 *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects,* available at https://www.permits.performance.gov/tools.

- Federal agencies should synchronize activities related to environmental reviews and authorizations, conducting them concurrently rather than

sequentially, unless an agency would be precluded from meeting statutory obligations in doing so. Synchronization of multi-agency reviews can reduce the time required for the Federal government to complete its permitting and reviews.

- The Council on Environmental Quality (CEQ) NEPA Implementing Regulations state that "Federal agencies shall, to the fullest extent possible, integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively."
- For projects covered under FAST-41, Federal agencies must integrate their environmental review and authorization activities, carrying out their obligations concurrently and in conjunction with other agency activities to the maximum extent practicable.

Through the tools provided to the Permitting Council by FAST-41, progress in implementation of concurrent reviews for covered projects can begin to be measured. The FAST-41 Coordinated Project Plan (CPP) serves as the foundation for interagency coordination, early identification of difficulties and issues that could delay Federal decision-making, and verification of implementation of best practices, including concurrent rather than sequential reviews. The CPP includes the project's permitting timetable (which is the timetable posted publicly on the Permitting Dashboard at https://www.permits.performance.gov/), which allows for analysis of progress made in incorporation of concurrent reviews across covered projects. Analysis of permitting timetable data will also help the Permitting Council identify obstacles to successfully using concurrent reviews.

As new FAST-41 projects are added to the Dashboard, the Permitting Council's Office of the Executive Director (OED) works with lead and cooperating/participating agencies to review initial CPPs, as well as quarterly updates to those CPPs, to ensure agencies develop the most efficient schedules for their environmental reviews and authorizations. The Lead Agency is responsible for synchronization and coordination of the timetable for all environmental reviews and authorizations. Through working with the agencies on individual projects as they develop the CPPs and permitting timetables, some considerations have already been identified that affect how various permitting processes can be aligned. For example, some agencies require a more developed project design to meet their informational requirements than the Lead Agency may need to move forward with a Draft Environmental Impact Statement (DEIS). Requiring the DEIS to include that higher level of design detail could have implications for the overall timeline or for investor considerations when additional funding may be required to develop those more detailed engineering designs.

As the Permitting Council continues to identify potential obstacles to concurrent reviews, that information is being shared with the Office of Management and Budget and the CEQ to help inform and develop the framework to implement One Federal Decision (OFD) as required under Executive Order (EO)13807 on infrastructure-related permitting. Apart from some exceptions specified in the EO, major infrastructure projects processed with

OFD shall result in one Record of Decision for the lead, cooperating and participating Federal agencies and decisions on all the necessary authorizations within 90 days thereafter.

3. *Earlier this year, the Inspector General at the U.S. Department of Transportation reported that DOT had implemented just over half of its planned actions from MAP-21 to accelerate projects, and that the FAST Act changes delayed the benefits of some already-implemented actions. Would you agree that legislative uncertainty and implementation delays can hinder our ability to achieve intended benefits, such as accelerating project delivery and reducing project costs?*

   While the Department of Transportation can specifically address the status of MAP-21and FAST Act project delivery provisions, I understand substantial progress has been made. The Permitting Council ereated by Title 41 of the FAST Act (FAST-41) has worked since its inception to improve Federal environmental reviews and authorizations by providing enhanced predictability, transparency and accountability through implementation of best practices and by using FAST-41 tools such as the CPPs described above. The permitting timetable developed in every project's CPP is made public on the Permitting Dashboard. The Permitting Dashboard serves as a single point of reference for information on covered infrastructure projects, providing predictability to project sponsors and a one stop shop where the public and interested stakeholders can view the timetable and status for all environmental reviews and authorizations required for any covered project.

   A fully implemented FAST-41 program will include the following benefits and services to FAST-41 covered projects:

   - Developing guidance to agencies on implementing FAST-41 to achieve predictable and accountable project permitting schedules;
   - Assuring implementation and institutionalization of best practices for environmental reviews and authorizations;
   - Ensuring coordinated project plans fully implement best practices, including concurrent rather than sequential reviews, that will result in a streamlined permitting process for every covered project;
   - Using the public-facing Permitting Dashboard to track the status and enhance transparency to the Federal permitting process for covered projects and to analyze the effectiveness of implemented best practices and evaluate changes in overall permitting process timelines;
   - Developing recommended performance schedules, based on two years of data, to include intermediate and final completion dates for environmental reviews and authorizations;
   - Providing extensive interagency coordination to identify and resolve issues early in the process to enhance the predictability and transparency of the federal permitting process; and

- Facilitating the development, maintenance, and adherence to project timetables using the tools provided in FAST-41, including the formal dispute resolution process.

As reported at the Permitting Council's September 2017 Council member meeting, FAST-41 coordination efforts already are showing positive results in terms of time and cost savings, including collaboration on a stalled Section 106 review under the National Historic Preservation Act whose completion allowed subsequent authorizations to move forward and, as relayed by the Project Sponsor, **saved an estimated 6 months and $300 million in capital costs to the project.**

4. *Our witness on the first panel from the Natural Resources Defense Council argued that infrastructure projects are often held up not because of federal environmental reviews, but because of lack of funding or state and local laws and zoning requirements. When it comes to the latter, I understand that state and local governments are permitted but not required to participate in the Federal Permitting Improvement Steering Council's work. It seems to me that there would be some value in having state and local governments participating as much as possible given the role they play in getting a project off the ground. What are your thoughts on state and local participation when it comes to coordinating permitting and other reviews and how we the Council can encourage it?*

   FAST-41 provides a state with the opportunity to participate in the environmental review and authorization process under FAST-41 if the Federal environmental review is being implemented within the boundaries of that state.

   If the state chooses to participate then it can subject all state agencies to the FAST-41 process that 1) have jurisdiction over the covered project, 2) are required to conduct or issue a review, analysis, opinion, or statement for the covered project, or 3) are required to make a determination on issuing a permit, license, or other approval or decision for the covered project.

   State, local, and tribal government "participating agencies" under FAST-41 can help ensure that specialized, expert knowledge about the local community and its resources is accurately represented in the development of Coordinated Project Plans. If a coordination plan is created between the facilitating or lead agency, as applicable, and any state, local, or tribal agency, the plan shall, to the maximum extent possible be included in a Memorandum of Understanding (MOU) among the federal and state, local, or tribal agencies as cooperating agencies. An MOU should describe the reason for cooperating agency status, identify the specific portions of the covered project and associated timetable that affect the cooperating state, local, or tribal agency, and make the agency subject to all requirements of FAST-41 pursuant to 42 U.S.C. § 4370m-2(c)(3)(D).

   The Permitting Council OED has conducted outreach to various state, local, and tribal entities to encourage their early involvement and/or cooperating agency status for FAST-

41 projects, including through meetings and conferences, such as the Environmental Council of the States State Environmental Protection Meeting (July 17, 2017), National Association of Counties Annual Conference (July 2017), and National Tribal Preservation Conference (August 2017). During the outreach activities, the Permitting Council OED and Permitting Council agencies presented the provisions of FAST-41 and how local concerns and permitting informational needs could be represented early in the Federal permitting process through FAST-41 participation, thus improving the state, local, and tribal consultation and individual review processes. One state has currently opted into the FAST-41 process for a covered project and a second state has expressed interest in opting into the FAST-41 process for another covered project.

5. *One of the main responsibilities given to the Federal Permitting Improvement Steering Council is to maintain the Permitting Dashboard that shows schedules and other information for agencies' consideration of major projects. What benefits can this transparency bring, and what steps can be taken to improve the Dashboard and the quality of information published on it?*

Transparency provides the following benefits to covered projects under FAST-41:
The Permitting Dashboard serves as a single point of reference for all FAST-41 covered projects, providing all stakeholders (*e.g.*, project sponsors, Federal agencies, Congress and the public) with a one-stop information source for these projects. Stakeholders can see the status of the covered projects with the use of visual tools as well as the detailed written schedules for completed and upcoming environmental reviews and authorizations. Providing this information on a public-facing website helps bring transparency, visibility, and accountability to the review process, helping ensure adherence to the timeline established and presented on the Permitting Dashboard. This centralized source for complete and accurate data provides detailed information on each step of the permitting process across agencies, allowing the Permitting Council to identify and resolve challenges faced by agencies as the permitting process progresses. The Permitting Dashboard also highlights and brings to the forefront potential data trends in permitting process timelines, allowing the Permitting Council to identify recurring issues and proactively prevent them in the future.

The following steps are being taken to improve the Dashboard and the quality of information published on it:
Since the beginning of FY 2017, the Permitting Council OED has worked with the lead and cooperating agencies to improve the data accuracy and completeness of permitting timetables to the Dashboard in the following ways:

1. The OED provided quarterly assessments throughout this calendar year (2017) to all agencies to help them address identified data gaps.
2. OED continues to improve the Permitting Dashboard, with technical support from the Department of Transportation, through enhancements such as automated notifications to agencies when authorization deadlines are approaching.
3. Development of new dynamic reporting and visualization enhancements for the Dashboard, planned for FY2018, will better allow the public to see how federal

agencies are performing in critical areas. Project sponsors and the public will be better able to track the progress of projects and will be provided with explanations for any delays, as appropriate.

The Permitting Dashboard does not currently include dates for FERC and NRC issued certificates and permits required for nuclear plants, hydropower facilities, and interstate gas pipelines (*e.g.*, according to 18 C.F.R. § 3c.2(b), "The nature and time of any proposed action by the Commission are confidential and shall not be divulged to anyone outside of the Commission."). Several other agency environmental reviews and authorization completion dates are contingent upon those NRC and FERC dates, making it difficult for those agencies to accurately set target completion dates and for FAST-41 to fully meet its intended objectives.

6. *This hearing has focused on the risks and uncertainties for projects prior to being built, which is important. However there can also be risks to infrastructure once it is built, particularly in low-lying areas that may see impacts from sea level rise. How do you believe that public agencies and project sponsors should be integrating climate change projections and sea level rise into project reviews?*

   Your question raises a methodological issue for the environmental review or authorization of infrastructure projects. FAST-41 directs lead agencies to determine, in collaboration with each FAST-41 cooperating agency, the methodologies to be used and level of detail required in the analysis of each alternative for a covered project. FAST-41 cooperating agencies must use these methodologies when conducting any required NEPA review for that particular covered project, to the extent consistent with existing law. Lead agencies should also take into account the requirements in the CEQ NEPA regulations regarding methodologies and scientific accuracy (40 C.F.R. § 1502.24), their own agency NEPA procedures, and those of cooperating agencies, which may contain additional requirements for methodologies associated with the environmental review. They should also take into account case law and best practices bearing on the particular methodology (for example, the need to be transparent about assumptions in models; providing explanations of the methodology that are clear and written in plain language so that decision-makers and the public can readily understand it).

Post-Hearing Questions for the Record
Submitted to Janet Pfleeger
Acting Executive Director
Federal Permitting Improvement Steering Council
From Sen. Steve Daines
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

Ms. Pfleeger, thank you for testifying. I am engineer by trade. I am not a career politician, rather an engineer who spent 28 years in the private sector identifying and fixing inefficiencies.

As we work towards President Trumps' goal of a one trillion dollar infrastructure package, a surefire way to make the American taxpayers dollars go farther is to eliminate redundancies and streamline the Federal permitting process.

Ms. Pfleeger, I understand a number of agencies and private companies have been developing technologies, such as Geographic Information Systems (GIS) maps, to locate natural resources such as wetlands and endangered species. This technology is used to determine infrastructure impacts and appropriate mitigations. However, Federal agencies still require time-intensive and costly field studies to verify the data. ***What is the Permitting Center doing to encourage agencies to move toward technology-based verses labor intensive reviews?***

The Permitting Council's Office of the Executive Director (OED) is a strong advocate for technology-based versus labor intensive reviews to ensure a timely and efficient permitting process. Shared databases, and other such technological tools, help agencies review projects effectively by supporting good planning and efficient decision making. Such shared electronic information systems provide access across agencies to pertinent data about known natural and historic resources. This shared access to information has the potential to eliminate redundant surveys, focus attention on areas where more information is needed, and reduce the time needed to perform an initial assessment of an area potentially impacted by a proposed project.

The Permitting Council OED is working closely with the Permitting Council agencies to promote the development and early use of shared databases and other tools to assist agencies in identifying potential community, historical, environmental resources in proposed project areas. This will help ensure agencies have access to the best available science and information can support fully informed and sound decision-making. The Permitting Council OED is accomplishing the promotion of shared databases and other tools in the following ways.

Under Title 41 of the Fixing America's Surface Transportation Act (FAST-41), the Permitting Council issues recommendations on best practices for environmental reviews and authorizations for infrastructure projects in December of each year. One of the categories identified in FAST-41 for which the Permitting Council develops these recommended best practices is "developing and making available to applicants appropriate geographic information systems and other tools" that simplify and expedite permitting and project planning efforts.

The Permitting Council OED is working with the agencies to coordinate identification and implementation of such best practices to maximize their effectiveness and provide the greatest return on investment. Specifically, the Permitting Council is:

(1) Determining how agencies are developing and integrating GIS tools and data sets (or databases) to benefit or potentially benefit FAST-41 projects through timely and efficient decision-making processes;
(2) Identifying tools agencies are utilizing that have been developed by other agencies, including which are used most frequently and have been deemed the most helpful to agencies during the environmental reviews and authorizations of proposed projects;
(3) Identifying what stage during the proposed project review process agencies are using these tools (i.e., early coordination, pre-application, National Environmental Policy Act (NEPA) documentation, and/or individual authorizations); and
(4) Identifying needs that could be addressed with an electronic information system that are currently unmet.

The Permitting Council OED monitors best practices implementation within and among individual agencies through: (i) OED review of Coordinated Project Plan (CPP) quarterly updates to ensure agency use of best practices for project specific environmental reviews and authorizations and (ii) the FAST-41 Annual Report to Congress due in April each year, in which the Executive Director assesses agency performance in making improvements consistent with best practices.

Ms. Pfleeger, I was pleased that in your testimony you mentioned outreach to stakeholders is a priority, particularly with Tribal entities. As you know, Montana is home to several large reservations with critical infrastructure needs. ***What input and guidance have you received from these groups that will make the implementation of FAST-41 more successful and how will you work to incorporate these recommendations?***

The Permitting Council Office of the Executive Director (OED) is committed to meaningful government-to- government consultation with federally recognized Tribal Nations. We recognize that formal and substantive consultation with Indian Tribes is a vital aspect of NEPA and other federal permitting. The FAST-41 Dashboard tool not only emphasizes the importance of these consultations in the various federal permitting processes, but helps assure potential impacts to tribal resources and sacred sites are avoided, minimized, and mitigated. The FAST-41 program provides enhanced transparency to assure that appropriate and meaningful consultation occurs.

Early engagement to substantively address Tribal concerns and obtain Tribal consent is not only consistent with United States trust and treaty responsibilities, it also improves outcomes for project sponsors by preventing subsequent delays in permitting and project development resulting from objections and lawsuits.

The Permitting Council OED meets with Tribal representatives and has reviewed the findings and recommendations in the *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* report released by the Department of the Interior, the U.S. Department of the Army, and the Department of Justice in 2017 available at

https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc2-060030.pdf and the *Improving Tribal Consultation in Infrastructure Projects* report released by the Advisory Council on Historic Preservation in 2017 available at http://www.achp.gov/docs/achp-infrastructure-report.pdf. Consistent with these reports' recommendations and Key Principles, FPISC-OED has provided Permitting Council agencies detailed metric information and advised them they will be evaluated on how they "ensure that Tribal consultations are conducted in a way that fully respects the government-to- government relationship." Agency performance will be assessed in April 2018 via the Permitting Council's Annual Report to Congress.

Post-Hearing Questions for the Record
Submitted to Terry Turpin
Director, Energy Projects
Federal Energy Regulatory Commission
From Ranking Member Tom Carper
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

1. In May, the EPW Committee heard from Leah Pilconis of the Associated General Contractors, that better shared databases on natural resources, and other such tools could help improve coordination between agencies. Do you agree that this could be helpful, and are there other digital tools or technologies that could help agencies review projects more quickly and effectively?

Response: FERC staff currently use databases maintained by other agencies to assist in our analysis of proposed projects. For example, we use databases maintained by the Department of Interior and the U.S. Geological Survey to assess project impacts on endangered species and instream flows at hydropower projects. For natural gas projects, staff was recently trained on the Environmental Protection Agency's "NEPAssist" and "EJSCREEN" web-based tools that draw data from GIS databases and public web services to screen for environmental and demographic indicators. Staff also utilize the U.S. Fish and Wildlife Service's web-based Information Planning and Conservation System to identify endangered species that may be affected in project areas. While these technologies are useful for conducting preliminary assessments and focusing analysis where it is most needed, site-specific data collection is typically needed to assess project-specific effects. In most cases, applicants generate new, discreet digital data tailored to each project to provide the data necessary for the environmental analysis required under the National Environmental Policy Act.

2. One goal of the reforms we're discussing today is to encourage agencies to review projects they have a role in vetting concurrently to the maximum extent possible so that necessary reviews take less time. What progress has the Council made since it began its work in achieving this goal? What obstacles might prevent agencies from coordinating their work so that reviews can be done at the same time rather than back to back?

Response: There are two primary reasons that agencies have difficulty in conducting concurrent reviews: a lack of information/project application; and dependent review processes. Depending on their authorizing statute(s) and legal precedents, agencies have differing specific needs for their own reviews. In many cases, information needed by one agency cannot be developed until later in the review process of another agency. As a result, project sponsors often do not submit permit applications and supporting information to all agencies at the same time. In addition, some permitting work cannot be accomplished until another agency

action is completed. For example, many federal agencies have indicated that their permits cannot be issued until National Historic Preservation Act Section 106 or Endangered Species Act Section 7 consultation by the Commission is complete. Often, the review underlying these permits requires property access that can only be achieved after Commission approval of a project. These dependencies are being identified and documented as project schedules and are disclosed on the Federal Infrastructure Project Permitting Dashboard, which will enable all agencies to look for efficiencies.

3. Earlier this year, the Inspector General at the U.S. Department of Transportation reported that DOT had implemented just over half of its planned actions from MAP-21 to accelerate projects, and that the FAST Act changes delayed the benefits of some already-implemented actions. Would you agree that legislative uncertainty and implementation delays can hinder our ability to achieve intended benefits, such as accelerating project delivery and reducing project costs?

Response: In my experience, legislative uncertainty and delays in implementation of process revisions can be impediments to increasing the efficiency of project review. However, the eventual benefits from legislative changes can lead to positive outcomes.

4. Our witness on the first panel from the Natural Resources Defense Council argued that infrastructure projects are often held up not because of federal environmental reviews, but because of lack of funding or state and local laws and zoning requirements. When it comes to the latter, I understand that state and local governments are permitted but not required to participate in the Federal Permitting Improvement Steering Council's work. It seems to me that there would be some value in having state and local governments participating as much as possible given the role they play in getting a project off the ground. What are your thoughts on state and local participation when it comes to coordinating permitting and other reviews and how we the Council can encourage it?

Response: The Commission's Pre-filing Process is designed to engage state and local agencies to identify and allow for resolution of issues prior to the filing of an application. This process has allowed state agencies to make beneficial use of the Commission's public outreach efforts, and coordinate with federal agencies and the project sponsor. Based on Commission staff's experience, many state agencies are willing to participate during the Pre-filing Process. Many state agencies also find that their information needs or review processes hinder their ability to participate in concurrent review of a project proposal once an application has been filed at the Commission.

5. One of the main responsibilities given to the Federal Permitting Improvement Steering Council is to maintain the Permitting Dashboard that shows schedules and other information for agencies' consideration of major projects. What benefits can this

transparency bring, and what steps can be taken to improve the Dashboard and the quality of information published on it?

Response: The Permitting Dashboard provides all agencies, the public, and the project proponent with an easily accessible snapshot view of all federal permits needed to process the application. Previously, this has only been available by monitoring project specific filings, which can be quite voluminous. However, many linear infrastructure projects involve multiple districts or field offices from a particular agency. The complexity of this information is not yet easily displayed on the Dashboard. In addition, some projects involve unique permits which currently cannot be displayed or tracked on the Dashboard.

6. This hearing has focused on the risks and uncertainties for projects prior to being built, which is important. However there can also be risks to infrastructure once it is built, particularly in low-lying areas that may see impacts from sea level rise. How do you believe that public agencies and project sponsors should be integrating climate change projections and sea level rise into project reviews?

Response: For hydropower projects, staff use a 30- to 60-year publicly-available water flow record when assessing project effects. This flow record reflects actual (not predicted or modeled) changes in hydrology that have or are occurring within the river basin within which the project is located. This flow record, by its nature, reflects any fluctuations related to climate change. If a significant issue arises that was not anticipated after the project is in operation, hydropower licenses include standard reopener articles such that changes in project operation or project facilities can be considered. Regarding sea level rise, most Commission jurisdictional hydropower projects are located far-enough upstream in a watershed that sea level rises would not be expected to impact facility or operation. For natural gas pipelines, sea level rise is not expected to significantly affect siting or operations given that these facilities are buried underground. Pipeline operators periodically inspect waterbody crossings during operation for signs of erosion and to perform remediation, as necessary. For aboveground facilities, such as liquefied natural gas terminals, staff reviews designs and frequently requests additional information from the applicant to ensure that sea level rise and storm surge is considered in the proposed project design.

Post-Hearing Questions for the Record
Submitted to Terry Turpin
Director, Energy Projects
Federal Energy Regulatory Commission
From Senator Steve Daines
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

Mr. Turpin, thank you for testifying. I am engineer by trade. I am not a career politician, rather an engineer who spent 28 years in the private sector identifying and fixing inefficiencies.

As we work towards President Trumps' goal of a one trillion dollar infrastructure package, a surefire way to make the American taxpayers dollars go farther is to eliminate redundancies and streamline the Federal permitting process.

In Montana, hydropower accounts for the second-largest share of electricity production and Montana is the fifth-largest producer of hydropower in the nation. The growth of regulations such as the Clean Water Rule has further complicated an already onerous permitting process. I am happy to see that the Administration is preparing to rescind the Clean Water Rule.

Mr. Turpin, in your testimony you mentioned the critical role the Federal Energy Regulatory Commission (FERC) plays in regulating hydropower in the U.S. To the extent that the Clean Water Rule has hampered permitting of hydropower projects, **how will you act quickly to revive stalled projects and streamline the permitting process to get these projects back on track?**

Response: *I am not aware of any case where the Clean Water Rule has hampered the Commission's ability to issue a timely decision on a hydropower license application. However, under section 401(a)(1) of the Clean Water Act (CWA), the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification (certification) for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed 1 year. Section 401(d) of the CWA provides that the certification must become a condition of any federal license for the project. Of the 82 applications currently pending for hydropower projects, 20 are delayed, at least in part, because the Commission has not yet received water quality certification from the state.*

Post-Hearing Questions for the Record
Submitted to Robyn S. Colosimo
Assistant for Water Resources Policy
U.S. Army Corps of Engineers
From Chairman Rob Portman
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

1. Please provide policies regarding and examples of how your headquarters are communicating the FAST-41 requirements to your field offices.

Answer: The U.S. Army Corps of Engineers (Corps) continues to develop implementation procedures communicating FAST 41 requirements between Corps headquarters and its district offices. For example, Corps Headquarters has developed a list of FAST-41 points of contact (POC) within each District Regulatory office and two FAST-41 POCs within the headquarters Regulatory Division. The Headquarters POCs have held several trainings with the field staff, regularly provide guidance updates to the field and coordinate on each project to ensure project-specific compliance every quarter. In addition, they are always available to answer any questions and regularly do so through an established line of communication through the Regulatory vertical team.

Similarly, for the Corps Section 408 authority (33 U.S.C. Section 408) staff leads have been identified at both the Headquarters and each Corps district. Monthly calls are held with the Section 408 coordinators, and discussions are held on how FAST-41 requirements intersect with the Section 408 processes, as well as sharing lessons learned and best practices to date.

Overall, as projects are added to the Permitting Dashboard, Corps leads engage with district personnel to support development of Coordinated Project Plans and data entry into the dashboard.

Post-Hearing Questions for the Record
Submitted to Robyn S. Colosimo
Assistant for Water Resources Policy
U.S. Army Corps of Engineers
From Ranking Member Tom Carper
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

1. In May, the EPW Committee heard from Leah Pilconis of the Associated General Contractors, that better shared databases on natural resources, and other such tools could help improve coordination between agencies. Do you agree that this could be helpful, and are there other digital tools or technologies that could help agencies review projects more quickly and effectively

Answer: Shared databases are generally helpful. In fact, the U.S. Army Corps of Engineers (Corps) already utilizes many of the digital tools developed by other agencies and vice versa, such as U.S. Fish and Wildlife Service and National Marine Fisheries Service data layers for determining the presence of species and/or critical habitat protected under the Endangered Species Act when evaluating applications for proposed activities. Improved awareness among agencies of the data layers each utilizes when reviewing proposed activities can produce additional efficiencies. There are many natural resource databases that are publically available, such as the U.S. Fish and Wildlife Service's National Wetlands Inventory Mapper. In this regard, the Corps fully supports one of FPISC's proposed Fiscal Year 2018 best practices for infrastructure projects that involves providing stakeholders with a list of GIS information sources that are publically available and used by Federal agencies to initially assess the potential for environmental resources in a project area. It is important to note that challenges, such as differing technological requirements, firewall's and data scales often unintentionally limit the full benefit of shared information.

2. One goal of the reforms we're discussing today is to encourage agencies to review projects they have a role in vetting concurrently to the maximum extent possible so that necessary reviews take less time. What progress has the Council made since it began its work in achieving this goal? What obstacles might prevent agencies from coordinating their work so that reviews can be done at the same time rather than back to back?

Answer: For many years, agencies, including the Corps, have been undertaking concurrent reviews to the extent practicable in an effort to streamline decision-making. The Council has provided the Corps with an additional forum to undertake such synchronized coordination and to track that coordination nationally. Obstacles that can prevent full coordination are often due to project sponsors decisions to not apply for each agency's respective authorizations at the same time, so an agency may not fully understand what it must evaluate until late in another agency's process. Another obstacle can be when an agency's decision is already abbreviated, so extensive coordination would not only be unnecessary, but also counterproductive, adding time and resources to an already streamlined process. Lack of funding for the project at the time of

project planning and NEPA development can also be a challenge; for instance the lead agency may coordinate its NEPA document with the cooperating agency, but the applicant and/or lead agency may not have adequate funding to conduct the level of project design or the studies needed to facilitate the cooperating agency's process. The result is often that a cooperating agency's review is pushed until after the NEPA process has concluded and additional funding is not available. At times the lack of desire on the lead agency's part to include the cooperating agency's statutory requirements in its NEPA review is a roadblock to concurrent reviews. Including information to meet a cooperating agency's statutory requirements that are viewed as extraneous to the lead agency's NEPA requirements may increase the time, cost, and effort needed to prepare the NEPA document due to the additional coordination and information or studies that may be required. As such, a lead agency may be hesitant to include the information a cooperating agency needs for their environmental decision-making role in the lead agency's NEPA document, often resulting in the creation of a supplemental NEPA document by the cooperating agency. Finally, limited staff resources is routinely a challenge as synchronized reviews are time and resource-intensive due to the level of coordination required amongst agencies.

3. Earlier this year, the Inspector General at the U.S. Department of Transportation reported that DOT had implemented just over half of its planned actions from MAP-21 to accelerate projects, and that the FAST Act changes delayed the benefits of some already-implemented actions. Would you agree that legislative uncertainty and implementation delays can hinder our ability to achieve intended benefits, such as accelerating project delivery and reducing project costs?

Answer: Implementation delays can hinder the ability to achieve intended benefits. Delays are generally a consequence of multiple agencies coordinating the implementation of the same statute while also reconciling that statute with their own governing statutes, regulations, and policies, and creating new regulations and policies to implement the changes in the statute. It takes time to resolve inconsistencies as they emerge.

4. Our witness on the first panel from the Natural Resources Defense Council argued that infrastructure projects are often held up not because of federal environmental reviews, but because of lack of funding or state and local laws and zoning requirements. When it comes to the latter, I understand that state and local governments are permitted but not required to participate in the Federal Permitting Improvement Steering Council's work. It seems to me that there would be some value in having state and local governments participating as much as possible given the role they play in getting a project off the ground. What are your thoughts on state and local participation when it comes to coordinating permitting and other reviews and how we the Council can encourage it?

Answer: Engaging state and local governments to participate in the FAST-41 process, especially in cases where they are responsible for administering federal laws, e.g. Sections 401 and 402 of the Clean Water Act, Coastal Zone Management Act, and Section 106 of the National Historic Preservation Act, would likely be very beneficial to the overall process. The Corps does not have recommendations regarding how the Council could encourage state and local government

engagement beyond inviting such agencies to participate early in the coordination process and we recognize that it may require substantive effort to build others into the evolving process.

5. One of the main responsibilities given to the Federal Permitting Improvement Steering Council is to maintain the Permitting Dashboard that shows schedules and other information for agencies' consideration of major projects. What benefits can this transparency bring, and what steps can be taken to improve the Dashboard and the quality of information published on it?

Answer: The Permitting Dashboard provides national attention to projects that would otherwise only receive regional attention and provides transparency to a larger set of agencies and stakeholders. This enhanced transparency can improve, among other things, communication, coordination, and resolution of issues. With regards to suggested improvements to the Dashboard, the following is offered:

1) Abbreviated Review Reporting: Agencies only report milestones for those decisions that are not already abbreviated as the Permitting Dashboard reporting process requires considerable time and effort, and diverting limited time/resources from conducting reviews which is counterproductive. Instead, the Corps proposes that each agency simply list the abbreviated review required, the target end date, and any dependent actions by other agencies; 2) Take Advantage of Existing Databases. The Permitting Dashboard needs to be able communicate with agencies' existing databases where much information is already tracked in order to prevent duplication of data entry as well as the potential for errors; and 3) Other Improvements: The Corps is already working with the Office of the Executive Director on some other changes that would improve clarity/quality of information on the Permitting Dashboard, such as allowing us to list which districts are conducting the reviews and consolidating our agency's Section 10 and Section 404 actions into a single action to reduce data duplication.

6. This hearing has focused on the risks and uncertainties for projects prior to being built, which is important. However there can also be risks to infrastructure once it is built, particularly in low-lying areas that may see impacts from sea level rise. How do you believe that public agencies and project sponsors should be integrating climate change projections and sea level rise into project reviews?

Answer: As a rule of thumb, reviews of impacts from climate change must be consistent with an agency's authorities as well as guidance from the Administration. As an example, the Corps Regulatory Program authority is often a small component of a larger project and is limited to impacts to aquatic resources regulated pursuant to its authorities.

Post-Hearing Questions for the Record
Submitted to Robyn S. Colosimo
Assistant for Water Resources Policy
U.S. Army Corps of Engineers
From Senator Steve Daines
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

Ms. Colosimo, thank you for testifying. I am engineer by trade. I am not a career politician, rather an engineer who spent 28 years in the private sector identifying and fixing inefficiencies.

As we work towards President Trumps' goal of a one trillion dollar infrastructure package, a surefire way to make the American taxpayers dollars go farther is to eliminate redundancies and streamline the Federal permitting process.

Ms. Colosimo, in your testimony you discussed Section 408 permitting and the Corps engagement with other federal agencies to synchronize review. Given the President's desire to push for infrastructure improvements, which are desperately needed, **how will the Corps handle the large number of permit requests that would likely result from a long term infrastructure package? How quickly will they be processed?**

Answer: Depending on its location and impacts, an infrastructure project may trigger the need for authorization under one or more of the U.S. Army Corps of Engineers (Corps') authorities. These include 33 U.S.C. Section 408 (Section 408), Section 10 of the Rivers and Harbors Act of 1899 (Section 10), Section 404 of the Clean Water Act (Section 404), and Section 103 of the Marine Protection Research and Sanctuaries Act (Section 103). In addition, an infrastructure project may require approval from the Corps' Real Estate Division if it crosses Corps' real property interests.

The Corps' Regulatory Program often has limited jurisdiction over the review of large infrastructure projects. For example, of the large infrastructure projects on the FAST-41 Dashboard, such as pipelines and transmission lines, the Corps Regulatory program authority is generally limited to regulating certain activities in aquatic resources pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. In fact, approximately two-thirds of the Corps Section 404 and Section 10 actions on the FAST-41 Dashboard qualify for authorization under general permits, which offer an abbreviated review process for certain activities that have minimal individual and cumulative adverse environmental effects. Also, of the approximately 70,000 bridge, railroad, and road-related activities reviewed by the Corps between fiscal years 2011-2016, approximately 97% were reviewed under general permits. General permit reviews are completed relatively quickly, often in less than 60 days, so long as the Corps has received all required information from the applicant and lead federal agency. The Corps expects a large percentage of permit requests resulting from a long-term infrastructure package will continue to be processed under general permits. For Section 404 and Section 10

reviews, the Corps also expects to continue to utilize existing funding authorities, including Section 214 WRDA of 2000 (as amended), 23 U.S.C. 139(j), and 49 U.S.C. 307 that allow acceptance of funds to expedite the review of qualifying infrastructure projects. For larger, complex projects that do not qualify for a general permit, the review time associated with an individual permit review may be extended. The Corps continues to make investments where possible in its Regulatory program, including improved training, to ensure its staff are poised to be as efficient and effective as possible.

For those infrastructure projects that may alter a Congressionally authorized Civil Works project, permission under Section 408 may be required. The Corps has been critically evaluating and working to update Engineer Circular 1165-2-216, the Corps' policy and procedures for Section 408. The objectives of the policy update include better alignment with other Corps authorities, instituting timelines from Section 1156 of the Water Resources Development Act (WRDA) of 2016, improving nationwide consistency, and delegating decision making to the appropriate level. The desired outcome of this effort is greater efficiency and timeliness in decision making which will be particularly important if the volume of review actions increase with a long term infrastructure package. The Corps also recently issued implementing guidance for contributed funds under Section 1156(a)(2) of WRDA 2016 in June 2017. This authority allows non-federal public and private entities to contribute funds for Section 408 reviews and supports the Corps in managing a greater level of work than what is capable under appropriations. The updated policy document and the contributed funds authority of Section 1156(a)(2) of WRDA 2016 will be essential in providing timely reviews, particularly as workload associated with increased infrastructure development increases.

Post-Hearing Questions for the Record
Submitted to Robyn S. Colosimo
Assistant for Water Resources Policy
U.S. Army Corps of Engineers
From Senator Claire McCaskill
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

According to former Secretary of Homeland Security John F. Kelly, the U.S. Army Corps of Engineers (USACE) will be intimately involved in the process of constructing a physical wall along the U.S.-Mexico border. Former Secretary Kelly, earlier this year, stated that USACE will "conduct programmatic, acquisition, project planning, and project execution activities in support of constructing the border wall" and "will execute real estate activities such as title research, surveys, and appraise any property to be acquired" to facilitate wall construction.[1] On July 25, 2017, Minority staff for the Homeland Security and Governmental Affairs Committee (HSGAC) received notification from U.S. Customs and Border Protection (CBP) that USACE had solicited contractor support to conduct landownership research in the Rio Grande Valley of Texas and that USACE would be attempting to negotiate with private landowners for the sale of their property by the end of Fiscal Year (FY) 2017.[2] Additionally, multiple media outlets have reported that USACE has retained at least one contractor to conduct soil sampling and other geotechnical work in areas along the southwest border, including in the Santa Ana National Wildlife Refuge, in preparation for the wall that President Trump has ordered.[3]

1) Please describe the programmatic, acquisition, project planning, and project execution activities that USACE has conducted and will be conducting in support of border wall construction.

   Answer: USACE is working under the following Interagency Agreement with Customs and Border Protection for Tactical Infrastructure (i.e. Border Barrier Systems) along the Southwest Border to include the majority of work on existing barriers: IAA HSBP1017X00059, as modified (provided as Attachments A, B and C.)

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[1] Department of Homeland Security, *Post-Hearing Questions for the Record Submitted to the Honorable John F. Kelly: "Improving Border Security and Public Safety"* (Apr. 5, 2017).

[2] Customs and Border Protection: *Notification Regarding Landownership Research* (July 25, 2017).

[3] *Trump Administration Preparing Texas Wildlife Refuge for First Border Wall Segment,* Texas Observer, (July 14, 2017) (www.texasobserver.org/trump-border-wall-texas-wildlife-refuge-breaking); *This 'crown jewel' of wildlife refuges is one of the world's top bird destinations. Trump's wall would end public access*, Los Angeles Times (July 17, 2017) (www.latimes.com/nation/la-na-texas-border-wall-20170717-story.html); *Engineers Begin Preparatory Work for Border Wall Construction,* New York Times (July 18, 2017) (www.nytimes.com/2017/07/18/us/politics/border-wall-construction.html).

The land title research outlined in the July notification pertained to Tactical Infrastructure (TI) projects funded in the Fiscal Year 2017 (FY17) enacted budget and to preparatory activities for future wall projects as outlined in reprogrammed funding in FY17 that authorized these activities. Other activities USACE has conducted on behalf of CBP as part of the reprogrammed funds are geotechnical analysis and border/levee wall system design. No real estate negotiations will take place for Fiscal Year 2018 (FY18) wall projects on behalf of CBP until CBP receives FY18 construction funding.

2) Has USACE entered into any interagency agreement or agreements with the Department of Homeland Security (DHS), CBP, or any other DHS components or subcomponents regarding border wall preconstruction and/or construction activities? If so, please provide a copy of the interagency agreement or agreements.

   Answer: USACE is working under the following Interagency Agreement, IAA HSBP1017X00059, as modified (provided as Attachments A, B and C) with CBP for Tactical Infrastructure (i.e. Border Barrier Systems) along the Southwest Border.

   The preconstruction and construction activities that are part of the Scope of Work: Per, Executive Order 170125. This Interagency Agreement (IAA) is between the U.S. Army Corps of Engineers (USACE) to assist CBP's Office of Facilities and Asset Management (OFAM) in performing programmatic, acquisition, project planning, and project execution activities for CBP's Border Barrier Systems requirements.

3) Has DHS entered into any interagency acquisitions with USACE for border wall preconstruction and/or construction activities?

   Answer: We conclude that an interagency acquisition is the same as or is a component of an Interagency Agreement. Yes, see response to 2 above and only in regard to limited preconstruction activities as directed by CBP.

4) Please provide the names and DUNS numbers for any and all contractors that USACE has retained for title research, surveying, geotechnical work, negotiations with landowners and/or any other preconstruction activities associated with the border wall that President Trump has ordered. For each contract, please also provide a narrative description of the work that is being performed along with the contract amount and the funding mechanism that is being used to pay for each contract. Was each contract competitively bid?

   Answer: Attachment is D is a Table with the relevant releasable information in response to Question 4 where USACE has retained contractors solely on behalf of CBP. All contracts were awarded in compliance with federal acquisition laws and regulations.

5) Along which specific segments of the southwest border has USACE conducted landownership research? In the course of USACE's research, how many privately owned

tracts of land have been identified that will need to be acquired by the federal government in order to facilitate construction of the border wall that President Trump has ordered? From how many individual property owners will those tracts need to acquired? What is the estimated fair market value of all tracts of land that will need to be acquired in order to facilitate construction of the border wall that President Trump has ordered?

Answer: USACE has conducted land ownership research in Starr, Hidalgo, and Cameron Counties, Texas as work in support of border infrastructure in the Rio Grande Valley Sector. This preliminary ownership research is funded by CBP's Congressionally-approved FY17 reprogramming request. USACE has also conducted land ownership research to support fence replacement projects in Texas (El Paso Sector, El Paso Station), New Mexico (El Paso Sector, Santa Teresa Station), and California (El Centro Sector, Calexico Station; and San Diego Sector (Imperial Beach)). These replacement projects were funded in CBP's FY17 appropriation. As USACE works only under the specific direction of CBP for current projects, USACE does not have an estimate for the total number of tracts, landowners or fair market value of real estate that may be required for future border wall implementation.

6) Please list each location along the southwest border where USACE or a contractor working on behalf of USACE has conducted surveys, soil sampling, geotechnical work, and/or other preconstruction activities in conjunction with border wall construction.

Answer: Please refer to Attachment D for a list of relevant USACE contracts by assigned project and for a location of the work under each of those contracts.

7) Has USACE or a contractor working on behalf of USACE conducted surveys, soil sampling, geotechnical work, and/or other preconstruction activities in the Santa Ana National Wildlife Refuge? If so, how and why was this site selected? What weight was given to the fact that the wildlife refuge is federally owned during the decision-making process regarding where preconstruction activities should occur?

Answer: USACE has contracted with firms for preconstruction activities consistent with CBP's mission requirements. In its FY 2018 budget request, DHS has identified the need for 60 miles of border barrier systems in the Rio Grande Valley (RGV) region of Texas, to include the area near the northern boundary of the Santa Ana National Wildlife Refuge, as an operational requirement. Planning activities for those locations are underway in anticipation of Fiscal Year 2018 construction and are funded by CBP's Congressionally-approved FY17 reprogramming request. These activities include geotechnical analysis, border/levee wall system design, and preliminary title research. USACE understands that CBP selects project priorities based on operational considerations. Inquiries on specific planning decisions should be directed to CBP.

8) Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, requires the DHS Secretary to consult with the Secretaries of the

Interior and Agriculture, state and local governments, Indian tribes, and property owners "to minimize the impact on the environment, culture, commerce, and quality of life" in areas where fencing is to be constructed.[4] What outreach, consultation, and/or public notification has been conducted in areas where USACE and/or a contractor working on USACE's behalf has begun preconstruction activities related to the border wall that President Trump has ordered? Was that outreach, consultation, and/or public notification conducted in advance of the preconstruction activities? What feedback did USACE receive as a result of the outreach, consultation, and/or public notification?

Answer: USACE support has not included consultation activities as described in question 8. CBP is responsible for the consultation activities under Section 102 of IIRIRA. As such, this question should be directed to CBP.

9) Please describe any and all negotiations with private landowners for the sale of property at fair market value that USACE or a contractor working on behalf of USACE has conducted to date in relation to the border wall that President Trump has ordered.

Answer: USACE performs this function solely in support of DHS missions and under the direction of DHS. USACE has not entered into negotiations with private landowners or completed the purchase of any property based on the Executive Order.

10) What, if any, additional resources, has USACE requested for FY 2018 or subsequent fiscal years for work related to the construction of the border wall that President Trump has ordered? What, if any, resources from FY2017 have been used for work related to the construction of the border wall that President Trump has ordered?

Answer: USACE has not requested any FY 2018 or subsequent funds for the construction of the border wall that President Trump has ordered. Any efforts USACE has conducted or will conduct on behalf of CBP are directed by and funded through interagency agreements with CBP. All FY 2017 funds have been used exclusively for projects prescribed in the 2017 Omnibus Funding Act.

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[4] Congressional Research Service, *Barriers Along the U.S. Borders: Key Authorities and Requirements* (R43975) (Jan. 27, 2017).

Post-Hearing Questions for the Record
Submitted to Robyn S. Colosimo
From Senator Claire McCaskill

"Cutting Through the Red Tape: Oversight of Federal Instructure Permitting and the Federal Permitting Improvement Steering Council"

September 7, 2017

USACE Response

Attachment A

IAA HSBP1017X00059

ACCEPTANCE OF CUSTOMER ORDER

1. TO (Requiring Activity Address) (Include ZIP Code)	2. CUSTOMER ORDER NO.	3. AMEND NO.	4. REV MAN
BUREAU OF CUSTOMS AND BORDER PROTECTION ATTN: 1300 PENNSYLVANIA AVENUE NW NP STE 1310 WASHINGTON DC-20229	HSBP1017X00059	00000	
	5. DATE (Signature Date) 11-APR-2017	6. AMOUNT 11,500,000.00	

7. The CUSTOMER ORDER identified above is accepted and the items requested will be provided as follows: (Check as Applicable)

a. [ ] ALL ITEMS WILL BE PROVIDED THROUGH REIMBURSEMENT (Category I)

[ ] AUTOMATIC REIMBURSEMENT TFO
[ ] AUTOMATIC REIMBURSEMENT NON-TFO
[ ] AUTOMATIC REIMBURSEMENT IPAC
[ ] FUNDED REIMBURSEMENT TFO
[ ] FUNDED REIMBURSEMENT NON-TFO
[X] FUNDED REIMBURSEMENT IPAC

ACCEPTED AS ECONOMY ACT ORDER
SENT ELECTRONICALLY? N

b. [ ] ALL ITEMS WILL BE PROCURED BY THE DIRECT CITATION OF FUNDS (CATEGORY II)

[ ] DIRECT FUND CITE TFO
[ ] DIRECT FUND CITE NON-TFO

c. [ ] ITEMS WILL BE PROVIDED BY BOTH CATEGORY I AND CATEGORY II AS INDICATED BELOW

d. [ ] THIS ACCEPTANCE, FOR CATEGORY I ITEMS, IS QUALIFIED BECAUSE OF ANTICIPATED CONTINGENCIES AS TO FINAL PRICE. CHANGES IN THIS ACCEPTANCE FIGURE WILL BE FURNISHED PERIODICALLY UPON DETERMINATION OF DEFINITIZED PRICES, BUT PRIOR TO SUBMISSION OF BILLINGS.

8. [ ] CUSTOMER ORDER NUMBER(S) IDENTIFIED IN BLOCK 14, (REMARKS) IS NOT ACCEPTED (IS REJECTED) FOR THE REASONS INDICATED.

9. TO BE PROVIDED THROUGH REIMBURSEMENT CATEGORY I			10. TO BE PROCURED BY DIRECT CITATION OF FUNDS CATEGORY II		
ITEM NO. a.	QUANTITY b.	ESTIMATED PRICE c.	ITEM NO. a.	QUANTITY b.	ESTIMATED PRICE c.
10		11,500,000.00			
d. TOTAL ESTIMATED PRICE		11,500,000.00	d. TOTAL ESTIMATED PRICE		

11. ANTICIPATED DATE OF OBLIGATION FOR CATEGORY II ITEMS	12. GRAND TOTAL ESTIMATED PRICE OF ALL ITEMS 11,500,000.00

13. FUNDS DATA (Check if Applicable)

a. [ ] ADDITIONAL FUNDS IN THE AMOUNT ARE REQUIRED (See Justification in block 14)

b. [ ] FUNDS IN THE AMOUNT OF ARE NOT REQUIRED AND MAY BE WITHDRAWN

14. REMARKS This order is accepted under the provisions of 31 USC 1535 (Economy Act).

RA TECHNICAL POC: [redacted]
RA FINANCIAL POC: [redacted]
PA TECHNICAL POC: [redacted]
PA FINANCIAL POC: [redacted]

FINANCING APPROPRIATION: 096 NA X 2017 3122 000 0000 OWDDHS 08 2455 96412 CCS: 999

15. ACCEPTING ACTIVITY (Complete Address)	16. TYPED NAME AND TITLE OF AUTHORIZED OFFICIAL	
BUDGET AND MANPOWER BRANCH USABD, FORT WORTH CESWF-RM-B 819 TAYLOR ST, RM 3A33 FORT WORTH, TX 76102-0300	[redacted] [redacted] BUDGET ANALYST	
	17. ELECTRONICALLY SIGNED BY [redacted]	18. DATE 17-APR-2017

DD FORM 448-2

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION

INTERAGENCY AGREEMENT
(IAA)

2FL44J
465132

1. Agreement No.	2. Modification No.	3. Order No.	4. Requisition No.
HSBP1017X00059			0020097828

5. Period of Performance	6. Statutory Authority	7. Date IAA Prepared
From 04/11/2017 To 04/10/2021		04/11/2017

8. Requesting Agency
Agency Name: DHS - Customs & Border Protection
Office/Division: Customs and Border Protection
POC: [redacted]
Address: 1300 Pennsylvania Ave, NW
Procurement Directorate - NP 1310
Washington DC 20229
POC Phone No.: [redacted]

9. Servicing Agency
Agency Name: ARMY CORPS OF ENGINEERS
Office/Division:
POC:
Address: 819 TAYLOR ST RM 3A14
FT WORTH TX 76102-0300
POC Phone No.:

10. Scope of Work
Per, Executive Order 170125.

This Interagency Agreement (IAA) is between the U.S. Army Corps of Engineers (USACE) to assist U.S. Customs and Border Protection (CBP), Office of Facilities and Asset Management (OFAM) in performing programmatic, acquisition, project planning, and project execution activities for CBP's Border Barrier Systems requirements.

11. Delivery/Shipping Schedule

See Attached Delivery Schedule

EXPIRES 30Sep17

12. IAA Amount	
Base Price of IAA	$11,500,000.00
Modification Amount	$0.00
Assisted Acquisition Servicing Fee	$0.00
Total IAA Price	$11,500,000.00

13. Billing and Payment

Requesting Agency	Servicing Agency
Locator Code: 70050800 DUNS #: DUNS# 879824324 Address: DHS - Customs & Border Protection Commercial Accounts Sect. 6650 Telecom Drive, Suite 100 Indianapolis IN 46278 POC: [redacted] POC Phone #: [redacted] POC Fax #: POC Email:	Locator Code: 00008736 DUNS #: 068112791 Address: 819 Taylor St RM 3A14 Ft Worth, TX 76102-0300 POC: [redacted] POC Phone #: [redacted] POC Fax #: POC Email:

14. Requesting Agency TAS No.	15. Servicing Agency TAS No.
10 _____07020152017_0533000__	10 _____00000000_3122___

rec'd 14Apr17 ACC
tech 17Apr17

CBP Form 236 (10/13)

16. Invoice/Payment Method	17. Billing Frequency
☐ Requesting Agency Initiate IPAC ☒ Servicing Agency Initiate IPAC ☐ Credit Card ☐ Other (explain below)	☒ Monthly ☐ Quarterly ☐ Semi-annually ☐ Annual ☐ Advanced Payment (explain below) ☐ Other (explain below)

18. Requesting Agency Accounting and Appropriation Data

10 6999.3211USCSGLCS0942063200Z2VQ15463SB031101AG00 BPE753211
TAS# 07020152017 0533

19. Approvals		
Program Officials	**Requesting Agency**	**Servicing Agency**
Name	[redacted]	[redacted]
Title	Contracting Officer's Representative	Chief, Interagency & International
Telephone No.	[redacted]	[redacted]
Fax No.		
Email	[redacted]	[redacted]
Signature	[redacted] Date: 4/1117	[redacted] Date: 4/14/17
Funding Officials		
Name	[redacted]	[redacted]
Title	Branch Chief - Financial Management	Budget Officer
Telephone No.	[redacted]	[redacted]
Fax No.		
Email	[redacted]	[redacted]
Signature	[redacted] Date: 4/11/17	[redacted] Date:
Contracting Officials		
Name	[redacted]	
Title	Contracting Officer	
Telephone No.	[redacted]	
Fax No.	[redacted]	
Email	[redacted]	
Signature	[redacted] Date: 4/11/17	Date:

Terms and Conditions for Assisted Acquisitions

1 **Purpose**

1.1 The terms and conditions of the Memorandum of Agreement (MOA) between CBP and the USACE, dated October 14, 2015 and this interagency agreement (IA) govern the acquisition assistance provided to the U.S. Customs and Border Protection (CBP), the Requesting Agency, by the U.S. Army Corps of Engineers (USACE), the Servicing Agency. The MOA terms and conditions shall control in the event of any conflict with this IA.

1.2 The Servicing Agency's obligation to provide supplies or services under this IA and the Requesting Agency's obligation to provide funding does not arise until all applicable requirements are satisfied and the IA is signed by the required parties at CBP and USACE.

2 **Authority**

CBP and USACE are executing this IA that supports an interagency acquisition under the authority of Economy Act, 31 U.S.C. 1535.

3 **Scope**

3.1.1 Organizations Authorized to Request Acquisition Assistance

The following organizations within the Requesting Agency are authorized to obtain assistance from USACE:

- Border Patrol & Air and Marine Program Management Office (BPAM PMO), Facilities Management and Engineering (FM&E)

3.1.2 Organizations Authorized to Provide Acquisition Assistance

The following organizations within the Servicing Agency are authorized to provide acquisition assistance to the Requesting Agency:

- Fort Worth District,
- Southwestern Division
- USACE Headquarters
- Engineering Construction Support Office (ECSO)
- Southwestern Division Border Infrastructure Program Management Office
- USACE Supporting Districts, as required by the work in the Statement of Work (SOW), through the ECSO

3.1.3 Limitation(s): The following restrictions apply: None

4 **Description of Products or Services to be Acquired**

See Statement of Work: Border Barrier Systems SOW

5 **Period of Agreement**

This IA becomes effective when signed by the Contracting Officer (CO) and Program Manager (PM)/Requirements Official (RO) of the Requesting Agency and the authorized official of the Servicing Agency and remains effective until March 31, 2021 unless agreed to and amended by both the Servicing and Requesting Agencies. **The countersigned IA must be returned to the CBP CO or this IA may be subject to cancellation.**

6 **Roles, Responsibilities of Servicing Agency and Requesting Agency**

The effective management and use of IAs is a shared responsibility of the Requesting Agency and the Servicing Agency. The parties hereby agree to the following roles and responsibilities, which are derived from guidance issued by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP), available at:
http://www.whitehouse.gov/sites/default/files/omb/assets/procurement/iac_revised.pdf

6.1 Requesting Agency

- Work closely with the Servicing Agency to establish requirements that are clear and complete.
- Be a good steward of the agency's funds by ensuring appropriate internal controls are in place to ensure interagency acquisition activities are consistent with sound project management, contracting, and fiscal practices.
- Work in close collaboration with the Servicing Agency throughout the project lifecycle. Make trained and qualified personnel available to support key activities, including the timely preparation and execution of funding documents, compliance with customer-unique laws and policies, acquisition planning, source selection evaluation, and contract administration.
- Provide accurate and timely information to support the Servicing Agency in effectively awarding and managing the contract, including evaluation of contractor performance and prompt payment.
- Review the general terms and conditions of the IA with the Servicing Agency no less than annually and make amendments as necessary.

6.2 Servicing Agency

- Be a good steward of the Requesting Agency's funds by ensuring appropriate internal controls, and applying sound project management, contracting, and fiscal practices.
- Manage all phases of the project lifecycle from requirements development through contract closeout, as agreed in the IA.

- Work in close collaboration with the Requesting Agency throughout the project lifecycle, responding promptly to inquiries from the Requesting Agency, which may include matters regarding process, project status, and funds balance, among others.
- Ensure timely delivery of acceptable goods and services.
- Maintain accurate records and files associated with acquisition assistance activities.
- Review the general terms and conditions of the IA with the Requesting Agency no less than annually and make amendments as necessary.
- Help the Requesting Agency comply with the bona fide needs rule by:
  - managing funds according to the Requesting Agency's guidance;
  - recording transactions in a timely fashion; and
  - Implementing and exercising controls to ensure compliance with all applicable statutory and regulatory fiscal requirements.

7 Billing and Payment

7.1 The Requesting Agency will pay the Servicing Agency for all actual costs associated with the provision of services in this IA. CBP reimbursement of costs incurred in the performance of work described in the SOW/Performance Work Statement (PWS) will be made via the U.S. Treasury Intra-government Payment and Collection (IPAC) System on a Servicing Agency initiated basis.

8 IA Funding

The Servicing Agency is limited to recovery of only actual costs incurred. The Servicing Agency shall notify the Requesting Agency's Contracting Officer's Representative (COR) when the costs incurred, together with costs of any outstanding commitments, total 80 percent (%) of the obligated estimated cost ceiling of this IA. The Servicing Agency shall make no other commitments or expenditures beyond 100% of the funds obligated and shall be excused from further performance of the work unless, and until, the Requesting Agency CO, or other authorized official, increases the total obligation by modification to the IA.

8.1 Special Terms for One-year Funding. The total amount to be reimbursed shall not exceed the total amount obligated for the current fiscal year. If this IA is issued under the authority of the Economy Act (31 U.S.C. 1535) and the Servicing Agency uses in-house resources to perform part or all of the agreement, in-house work must stop on September 30th of the current fiscal year, and any unexpended funds for work to be performed in-house must be de-obligated. In-house work that will continue in the next fiscal year must be funded, effective October 1st, with the new fiscal year's funds. If the Servicing Agency obligates the fiscal year funds by awarding a contract or an order prior to the expiration of the fiscal year, the funds obligated by such award do not need to be de-obligated after September 30.

8.2 Special Terms for Greater Than One-year Funding. For longer than one-year (e.g. two-year, no-year) funding availability, the dates are extended appropriately.

9 **Contract Termination, Disputes and Protests**

9.1 If a contract or order awarded pursuant to this IA is terminated or cancelled or a protest or dispute arises from specifications, solicitation, award, performance or termination of a contract, appropriate action will be taken in accordance with the terms of the contract and applicable laws and regulations.

9.2 The Servicing Agency shall consult with and seek concurrence from the Requesting Agency before agreeing to a settlement or payments to ensure that the Requesting Agency has adequate time in which to raise any objections or address any fiscal or budgetary concerns arising from the proposed payment or settlement. If concurrence is not obtained, the parties agree to refer the matter to the District Engineer, of the applicable USACE District where the Contracting Officer resides, and the CBP FM&E Director for resolution before the Servicing Agency agrees to any settlements or payments. The Servicing Agency Contracting Officer will delay any decision for settlement and payment until no sooner than thirty calendar days after the issue is referred to the District Engineer and CBP FM&E Director.

10 **Amendments**

Any amendments to the terms and conditions to this IA must be made in writing and signed by both the Servicing Agency and the Requesting Agency. The party proposing the amendment must allow the other party a minimum of 7 calendar days to review and accept any proposed changes before they can take effect. At its discretion, the reviewing agency may agree to allow the change to take effect before the reviewing period expires. If the parties cannot agree regarding the proposed amendment, the disagreement is subject to the provisions on IA interpretation of this agreement.

11 **IA Termination**

This IA may be terminated upon 180 calendar days' written notice by either party as a unilateral agreement. A bilateral agreement from both parties to terminate can be issued at any time during the course of this agreement. If this IA is cancelled, any implementing contract/order may also be cancelled. If the IA is terminated, the agencies must agree to the terms of the termination, including costs attributable to each party and the disposition of awarded and pending actions.

12 **Interpretation of the IA**

12.1 If the Servicing Agency and Requesting Agency are unable to agree about a material aspect of the IA, the parties agree to engage in an effort to reach mutual agreement in the proper interpretation of this IA, including amendment of this IA, as necessary, by escalating the dispute within their respective organizations.

12.2 If a dispute related to funding cannot be resolved under 12.1, the parties agree to refer the matter expeditiously to their respective Chief Financial Officers (CFO) with a recommendation that the dispute be resolved in accordance with Appendix 10, *Intragovernmental Transaction (IGT) Guide*, of Chapter 4700 of Volume I, *Federal Agencies*, of the Treasury Financial Manual, or subsequent guidance.

13 **Description of Acquisition Assistance**

The servicing agency will provide the following services to the requesting agency: Preparation of the Acquisition Plan (as required) and all applicable acquisition documents related to solicitations/contracts that it issues on CBP's behalf, working with the Border Patrol and Air and Marine (BPAM) Program Management Office (PMO) as needed; Preparation, execution, and administration of those solicitations/contracts; Submitting the Congressional Notification (as required) for those contract/task order awards in accordance with Term #15 of this document.

14 **Small Business Credit**

14.1 CBP, as the requesting agency, must supply the servicing agency with the lowest and most specific FIPS 95-2 office code to ensure that the CBP receives the small business credit.

14.2 The servicing agency is responsible for entering the specific CBP code into FPDS-NG for the award.

15 **Congressional Notification Requirements**

In accordance with HSAM 3005.303-70, Congressional Notifications are required for:

- Any contract award including new contract actions being awarded on behalf of DHS by a Servicing Agency through an assisted acquisition in excess of $1 million (including the base value and all options).
- Any modification in excess of $1 million for additional supplies or services that were not covered in the Congressional notification for the award of the contract or task or delivery order.
- Any task or delivery order using FY 2012 or later multi-year DHS funds in excess of $10 million.
- Any task or delivery order, in any amount, that causes cumulative obligations in a single FY 2012, FY 2013 or FY 2014 multi-year account to exceed 50 percent of the total amount appropriated.

Failure to properly make Congressional notification may result in a violation of the Anti-Deficiency Act. Additional details on Congressional notification requirements and the required DHS Form 2140-01 are available in Appendix A of these terms and conditions.

The CO of the Servicing Agency shall prepare and submit DHS Form 2140-01 and the SOW/PWS at least six (6) full business days prior to the planned award of the contract action

via electronic mail to cbppqad@dhs.gov. The subject line must state "Congressional Notification for Contract No. X."

The business day begins at 9:00 a.m. Eastern Time (ET). For notifications received after 9:00 a.m. ET, the first full business day will be the day following receipt. For example, if a contract or order is to be awarded on a Friday, DHS Form 2140-01 must be received by no later than 9:00 a.m. the previous Friday. CBP will submit the Congressional notification information and will send notice via email of the earliest award date to the Servicing Agency CO. **NOTE: The contract award or order issuance cannot take place prior to notice from CBP.**

Congressional Notification requirements are subject to change based on the requirements stated within DHS's annual appropriations.

16 **Review of Terms and Conditions**

If the period of performance of this IA exceeds one year, the parties agree to jointly review the terms and conditions of the IA at least annually. Appropriate changes will be made by amendment to this IA.

17 **Signatures**

By signing the Terms and Conditions document, the Requesting Agency confirms that a bona fide need exists and that funds are for the designated purpose, meet time limitations, and are legally available for the acquisition described in the IA; that all unique funding and procurement requirements, including all statutory and regulatory requirements applicable to the funding being provided, have been disclosed to the Servicing Agency; and all internal reviews and approvals required prior to transferring funds to the Servicing Agency have been completed. Further, both the Requesting Agency and the Servicing Agency agree to the terms and conditions as set forth herein.

Requesting Agency Contracting Officer:

[redacted]

[redacted]

Contracting Officer

4/14/17

Date

Requesting Agency Business Operations Division Director

[redacted]

[redacted]

Director, BPAM PMO

4/14/17

Date

Servicing Agency Senior Official:

[redacted]

[redacted]

Chief, Interagency and International Services

4/14/17

Date

Servicing Agency Division Senior Official

[redacted]

[redacted]

Southwest Division Regional Business Director

Date

Servicing Agency Program Director:

[redacted]

[redacted] _____ _____
Date

SWD Director for Border Infrastructure
PMO

APPENDIX A
Congressional Notification Requirements

	GENERAL/ROUTINE CONGRESSIONAL NOTIFICATIONS	BSFIT CONGRESSIONAL NOTIFICATIONS
CN REQUIRED *(see HSAM Appendix D)*	• New contracts, including IDIQ and letter contracts, SBU & A/E Service Contracts • New contracts awarded by an IA Servicing Agency • Orders under DHS/CBP multiple award contracts using FY 2010 or later appropriated funds • Orders & Mods > threshold of IDIQ contract • Orders >$10M using FY12+ DHS Multi-year funds • All Orders using FY12+ Multi-year funds that caused the cumulative amount to exceed 50% of the total amount appropriated. • Mods for additional supplies/services exceeding $1 million beyond the original scope of the contract • Non-competitive actions over $1M resulting in a Mod • SB Set-Asides, see FAR 15.503(a)(2) • Orders under DHS BPA IAW FAR 13.5, established under the Commercial Item Test Program • Letters of intent > $1 million • Contract actions Subject to Availability of Funds	• New contracts, task orders, delivery orders, interagency agreements and their modifications IAW thresholds below. 1. **TOs, DOs, IAs > $1M: 5 full business days** before anticipated award date 2. **Mods to Contracts, TOs, DOs or IAs ≥$25M: 5 full business days** before anticipated award date 3. **New TOs, DOs or IAs ≥$25M: FY09/10/11 - 18 full business days** or for **FY12 & forward, 5 full business days** before anticipated award date 4. **New contract awards, EAGLE and FirstSource orders > $1M** - processed IAW HSAM 3005.303-70 – **5 business days** before anticipated award date 5. NOTE: Add 1 day for CSB POC to review
CN NOT REQUIRED	• Mods within the scope and terms of the existing contract • Administrative mods or mods to exercise option periods • Orders under IDIQ contracts up to the contract threshold using FY 2009 and prior funds • Orders under non-DHS IDIQ contracts, including GSA FSS –up to the threshold or if not affected by FY12 and subsequent multi-year funding • Orders under single award IDIQ contracts • DHS/CBP BPAs using annual funds established under GSA FSS contracts IAW FAR 8.405 and orders placed under them. • Execution of an IA with a Servicing Agency	• Contracts and Orders under $1 million • Modifications under $25 million

DEPARTMENT OF HOMELAND SECURITY

CONTRACT AWARD NOTIFICATION

Competition Sensitive - This document contains Source Selection information (See FAR 2.101 & 3.104).

The information contained herein is not to be divulged except as permitted by law or as authorized by the Contracting Officer for the procurement.

AGENCY INFORMATION

1. Component:

2. Contracting Officer:	3. Project Officer:
Telephone Number:	Telephone Number:
E-Mail Address:	E-Mail Address:

CONTRACTOR INFORMATION

4. Contractor:	5. Contractor Address: *Include City, State and Zip Code*
	Telephone Number:

6a. Procurement Instrument Identifier (PIID) No.:	6b. Modification No.:	9. Funding Information *(From Procurement Request)*: FY Used:	PPA:
6c. Order No.:	6d. Call No.:	Treasury Account Symbol *(6-9 characters, dashes, decimal points or spaces)*:	
7a. Anticipated Date of Award:	7b. Contract Type:		
8. Obligated Cost or Price of this Action: $	Total Amount of Action Including Options: $	Title of Account:	

10. Method of Acquisition: *Check One*

☐ Noncompetitive ☐ Competitive, Sealed Bid ☐ Competitive, Negotiated

11. Major Subcontractor Name(s): *Include Street Address, City, State, and Zip Code*

Subcontractor	Subcontractor	Subcontractor

12. Place(s) of performance (contractor and major subcontractor(s)): *Include Street Address, City, State and Zip Code*

Contractor	Subcontractor	Subcontractor

Summary of work to be performed: *(Include enough information to describe the effort to be performed and its purpose. Attach a copy of the detailed statement of work. It is imperative that a complete description be provided that is sufficient for preparing a press release or providing a meaningful description when notifying interested parties.)*

Contracting Officer Signature	Date

DHS Form 2140-01 (5/14)

Interagency Acquisitions Supplement

Determination and Findings

Authority to Enter into an Interagency Acquisition Under the Economy Act

Based on the following determination and findings, in accordance with the authority of the Economy Act (31 U.S.C. 1535), as implemented in subpart 17.5 of the Federal Acquisition Regulation (FAR), the Requesting Agency, Department of Homeland Security, U.S. Customs and Border Protection (CBP), intends to enter into an Interagency Acquisition (IA) with the Servicing Agency, the United States Army Corps of Engineers (USACE).

FINDINGS

1. The Requesting Agency has a need for the Servicing Agency to provide and perform programmatic, acquisition, project planning, and project execution activities in support of the U.S. Border Barrier Systems in response to Executive Order 13767. The total cost of the interagency acquisition (IAA) is estimated to be $4.2Billion.

   This agreement is effective for four years from the date the IAA is issued, which is estimated to be April 11, 2017. As a result, the Base Period of this IAA is estimated to be April 11, 2017 – April 10, 2021. This agreement will also include two Option Years, estimated as follows:

   Option Year 1: April 11, 2021 – April 10, 2022
   Option Year 2: April 11, 2022 – April 10, 2023

2. The USACE is a long-standing partner of CBP in the construction of border infrastructure. In addition to having over 20 years of tactical infrastructure and facility project construction, USACE was the executing agency for previous CBP fence projects, including Pedestrian Fence (PF) 225, PF70, and Vehicle Fence (VF) 300 projects. Proven in its history in assisting CBP with these past fence projects, the USACE has the construction and acquisition experience/expertise to provide the type of services required for the Border Barrier Systems, which is not currently available within the Requesting Agency. The USACE has the manpower, resources, and acquisition capacity to successfully oversee planning, contract execution, and contract oversight, which the Requesting Agency does not currently have, but will be necessary, especially when considering the numerous projects associated with the planned Border Barrier Systems.

   CBP cannot obtain these services as conveniently or economically on its own as it can through the USACE. CBP does not have the wealth of resources, experience, and technical/acquisition knowledge that the USACE has in construction and construction-related activities, especially for the number of projects planned for the Border Barrier Systems. Due to its lack of resources and expertise, CBP would face challenges in awarding and managing any contracts with a private source, which would more than likely lead to cost and schedule delays, thereby impacting its ability to meet its deadlines

for the Border Barrier Systems. In contrast to CBP's limitations, the USACE has the resources, nationwide, to effectively manage and oversee all construction aspects of these projects, including all programmatic, acquisition, project planning, and project execution activities. Not only does the USACE have internal, local staff along the southwest border to assist in project execution, but it also has programmatic and real estate support through its own contracts to supplement support where needed. In addition, the USACE has established IDIQ construction contracts, which it can utilize to procure the projects/work necessary for the Border Wall. These established contracts streamline the acquisition process and get contracts in place much more efficiently and effectively than CBP could if it procured the projects itself. Utilizing these established USACE contracts allows CBP to meet its deadlines to construct the Border Barrier Systems. To date, the USACE has been responsive and provided CBP with the desired programmatic support and requirements on schedule and within budget. It is expected they would perform accordingly on these projects as well.

3. Nothing in this requirement conflicts with the authority of the servicing agency.

4. As discussed in Section two (2) of this document, the servicing agency has capabilities or expertise to enter into a contract for such supplies or services which is not available within the requesting agency.

5. It is in the best interest of the Government to issue an IAA since the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source for the reason(s) stated in Section 2 above.

6. The requesting agency shall furnish a copy of the D&F to the servicing agency with the order.

DETERMINATION

Based on the above findings, I hereby determine that it is in the best interest of the Government to enter into an IA with the servicing agency.

Name of the CBP Requirements Official: [redacted]

Signature: [redacted]

Date: 4/11/17

Name of the CBP Contracting Officer: [redacted]

Signature: [redacted]

Date: 4/11/17

Determination of Best Procurement Approach for Assisted Acquisitions

FAR 17.502-1

IAA No. HSBP1017X00059 **PR No.** [20097828]

Based on the following determination and findings, in accordance with the authority of the Economy Act (31 U.S.C. 1535), as implemented in subpart 17.5 of the Federal Acquisition Regulation (FAR), the Requesting Agency, Department of Homeland Security, U.S. Customs and Border Protection (CBP), intends to enter into an Interagency Acquisition (IA) with the Servicing Agency, the United States Army Corps of Engineers (USACE).

FINDINGS

1. The Requesting Agency has a need for the Servicing Agency to provide technical expertise and support for design standard, master planning, and acquisition management requirements encompassing program and project management, cost estimating, design, real estate oversight, and environmental planning support through an assisted acquisition.

2. The USACE is a long-standing partner of CBP in construction of border infrastructure. In addition to over 20 years of tactical infrastructure and facility project construction, USACE was the executing agency for the previous Pedestrian Fence (PF) 225, PF70, and Vehicle Fence (VF) 300 projects. The USACE has the manpower and acquisition capacity to oversee planning, contract execution, and contract oversight. The USACE also has the authority, experience and expertise to provide the type of services required, which is not available within the Requesting Agency. Additionally, the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source because choosing another source would negate the technical knowledge and expertise possessed by the USACE, and the advantages to be gained by utilizing the USACE's ability to respond to construction-based programmatic support requirements on a national scale. Specifically, USACE has contracts nationwide and local staff in areas of the southwest border to effectively oversee the construction and real estate requirements. To date, the USACE has been responsive and provided CBP with the desired programmatic support and requirements on schedule and within budget.

   CBP cannot obtain these services as conveniently or economically on its own as it can through the USACE. CBP does not have the wealth of resources, experience, and technical/acquisition knowledge that the USACE has in construction and construction-related activities, especially for the number of projects planned for the Border Barrier Systems. Due to its lack of resources and expertise, CBP would face challenges in awarding and managing any contracts with a private source, which would more than likely lead to cost and schedule delays, thereby impacting its ability to meet its deadlines for the Border Barrier Systems. In contrast to CBP's limitations, the USACE has the resources, nationwide, to effectively manage and oversee all construction aspects of these projects, including all programmatic, acquisition, project planning, and project execution activities. Not only does the USACE have internal, local staff along the southwest border to assist in project execution, but it also has programmatic and real

estate support through its own contracts to supplement support where needed. In addition, the USACE has established IDIQ construction contracts, which it can utilize to procure the projects/work necessary for the Border Barrier Systems. These contracts streamline the acquisition process and get contracts in place much more efficiently and effectively than CBP could if it procured the projects themselves. Utilizing these established USACE contracts allows CBP to meet its deadlines to construct the Border Barrier Systems. To date, the USACE has been responsive and provided CBP with the desired programmatic support and requirements on schedule and within budget. It is expected they would perform accordingly on these projects as well.

3. Construction acquisition and project management are some of the USACE's core capabilities. They have access to multiple vendors nationwide and have the in-house technical expertise, as well as the capability, to award the appropriate contract for the Border Barrier Systems requirements which will enable a streamlined, and as needed, an expedited pre-award and award process. Using the USACE's expertise in this area is resource advantageous because alternatively, CBP would be required to solicit, award, and manage multiple contracts, which would necessitate an increase in cost and staff, and could potentially lead to delays in delivering the Border Barrier Systems to the Border Patrol. Additionally, the USACE provides a benefit of national coverage, as it has locations nationwide to be able to support CBP's requirements. The USACE is also very familiar with CBP and its mission, as it has significant experience with CBP operations and the programmatic support requirements of CBP facilities and tactical infrastructure.

With regard to costs, the USACE charges CBP for the work it self-performs on CBP requirements as GS-scale time, which is reasonable as those rates are established by the Government. For all work that the USACE contracts out to other sources, it negotiates those prices to ensure the Government receives the best value possible for the services it receives. Those costs are then passed on to CBP to pay under the IAA, which have already been determined fair and reasonable due to the USACE's negotiations.

As a basis for determining that an IA was the optimal and most cost effective strategy, various alternatives were considered based on the Border Patrol and Air and Marine (BPAM) Program Management Office's (PMO) history of obtaining programmatic support services in the past for CBP FM&E BPAM PMO facilities. These alternatives included:

i In-House (CBP) Resources

ii Existing DHS or CBP Contracts

iii New Contract

iv Servicing Agency In-House Resources

v Existing Servicing Agency Contracts

A detailed description of the advantages and disadvantages of each alternative are shown in the table below.

Alternative	Advantages	Disadvantages	Recommendation
1. In-House (CBP) Resources	• Greater control over program performance and quality of programmatic support activities • Quicker identification of issues/actions before they become critical requirements • Reduces contract administration/ modifications	• No in-house expertise in the quantities necessary to provide the services required to perform programmatic support activities for facilities and TI in such a manner as to support mission requirements • Not cost/resource effective due to the number of certified/trained employees with the requisite experience and expertise CBP would need to obtain/maintain to perform programmatic support activities in support of multiple facilities, TI, system, and PMO requirements	Not recommended
2. Existing DHS or CBP contracts	• Greater control over program performance and quality of programmatic support activities • Quicker identification of issues/actions before they become critical requirements • Provides increased visibility and oversight over the Contractor's performance	There are no known DHS or CBP contracts that can provide the size and scope needed to perform the construction-based programmatic services for the BPFTI PMO facilities and tactical infrastructure to meet CBP mission requirements.	Not recommended
3. New Contract	• Greater control over program performance and quality of programmatic support activities • Quicker identification of issues/actions before they become critical requirements • Provides increased visibility and oversight over the Contractor's performance	• Increases burden on Government to manage multiple contracts and vendors (i.e., increased resources required) • Increases contract administration for each contract with the need to have a good understanding of the pre and post award activities throughout the construction-based programmatic acquisition lifecycle • Introduces the potential for long Procurement Administrative Lead Time (PALT) when competing requirements (based on unfamiliarity with construction industry and vendors throughout CONUS)	Not recommended
4. Servicing Agency In-House Resources	• In-house expertise to provide the services necessary to perform programmatic activities in support of Border Barrier requirements • Cost/resource effective due to the availability of resources (material/ construction equipment) and/or contractor support needed to perform programmatic support activities based on similar program management support USACE already provides.	• Minimizes CBP's ability to have "direct" control over program performance and quality of programmatic support activities • Delays identification and awareness of issues/actions (via USACE) before they become critical requirements	**Recommended** • USACE is the only agency that can execute the tasks required by DHS/CBP. • No other agency has the extensive experience required to complete the

	• Reduces contract administration since USACE will administer any contracts awarded as a result of CBP programmatic support requirements • Capitalizes on lessons learned from previous contracts CBP has had with USACE • Agency labor is GS Scale time, which are rates established by the government and are therefore considered reasonable		needed construction-based programmatic support with in-house personnel or a combination of in-house personnel augmented with contracted services. • USACE will augment its own resources as necessary with contracted services to support a surge in work requirements or to provide a limited number of unique capabilities that it may not have in-house.
5. Existing Servicing Agency Contracts	• In-house expertise to provide the services necessary to perform programmatic activities in support of Border Barrier requirements • Cost/resource effective due to the availability of resources (material/ construction equipment) and/or contractor support needed to perform programmatic support activities based on similar program management support USACE already provides. • Reduces contract administration since USACE will administer any contracts awarded as a result of CBP programmatic support requirements • Agency labor is GS Scale time, which are rates established by the government and are therefore considered reasonable	• There are no known existing USACE contracts that can provide the size and scope needed to perform the construction-based programmatic services for BPFTI PMO facilities and tactical infrastructure to meet CBP mission requirements	Not recommended.

4. DHS/CBP funds (current and future appropriations) used to acquire these services will comply with applicable DHS/CBP appropriation limitations, and all applicable laws and policies.

5. The Servicing Agency is able to comply with the requesting agency's statutes, regulations, and policies, including any unique acquisition and fiscal requirements.

DETERMINATION

Based on the above findings, I hereby determine that entering into an interagency acquisition with the servicing agency, USACE, is the best procurement approach for the agency's requirement.

Signed:

[redacted]

Signature of Program Manager/Requirements Official — 4/11/17 Date

[redacted]

Director, BPAM PMO

[redacted]

Signature of Contracting Officer — 4/11/17 Date

[redacted]

CBP Procurement

[redacted]

Signature of Contracting Officer Supervisor — Date

[redacted]

CBP Procurement

BORDER BARRIER SYSTEMS

INTERAGENCY AGREEMENT
STATEMENT OF WORK
BETWEEN
U.S. CUSTOMS AND BORDER PROTECTION AND
U.S. ARMY CORPS OF ENGINEERS

I. AUTHORITY

The authority of the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) ("Requesting Agency") and the U.S. Army Corps of Engineers (USACE) ("Servicing Agency") to enter into this Interagency Agreement (IAA) is the Economy Act of 1932 (31 U.S.C. 1535), resulting in an assisted acquisition.

II. OBJECTIVE/PURPOSE

This Interagency Agreement (IAA) is between the U.S. Army Corps of Engineers (USACE) U.S. Customs and Border Protection (CBP) to assist CBP's Office of Facilities and Asset Management (OFAM), Border Patrol Air and Marine (BPAM) Program Management Office (PMO) in performing programmatic, acquisition, project planning, and project execution activities in support of the U.S. Border Wall as required by Executive Order 13767 (Attachment A).

The goal of USACE is to execute the assigned CBP projects on schedule and to seek opportunities to continually improve service to CBP. Applying best practices, the USACE will continually strive to improve its delivery of high quality products and services on time and at the best value.

The partnership with USACE is essential to completing border barrier construction. CBP has a need for the USACE to provide technical expertise and support for design standard, master planning, and acquisition management requirements encompassing program and project management, cost estimating, design, real estate oversight, environmental planning, construction and contract administration support through an assisted acquisition. CBP and USACE have a memorandum of agreement (MOA) that establishes a mutual framework governing the respective responsibilities of USACE and CBP for the provision of goods and services pursuant to the Economy Act (31 U.S.C. § 1535).

III. SCOPE

This Statement of Work describes the comprehensive scope of support services for CBP's Border Barrier Systems requirements. Specific details on each project will be documented in Project Requirement Documents (PRD) agreed to by the project team members from both the

Servicing and Requesting agencies. PRDs will be included in the IAA file, but all changes within scope of the PRDs and this IAA will be executed via the BPAM Change Management Process. Modifications to the IAA will be issued every quarter to account for the updates made through the Change Management Process.

IV. REQUIREMENTS/TASKS:

USACE will use its best efforts to provide the following services either by contract or by in-house efforts to support CBP's Border Barrier Systems requirements:

a. Provide **program and project management support and expertise** (using either in-house or contractor resources), including but not limited to:

   1) Supporting overarching program management requirements and reporting needs (includes USACE enterprise level oversight and engagement).

   2) Providing complete project management services to include cost, schedule, and scope management.

   3) Tracking project progress and providing progress reporting and updated schedules through regular reporting, periodic reviews, and maintaining current data in the Facilities and Infrastructure Tracking Tool (FITT) database or equivalent system

   4) Supporting project closeout activities to ensure that all obligations, expenditures, and vouchers are finalized and executed, excess funds are de-obligated, and financial records for the project are properly closed out

   5) Assisting in resolving warranty issues should the contractor refuse to address these items, as applicable

   6) Providing project scoping, studies, investigations, evaluations, consultations, conceptual design, value engineering, and operation, monitoring, and topographic, geotechnical, and environmental survey services.

   7) Tracking project progress and providing progress reporting and updated schedules (including construction schedules provided by contractors) through regular reporting, periodic reviews, and maintaining current data in the FITT database or equivalent system from project initiation to project closeout.

   8) Analyzing project, cost and schedule risk, risk analyses, and develop mitigation strategies to minimize the impact to the project over the lifecycle of the project.

   9) Providing cost trends and analysis, and generate cost reports and life cycle cost estimates as applicable.

   10) Providing detailed reports of costs incurred.

   11) Participating in regular status updates (i.e., Weekly Calls and Program Management Reviews) as required.

   12) Providing environmental and real estate compliance support, including:

a) Support of environmental compliance requirements such as the preparation and review of biological and cultural survey reports, environmental assessments, environmental stewardship plans, biological resource plans, environmental stewardship summary reports, environmental impact statements, Findings of No Significant Impact, Records of Decision, mitigation plan(s), and other associated documentation requirements in compliance with the National Environmental Policy Act (NEPA) of 1969, DHS Directive 023-01, Environmental Planning Program and CBP policies and procedures for land acquisition. Additional activities include support of data identification, collection (including site visits and interviews), development, and interpretation; sampling and analysis; and human health risk and environmental impact evaluations and reports.

b. Provide technical, contractual, and project management experience to develop and execute **acquisition strategies**, including but not limited to:

1) Design-Bid-Build (DBB), Design-Build (DB), A/E Brooks Act, Services and/or other recommended acquisition vehicles and/or approaches.

2) During acquisition strategy discussions, identifying available contracting vehicles in other USACE districts.

3) As required, developing Requests for Proposals (RFP), Invitations for Bids, Independent Government Estimates (IGE), Acquisition Plans, Statements of Work (SOW)/Statements of Objectives (SOO)/Statements of Need (SON), Source Selection Evaluation Boards and other necessary acquisition documentation in support of CBP Tactical Infrastructure (TI) construction requirements.

c. Provide program management, real estate, environmental, and A/E support in the preparation of designs including plans, drawings, design analyses, specifications and cost estimates required to execute a site-specific construction project (including studies and surveys). This support will also include landscaping, value engineering, as well as reviews of all of the above products and services. Other design phase support includes but is not limited to:

1) Providing civil, mechanical, structural, electrical, and geotechnical services to support design requirements for TI based on the most current version of the BPAM TI Design Standards.

2) Supporting DBB requirements, including developing statements of work (SOW) for design services, acquiring A/E design services, developing designs, developing SOWs for construction services, acquiring construction services, and constructing the project.

3) Supporting DB requirements, including developing SOWs for DB services, acquiring DB services, and designing and constructing the project.

4) Ensuring all environmental and real estate requirements are satisfied before the construction phase begins. Identifying any environmental concerns and best management practices (BMPs) and additional real estate interests (not identified during the planning phase) that may be required to access construction, utilities, and other needs.

5) Provide management updates to the BPAM TI Design Standards.

d. Provide support during the border barrier systems **construction phase** of projects, including but not limited to:

1) Providing contract administration & oversight by ensuring construction contract requirements are met, overseeing contractor progress, validating compliance with Davis-Bacon Act wage rates, reviewing and evaluating changes that originate from the contractor, reviewing progress payments, and performing quality assurance.

2) Reviewing, evaluating, and incorporating change requests, and providing notification of any field modifications following established CBP Change Management Processes prior to any modifications.

3) Providing resident engineering expertise and participating in weekly construction progress meetings.

4) Performing environmental monitoring and cultural surveying, addressing environmental issues, conducting environmental and real estate stakeholder outreach, and applying BPAM construction BMPs as required throughout the entire construction phase.

5) Coordinating and conducting final inspections and walkthroughs prior to acceptance to identify any deficiencies that must be corrected.

6) Supporting project closeout activities to ensure that all obligations, expenditures, and USACE and contractor vouchers are finalized and executed, excess funds are de-obligated, and financial records for the project are properly closed out.

7) Assisting in resolving warranty issues should the contractor refuse to address these items.

8) Submitting closeout and project documentation through FITT or equivalent system, to include as built drawings, warranties, O&M manuals, acceptance letter, final inspection notice, final punch list, etc. (as applicable).

9) Providing construction management services to manage quality, cost and schedule in accordance with established USACE processes.

10) Providing technical engineering support, as required, to CBP for construction of Tactical Infrastructure projects.

V. ESTIMATED COST BREAKOUT (INCLUDING APPLICABLE FEES):

Subject to the appropriation of funds by Congress, this Interagency Agreement is estimated to be in the amount of $4.2 Billion and will include requirements and activities, assisted and non-assisted, associated with CBP's Border Barrier Systems program.

The initial value of the Base Period is $11,500,000, which is reflected in "1.0 Program Management" in the table below. This funding includes real estate and overall program and project staffing. Staffing includes but is not limited to functional areas in business operations, acquisition, design and construction management, real estate, program and project management,

as well as public affairs. The remaining requirements (assisted acquisition and non-assisted acquisition activities) will be funded through modifications to this agreement as funding becomes available.

FY17 & FY18 IAA Wall Funding ($K)			
WBS Element	**FY2017**	**FY2018**	**Total**
TOTAL	**$ 1,517,500**	**$ 2,619,000**	**$ 4,136,500**
1.0 Program Management	$ 10,500	$	$ 11,500
1.1 Program Management	$ 4,000	$ -	$ 4,000
1.1.1 Architecture and Engineering	$ 4,000	$ -	$ 4,000
1.1.1.1 100% Design SDC	$ 2,000	$ -	$ 2,000
1.1.1.2 100% Design RGV	$ 2,000	$ -	$ 2,000
1.1.2 USACE Program Management Support	$ 7,500	$ -	$ 7,500
1.1.2.1 Real Estate (Labor and Contract)	$ 3,000	$ -	$ 3,000
1.1.2.2 Program Support (Labor and Travel)	$ 1,500	$ -	$ 1,500
1.1.2.3 Acquisition Planning (Labor)	$ 900	$ -	$ 900
1.1.2.4 Ops Cell Support	$ 1,100	$ -	$ 1,100
1.1.2.5 Project Planning	$ 1,000	$ -	$ 1,000
2.0 Construction	$ 1,506,000	$ 2,619,000	$ 4,125,000
2.1 Wall System (SDC)	$ 256,000	$ -	$ 256,000
2.1.1 Construction	$ 166,000	$ -	$ 166,000
2.1.2 System	$ 87,000	$ -	$ 87,000
2.1.3 Real Estate & Support	$ 3,000	$ -	$ 3,000
2.2 Wall System (FY17 and FY18 Priority Projects)	$ 150,000	$ 1,034,000	$ 1,184,000
2.2.1 Construction	$ 75,000	$ 520,000	$ 595,000
2.2.2 System	$ 49,000	$ 337,000	$ 386,000
2.2.3 Real Estate & Support	$ 26,000	$ 177,000	$ 203,000
2.3 Fence/Wall (Levee) (RGV)	$ 498,000	$ 161,000	$ 659,000
2.3.1 Construction	$ 420,000	$ 135,000	$ 555,000
2.3.2 System	$ 8,000	$ 3,000	$ 11,000
2.3.3 Real Estate & Support	$ 70,000	$ 23,000	$ 93,000
2.4 Fence (rest of border)	$ -	$ 224,000	$ 224,000
2.4.1 Construction	$ -	$ 156,000	$ 156,000
2.4.2 System	$ -	$ 8,000	$ 8,000
2.4.3 Real Estate & Support	$ -	$ 60,000	$ 60,000
2.5 Replacement Fence	$ 102,000	$ 358,000	$ 460,000
2.5.1 Construction	$ 98,000	$ 343,000	$ 441,000
2.5.2 System	$ 4,000	$ 15,000	$ 19,000
2.5.3 Real Estate & Support	$ -	$ -	$ -
2.6 Road Construction	$ 119,000	$ 126,000	$ 245,000
2.6.1 Road Construction	$ 119,000	$ 126,000	$ 245,000
2.7 Road Maintenance	$ 23,000	$ 23,000	$ 46,000
2.7.1 Road Maintenance	$ 23,000	$ 23,000	$ 46,000
2.8 Other Tactical Infrastructure	$ 55,000	$ -	$ 55,000
2.9 Surveillance Technology	$ 200,000	$ 150,000	$ 350,000
2.10 Other Assets and Equipment	$ 103,000	$ 543,000	$ 646,000

All costs covered under this agreement will be reimbursable, and actual costs are dependent on the work performed. This budgetary estimate is based on a summation of all the USACE labor, contract awards (issued by USACE), and other direct costs assumed to be required to fund the portfolio of projects executed under this IAA (through closeout of the contracts issued by USACE and their warranties). Additional supporting documentation on the basis of the cost estimates will be available in the Project Requirement Documents (PRDs). PRDs will be executed via the BPAM Change Management Process, and modifications to the IAA will be issued every quarter to account for the updates made through the Change Management Process. As projects are better defined and PRDs are updated, changes to this section and the rest of the IAA will be issued in accordance with this process.

VI. DELIVERABLES:

USACE must provide an electronic version of the following:

- Weekly updates in the FITT or equivalent system
- Bi-weekly expense burn rate report by P2 number
- Monthly (weekly, as required) Project Delivery Schedule

VII. PLACE OF PERFORMANCE

The place of performance for this requirement shall include southwest border locations, including but not limited to San Diego (SDC), El Centro (ELC), Yuma (YUM), Tucson (TCA), El Paso (EPT), Big Bend (BBT), Del Rio (DRT) Laredo (LRT), and Rio Grande Valley (RGV) Sectors.

VIII. PERIOD OF PERFORMANCE

The Base Period of this Agreement is through four years from date of award, which is estimated to be from April 10, 2017 – April 9, 2021. This agreement also includes two Option Years as follows:

Option Year 1: April 10, 2021 – April 9, 2022
Option Year 2: April 10, 2022 – April 9, 2023

IX. FUNDING

The initial value of the Base Period is $11,500,000. This funding includes real estate and overall program and project staffing. Staffing includes but is not limited to functional areas in business operations, acquisition, design and construction management, real estate, program and project management, as well as public affairs. The remaining requirements (assisted acquisition and

non-assisted acquisition activities) will be funded through modifications to this agreement as funding becomes available.

Although funding for multiple functional areas will be provided to USACE via a single line item on the IAA, USACE will track funding and the associated functional areas via "P2" projects. P2 is a suite of commercial-off-the-shelf (COTS) software applications configured to support project execution, which ties together project details with project financial information. P2 provides project development teams with the ability to manage their projects using proven Project Management best practices. P2 also allows for web-based executive level, district-specific, regional, and customer reports. Any modifications of funding between P2s at USACE must have an approved CBP change request and be administered via the BPAM Change Management Process.

Specific funding information is as follows:

Cost Center: 942063200
Order: Z2VQ
Fund: 15463
Functional Area: SB031101AG00
Fund Center: BPE75
PR: 20097828

X. POINTS OF CONTACT

CBP:

[redacted]
CBP Program Official (Division Director/Program Manager)
Border Patrol & Air and Marine Program Management Office (BPAM PMO)
Phone: [redacted]
E-mail:

[redacted]
CBP Budget Official
Border Patrol & Air and Marine Program Management Office (BPAM PMO)
Phone: [redacted]
E-mail:

[redacted]
Contracting Officer Representative
Border Patrol & Air and Marine Program Management Office (BPAM PMO)
Phone: [redacted]
E-mail

BORDER BARRIER SYSTEMS

CBP Acquisitions:

[redacted]
Contract Specialist
US Customs and Border Protection/DHS
Phone: [redacted]
Email:

[redacted]
Contracting Officer
US Customs and Border Protection/DHS
Phone: [redacted]
Email:

[redacted]
Contracting Officer
US Customs and Border Protection/DHS
Phone: [redacted]
Email:

USACE:

[redacted]
SWD Director for Border Barrier Systems USACE, Ft Worth
Phone: [redacted]
E-mail:

[redacted]
Deputy Director, SWD Director for Border Barrier Systems
USACE, Ft Worth
Phone: [redacted]
E-mail:

[redacted]
Chief, Program Control Section
USACE, Ft Worth
Phone: [redacted]
E-mail:

[redacted]
Budget Analyst
USACE, Ft Worth
Phone: [redacted]
E-mail

BORDER BARRIER SYSTEMS

[redacted]
Budget Analyst
USACE, Ft Worth
Phone: [redacted]
E-mail: [redacted]

XI. PARTICIPATING AGENCY INFORMATION

Specific Agency information is as follows:
Full Agency Name: U.S. Army Corps of Engineers, Fort Worth, District
Full Agency Address: 819 Taylor St, Rm 3A14, Fort Worth, TX 76102
Telephone Number: [redacted]

Fax Number: [redacted]
Tax Identification Number: 62-1642142
DUNS Number: 068112791
Agency Locator Code: 00008736

Attachment A

The White House
Office of the Press Secretary
For Immediate Release
January 25, 2017

Executive Order: Border Security and Immigration Enforcement Improvements

EXECUTIVE ORDER

BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) (INA), the Secure Fence Act of 2006 (Public Law 109 367) (Secure Fence Act), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104 208 Div. C) (IIRIRA), and in order to ensure the safety and territorial integrity of the United States as well as to ensure that the Nation's immigration laws are faithfully executed, I hereby order as follows:

Section 1. Purpose. Border security is critically important to the national security of the United States. Aliens who illegally enter the United States without inspection or admission present a significant threat to national security and public safety. Such aliens have not been identified or inspected by Federal immigration officers to determine their admissibility to the United States. The recent surge of illegal immigration at the southern border with Mexico has placed a significant strain on Federal resources and overwhelmed agencies charged with border security and immigration enforcement, as well as the local communities into which many of the aliens are placed.

Transnational criminal organizations operate sophisticated drug- and human-trafficking networks and smuggling operations on both sides of the southern border, contributing to a significant increase in violent crime and United States deaths from dangerous drugs. Among those who illegally enter are those who seek to harm Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.

Federal immigration law both imposes the responsibility and provides the means for the Federal Government, in cooperation with border States, to secure the Nation's southern border. Although Federal immigration law provides a robust framework for Federal-State partnership in enforcing our immigration laws and the Congress has authorized and provided appropriations to secure our

borders the Federal Government has failed to discharge this basic sovereign responsibility. The purpose of this order is to direct executive departments and agencies (agencies) to deploy all lawful means to secure the Nation's southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.

Sec. 2. Policy. It is the policy of the executive branch to:

(a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism;

(b) detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations;

(c) expedite determinations of apprehended individuals' claims of eligibility to remain in the United States;

(d) remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed; and

(e) cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities, as well as State monitoring and detention programs that are consistent with Federal law and do not undermine Federal immigration priorities.

Sec. 3. Definitions. (a) "Asylum officer" has the meaning given the term in section 235(b)(1)(E) of the INA (8 U.S.C. 1225(b)(1)).

(b) "Southern border" shall mean the contiguous land border between the United States and Mexico, including all points of entry.

(c) "Border States" shall mean the States of the United States immediately adjacent to the contiguous land border between the United States and Mexico.

(d) Except as otherwise noted, "the Secretary" shall refer to the Secretary of Homeland Security.

(e) "Wall" shall mean a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.

(f) "Executive department" shall have the meaning given in section 101 of title 5, United States Code.

(g) "Regulations" shall mean any and all Federal rules, regulations, and directives lawfully promulgated by agencies.

(h) "Operational control" shall mean the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.

Sec. 4. Physical Security of the Southern Border of the United States. The Secretary shall immediately take the following steps to obtain complete operational control, as determined by the Secretary, of the southern border:

(a) In accordance with existing law, including the Secure Fence Act and IIRIRA, take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border, using appropriate materials and technology to most effectively achieve complete operational control of the southern border;

(b) Identify and, to the extent permitted by law, allocate all sources of Federal funds for the planning, designing, and constructing of a physical wall along the southern border;

(c) Project and develop long-term funding requirements for the wall, including preparing Congressional budget requests for the current and upcoming fiscal years; and

(d) Produce a comprehensive study of the security of the southern border, to be completed within 180 days of this order, that shall include the current state of southern border security, all geophysical and topographical aspects of the southern border, the availability of Federal and State resources necessary to achieve complete operational control of the southern border, and a strategy to obtain and maintain complete operational control of the southern border.

Sec. 5. Detention Facilities. (a) The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico.

(b) The Secretary shall take all appropriate action and allocate all legally available resources to immediately assign asylum officers to immigration detention facilities for the purpose of accepting asylum referrals and conducting credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1225(b)(1)) and applicable regulations and reasonable fear determinations pursuant to applicable regulations.

(c) The Attorney General shall take all appropriate action and allocate all legally available resources to immediately assign immigration judges to immigration detention facilities operated or controlled by the Secretary, or operated or controlled pursuant to contract by the Secretary, for the purpose of conducting proceedings authorized under title 8, chapter 12, subchapter II, United States Code.

Sec. 6. Detention for Illegal Entry. The Secretary shall immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law. The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as "catch and release," whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.

Sec. 7. Return to Territory. The Secretary shall take appropriate action, consistent with the requirements of section 1232 of title 8, United States Code, to ensure that aliens described in section 235(b)(2)(C) of the INA (8 U.S.C. 1225(b)(2)(C)) are returned to the territory from which they came pending a formal removal proceeding.

Sec. 8. Additional Border Patrol Agents. Subject to available appropriations, the Secretary, through the Commissioner of U.S. Customs and Border Protection, shall take all appropriate action to hire 5,000 additional Border Patrol agents, and all appropriate action to ensure that such agents enter on duty and are assigned to duty stations as soon as is practicable.

Sec. 9. Foreign Aid Reporting Requirements. The head of each executive department and agency shall identify and quantify all sources of direct and indirect Federal aid or assistance to the Government of Mexico on an annual basis over the past five years, including all bilateral and multilateral development aid, economic assistance, humanitarian aid, and military aid. Within 30 days of the date of this order, the head of each executive department and agency shall submit this information to the Secretary of State. Within 60 days of the date of this order, the Secretary shall submit to the President a consolidated report reflecting the levels of such aid and assistance that has been provided annually, over each of the past five years.

Sec. 10. Federal-State Agreements. It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law, and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the

Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in the manner that provides the most effective model for enforcing Federal immigration laws and obtaining operational control over the border for that jurisdiction.

Sec. 11. Parole, Asylum, and Removal. It is the policy of the executive branch to end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens.

(a) The Secretary shall immediately take all appropriate action to ensure that the parole and asylum provisions of Federal immigration law are not illegally exploited to prevent the removal of otherwise removable aliens.

(b) The Secretary shall take all appropriate action, including by promulgating any appropriate regulations, to ensure that asylum referrals and credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1125(b)(1)) and 8 CFR 208.30, and reasonable fear determinations pursuant to 8 CFR 208.31, are conducted in a manner consistent with the plain language of those provisions.

(c) Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II).

(d) The Secretary shall take appropriate action to ensure that parole authority under section 212(d)(5) of the INA (8 U.S.C. 1182(d)(5)) is exercised only on a case-by-case basis in accordance with the plain language of the statute, and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole.

(e) The Secretary shall take appropriate action to require that all Department of Homeland Security personnel are properly trained on the proper application of section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232) and section 462(g)(2) of the Homeland Security Act of 2002 (6 U.S.C. 279(g)(2)), to ensure that unaccompanied alien children are properly processed, receive appropriate care and placement while in the custody of the Department of Homeland Security, and, when appropriate, are safely repatriated in accordance with law.

Sec. 12. Authorization to Enter Federal Lands. The Secretary, in conjunction with the Secretary of the Interior and any other heads of agencies as necessary, shall take all appropriate action to:

(a) permit all officers and employees of the United States, as well as all State and local officers as authorized by the Secretary, to have access to all Federal lands as necessary and appropriate to implement this order; and

(b) enable those officers and employees of the United States, as well as all State and local officers as authorized by the Secretary, to perform such actions on Federal lands as the Secretary deems necessary and appropriate to implement this order.

Sec. 13. Priority Enforcement. The Attorney General shall take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border.

Sec. 14. Government Transparency. The Secretary shall, on a monthly basis and in a publicly available way, report statistical data on aliens apprehended at or near the southern border using a uniform method of reporting by all Department of Homeland Security components, in a format that is easily understandable by the public.

Sec. 15. Reporting. Except as otherwise provided in this order, the Secretary, within 90 days of the date of this order, and the Attorney General, within 180 days, shall each submit to the President a report on the progress of the directives contained in this order.

Sec. 16. Hiring. The Office of Personnel Management shall take appropriate action as may be necessary to facilitate hiring personnel to implement this order.

Sec. 17. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
January 25, 2017.

Post-Hearing Questions for the Record
Submitted to Robyn S. Colosimo
From Senator Claire McCaskill

"Cutting Through the Red Tape: Oversight of Federal Instructure Permitting and the Federal Permitting Improvement Steering Council"

September 7, 2017

USACE Response

Attachment B

IAA HSBP1017X00059

Modification P00001

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION

INTERAGENCY AGREEMENT
(IAA)

1. Agreement No.	2. Modification No.	3. Order No.	4. Requisition No.
HSBP1017X00059	P00001		0020097828

5. Period of Performance	6. Statutory Authority	7. Date IAA Prepared
From 04/11/2017 To 04/10/2021	Economy Act, 31 U.S.C. § 1535	04/11/2017

8. Requesting Agency
Agency Name: DHS - Customs & Border Protection
Office/Division: Customs and Border Protection
POC: [redacted]
Address: 1300 Pennsylvania Ave, NW
Procurement Directorate - NP 1310
Washington DC 20229
POC Phone No.: [redacted]

9. Servicing Agency
Agency Name: ARMY CORPS OF ENGINEERS
Office/Division:
POC:
Address: 819 TAYLOR ST RM 3A14
FT WORTH TX 76102-0300
POC Phone No.:

10. Scope of Work
The purpose of Modification P00001 is to add funding in the amount $339,000,000.00 for Replacement Fence and RGV Gates. As a result, the following changes are being incorporated:

1)An amount of $290,500,000.00 is obligated for Replacement Fence (Funded Line Item #20).
2) An amount of $48,500,000.00 is obligated for RGV Gates (Funded Line Item #30).
3) Total amount obligated for Modification P00001: $339,000,000.00
4)Total obligated amount for IAA HSBP1017X00059 is increased from $11,500,000.00 by $339,000,000.00 to $350,500,000.00.

11. Delivery/Shipping Schedule

See Attached Delivery Schedule

12. IAA Amount		13. Billing and Payment	
Base Price of IAA	$11,500,000.00	**Requesting Agency**	**Servicing Agency**
Modification Amount	$339,000,000.00	Locator Code: 70050800 DUNS #: DUNS# 879824324 Address: DHS - Customs & Border Protection Commercial Accounts Sect. 6650 Telecom Drive, Suite 100 Indianapolis IN 46278	Locator Code: DUNS #: Address:
Assisted Acquisition Servicing Fee	$0.00		
Total IAA Price	$350,500,000.00	POC: [redacted] POC Phone #: POC Fax #: POC Email:	POC: POC Phone #: POC Fax #: POC Email:

14. Requesting Agency TAS No.		15. Servicing Agency TAS No.	
10	07020152017_0533000	10	00000000_3122
20	07020172021_0532000	20	00000000_3132
30	07020172021_0532000	30	00000000_3132

16. Invoice/Payment Method

- [ ] Requesting Agency Initiate IPAC
- [x] Servicing Agency Initiate IPAC
- [ ] Credit Card
- [ ] Other (explain below)

17. Billing Frequency

- [x] Monthly
- [ ] Quarterly
- [ ] Semi-annually
- [ ] Annual
- [ ] Advanced Payment (explain below)
- [ ] Other (explain below)

18. Requesting Agency Accounting and Appropriation Data

10 6999.3211USCSGLCS0942063200Z2WQ15463SB031101AG00 BPE753211
TAS# 07020152017 0533

20 6999.3211USCSGLCS0942063200Z2WQ17562AB200000AG00 BPE763211
TAS# 07020172021 0532

30 6999.3211USCSGLCS0942063200Z2WQ17562AB200000AG00 BPE773211
TAS# 07020172021 0532

Telephone No.	[redacted]	[redacted]
Fax No.		
Email	[redacted]	[redacted]
Signature	[redacted] Date: 06/09/2017	[redacted] Date: 6/12/17
Funding Officials		
Name	[redacted]	[redacted]
Title	Branch Chief - Financial Management	Budget Officer
Telephone No.	[redacted]	[redacted]
Fax No.		
Email	[redacted]	[redacted]
Signature	[redacted] Date: 6/09/2017	[redacted] Date: 6/9/2017
Contracting Officials		
Name	[redacted]	
Title	Contracting Officer	
Telephone No.	[redacted]	
Fax No.		
Email	[redacted]	
Signature	[redacted]	[redacted]

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION

INTERAGENCY AGREEMENT
(IAA)

INSTRUCTIONS

Block 1: Insert IAA number (automatic system populated).

Block 2: Insert modification number of the IAA (automatic system populated).

Block 3: Insert IAA order number (automatic system populated).

Block 4: Insert IAA requisition number (automatic system populated).

Block 5: Insert period of performance for the IAA.

Block 6: Insert statutory authority for the IAA.

Block 7: Insert date the IAA was prepared (automatic system populated).

Block 8: Insert requesting agency information.

Block 9: Insert servicing agency information.

Block 10: Insert a brief description of the IAA requirements (scope of work) and list the applicable attachments in this block. At a minimum, the attachments should include the IAA terms and conditions, statement of work, and analysis of alternative, if applicable.

Block 11: Insert the delivery and/or shipping schedule for the IAA or indicate where the delivery/shipping schedule may be found.

Block 12: Insert the base price of the IAA, modification amount, assisted acquisition servicing fee, and total IAA price--automatic system populated.

Block 13: Insert the billing and payment information for the requesting and servicing agency (requesting agency information automatic system populated).

Block 14: Insert the requesting agency TAS number for each line item (automatic system populated).

Block 15: Insert the servicing agency TAS number for each line item (automatic system populated).

Block 16: Check the invoice/payment method for the IAA and explain if "other" is selected.

Block 17: Check the billing frequency for the IAA and explain if "advanced payment" or "other" is selected.

Block 18: Insert the requesting agency accounting and appropriation data per line item (automatic system populated).

Block 19: Insert IAA approval information for the requesting and servicing agency pertaining to program officials, funding officials, and contracting officers. Include the date for each signature.

Date: June 2, 2017

TO: [redacted]
Contracting Officer
Procurement Directorate
U.S. Customs & Border Protection

FROM: [redacted]
Financial Management Branch Chief
Border Patrol & Air and Marine
Program Management Office

SUBJECT: Request for Modification- HSBP1017X00059

The Border Patrol & Air and Marine Program Management Office (BPAM PMO) requests a modification to the IAA for HSBP1017X00059 (PR 20097828), as follows:

1) Add additional funding in the amount of $339,000,000.00. Additional funding is to be used for replacement fence projects in El Centro Sector, San Diego Sector, El Paso Sector as well as gates in Rio Grande Valley Sector. All work is covered within the existing SOW as shown in the "FY17 & FY18 IAA Wall Funding" table on page 5 of the SOW, replacement fence is covered under section 2.4 and gates under section 2.8. This funding has been added to PR 20097828 on multiple lines as follows:
   - $290,500,000.00 on line 20 for Replacement Fence.
   - $48,500,000.00 on line 30 for Gates.

Please refer any questions to [redacted]. BPAM Program Management Office [redacted] The Servicing Agency point of contact is [redacted]. Director, SWD Border Infrastructure PMO [redacted]

Thank you,

[redacted]
Financial Management Branch Chief
Border Patrol & Air and Marine
Program Management Office

Attachment "A"

Summary of FY17 PC&I Funding

Programs	
1.0 Replacement Fence	***290,500,000.00***
1.1 USACE Program Support	**12,000,000.00**
1.2 Replacement Fence	**208,000,000.00**
1.2.1 ELP 20 miles	104,000,000.00
1.2.2 ELP 4 miles	20,800,000.00
1.2.3 SDC 14 miles	72,800,000.00
1.2.4 ELC 2 miles	10,400,000.00
1.3 Change Management Reserve	**70,500,000.00**
2.0 RGV Gates	***48,500,000.00***
2.1 RGV Gates	**48,500,000.00**
	-
Grand Total	**339,000,000.00**

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, D.C. 20314-1000

CEMP-CN 12 June 2017

MEMORANDUM FOR Southwestern Division Director for Border Infrastructure PMO and Fort Worth District Resource Management Office

SUBJECT: Customer Order Funding Guidance for Customs and Border Patrol

1. Fort Worth District (SWF) is authorized to load the attached IAA Modification (HSBP1017X00059 P0001) in CEFMS for the increased amount of $350,500,000.00.

2. A funding Directive will follow that provides SWF the authority to undertake the activities detailed in the attached SOW in support of the U.S. Border Wall U.S. Customs and Border Protection (CBP).

3. Please contact me at [redacted] if you have any questions.

Enclosures
1. IAA HSBP1017X00059 P0001
2. Border Barrier Systems IAA SOW Mod P0001

[redacted]
Senior Program Manager
Interagency and International Services
HQUSACE

Post-Hearing Questions for the Record
Submitted to Robyn S. Colosimo
From Senator Claire McCaskill

"Cutting Through the Red Tape: Oversight of Federal Instructure Permitting and the Federal Permitting Improvement Steering Council"

September 7, 2017

USACE Response

Attachment C

IAA HSBP1017X00059

Modification P00002

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION

INTERAGENCY AGREEMENT
(IAA)

1. Agreement No.	2. Modification No.	3. Order No.	4. Requisition No.
HSBP1017X00059	P00002		0020097828

5. Period of Performance	6. Statutory Authority	7. Date IAA Prepared
From 04/11/2017 To 04/10/2021	Economy Act, 31 U.S.C. § 1535	04/11/2017

8. Requesting Agency
Agency Name: DHS - Customs & Border Protection
Office/Division: Customs and Border Protection
POC: [redacted]
Address: 1300 Pennsylvania Ave, NW
Procurement Directorate - NP 1310
Washington DC 20229
POC Phone No.: [redacted]

9. Servicing Agency
Agency Name: ARMY CORPS OF ENGINEERS
Office/Division:
POC:
Address: 819 TAYLOR ST RM 3A14
FT WORTH TX 76102-0300
POC Phone No.:

10. Scope of Work
The purpose of Modification P00002 is to add funding in the amount $743,000.00 for Border Barrier Systems requirements (see IAA SOW for details). As a result, the following changes are being incorporated:

1)An amount of $743,000.00 is obligated for Border Barrier Systems requirements (Funded Line Item #40).
2) Total amount obligated for Modification P00002: $743,000.00
3) Total obligated amount for IAA HSBP1017X00059 is increased from $350,500,000.00 by $743,000.00 to $351,243,000.00.

11. Delivery/Shipping Schedule

See Attached Delivery Schedule

12. IAA Amount	
Base Price of IAA	$350,500,000.00
Modification Amount	$743,000.00
Assisted Acquisition Servicing Fee	$0.00
Total IAA Price	$351,243,000.00

13. Billing and Payment

Requesting Agency	Servicing Agency
Locator Code: 70050800 DUNS #: DUNS# 879824324 Address: DHS - Customs & Border Protection Commercial Accounts Sect. 6650 Telecom Drive, Suite 100 Indianapolis IN 46278 POC: [redacted] POC Phone #: POC Fax #: POC Email:	Locator Code: DUNS #: Address: POC: POC Phone #: POC Fax #: POC Email:

14. Requesting Agency TAS No.		15. Servicing Agency TAS No.	
10	07020152017_0533000	10	00000000_3122
20	07020172021_0532000	20	00000000_3122
30	07020172021_0532000	30	00000000_3122
40	07020152017_0533000	40	00000000_3122

16. Invoice/Payment Method

- [ ] Requesting Agency Initiate IPAC
- [x] Servicing Agency Initiate IPAC
- [ ] Credit Card
- [ ] Other (explain below)

17. Billing Frequency

- [x] Monthly
- [ ] Quarterly
- [ ] Semi-annually
- [ ] Annual
- [ ] Advanced Payment (explain below)
- [ ] Other (explain below)

18. Requesting Agency Accounting and Appropriation Data

10	6999.3211USCSGLCS0942063200Z2WQ15463SB031101AG00 BPE753211 TAS# 07020152017 0533
20	6999.3211USCSGLCS0942063200Z2WQ17562AB200000AG00 BPE763211 TAS# 07020172021 0532
30	6999.3211USCSGLCS0942063200Z2WQ17562AB200000AG00 BPE773211 TAS# 07020172021 0532
40	6999.3211USCSGLCS0942063200Z2WQ15463SB031101AG00 BPE753211 TAS# 07020152017 0533

19. Approvals				
Program Officials	**Requesting Agency**		**Servicing Agency**	
Name	[redacted]		[redacted]	
Title	Contracting Officer's Representative		Chief, Interagency and International Services	
Telephone No.	[redacted]		[redacted]	
Fax No.				
Email	[redacted]		[redacted]	
Signature		Date:	[redacted]	Date: 9/26/17
Funding Officials				
Name	[redacted]		[redacted]	
Title	Branch Chief - Financial Management		Budget Officer	
Telephone No.	[redacted]		[redacted]	
Fax No.				
Email	[redacted]		[redacted]	
Signature		Date:		Date:
Contracting Officials				
Name	[redacted]			
Title	Contracting Officer			
Telephone No.	[redacted]			
Fax No.	[redacted]			
Email	[redacted]			
Signature	[redacted]	Date: 9/22/17		Date:

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION

INTERAGENCY AGREEMENT
(IAA)

INSTRUCTIONS

Block 1: Insert IAA number (automatic system populated).

Block 2: Insert modification number of the IAA (automatic system populated).

Block 3: Insert IAA order number (automatic system populated).

Block 4: Insert IAA requisition number (automatic system populated).

Block 5: Insert period of performance for the IAA.

Block 6: Insert statutory authority for the IAA.

Block 7: Insert date the IAA was prepared (automatic system populated).

Block 8: Insert requesting agency information.

Block 9: Insert servicing agency information.

Block 10: Insert a brief description of the IAA requirements (scope of work) and list the applicable attachments in this block. At a minimum, the attachments should include the IAA terms and conditions, statement of work, and analysis of alternative, if applicable.

Block 11: Insert the delivery and/or shipping schedule for the IAA or indicate where the delivery/shipping schedule may be found.

Block 12: Insert the base price of the IAA, modification amount, assisted acquisition servicing fee, and total IAA price--automatic system populated.

Block 13: Insert the billing and payment information for the requesting and servicing agency (requesting agency information automatic system populated).

Block 14: Insert the requesting agency TAS number for each line item (automatic system populated).

Block 15: Insert the servicing agency TAS number for each line item (automatic system populated).

Block 16: Check the invoice/payment method for the IAA and explain if "other" is selected.

Block 17: Check the billing frequency for the IAA and explain if "advanced payment" or "other" is selected.

Block 18: Insert the requesting agency accounting and appropriation data per line item (automatic system populated).

Block 19: Insert IAA approval information for the requesting and servicing agency pertaining to program officials, funding officials, and contracting officers. Include the date for each signature.

Attachment D - USACE Support to CBP Border Infrastructure

2-Oct-17

#	Action	Location	IAA	Contractor		Contract Amount ($)	Scope of Work
				Name	DUNS		
1	Prototype Support	Otay Mesa, CA	HSBP1017X00059	Horizon Surveys LLC	78825708	$6,900.00	Stake the northern boundary line of Federally owned Tract #703. In support of Prototype construction effort
2	RGV-01, 2.9 mi Levee Wall	Santa Ana NWR, TX	HSBP1017X00059	Michael Baker International	182698449	$3,702,734.49	Conduct surveys, 100% Design and prepare solicitation documents
3	RGV-02, 7.9 mi Levee Wall	Hidalgo Co, TX	HSBP1017X00059	Michael Baker International	182698449	Included in RGV-01 award	Conduct surveys
			HSBP1017X00059	O'Brien	0790794960	$302,450.20	Prepare 35% design and solicitation documents
4	RGV-03, 10.8 mi Levee and Non-levee Wall	Hidalgo Co, TX	HSBP1017X00059	Michael Baker International	182698449	Included in RGV-01 award	Conduct surveys
			HSBP1017X00059	Prime	078373181	$621,749.91	Prepare 35% design and solicitation documents
5	RGV-04, 11.2 mi Levee Wall	Hidalgo Co, TX	HSBP1017X00059	Michael Baker International	182698449	Included in RGV-01 award	Conduct surveys
			HSBP1017X00059	EJES	007334761	$807,811.78	Prepare 35% design and solicitation documents
6	RGV Planning, Hidalgo County	Hidalgo Co, TX	HSBP1017X00059	Premier Land Services	795432272	$417,644.46	Identify landowners, provide title abstracts, provide title evidence
7	RGV-05, 2.2 mi Non-Levee Wall	Starr Co, TX	HSBP1017X00059	Michael Baker International	182698449	Included in RGV-01 award	Conduct surveys, 35% Design and prepare solicitation documents
8	RGV Planning, Starr County	Starr Co, TX	HSBP1017X00059	Michael Baker International	182698449	Included in RGV-01 award	Conduct surveys
			HSBP1017X00059	Premier Land Services	795432272	$3,000,000.00	Identify landowners, provide title abstracts, provide title evidence
9	SDC 14 mi Secondary Wall	San Diego Co, CA	HSBP1017X00059	Michael Baker International	182698449	$435,349.32	Conduct surveys, 35% Design and prepare solicitation documents

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC - 1 2017

The Honorable Rob Portman
Chairman
Permanent Subcommittee on Investigations
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Portman:

Enclosed are responses prepared by the U.S. Fish and Wildlife Service to questions submitted following the Subcommittee's July 12, 2017 oversight hearing examining the federal permitting process for major infrastructure projects.

Thank you for the opportunity to provide this material to the Subcommittee.

Sincerely,

Christopher P. Salotti
Legislative Counsel
Office of Congressional and Legislative Affairs

Enclosure

cc: The Honorable Tom Carper
Ranking Member

Questions for the Record
Submitted to Gary Frazer Assistant Director for Ecological Services
U.S. Fish and Wildlife Service
"Cutting through the Red Tape: Oversight of Federal Infrastructure Permitting and the Federal Permitting Improvement Steering Council"
September 7, 2017

From Chairman Rob Portman

Please provide policies regarding and examples of how your headquarters are communicating the FAST-41 requirements to your field offices.

RESPONSE:
The U.S. Fish and Wildlife Service (Service) headquarters has used a variety of mechanisms to actively communicate about FAST-41 and its requirements to our Regional and Field Offices. We designated a national lead point-of-contact (POC) who has worked with Service leadership and our field and regional staff to share information about and implement the FAST-41 requirements. This includes disseminating FAST-41 materials; providing updates and question and answer sessions during monthly calls with regional counterparts; working one-on-one with regional and field staff to help educate them on FAST-41's requirements; and hosting a national webinar on FAST-41, among other activities. Specific examples include:

- July 2016 – September 2017: The POC provided information via multiple conference calls and emails regarding FAST-41 implementation, the Permitting Dashboard, and the Federal Permitting Improvement Steering Council's January 13, 2017 Guidance Document and January 18, 2017 Best Management Practices document to an expanded list of the regional coordinators and field staff tasked with FAST-41 and other environmental review responsibilities.

- September 28, 2017: Headquarters staff hosted an hour-long video conference on FAST-41 and related infrastructure initiatives (Executive Order 13807 and Secretarial Order 3355) for Service employees across the country. Headquarters staff presented information on the initiatives, recommended best practices for coordination, and answered employees' questions.

From Ranking Member Tom Carper

In May, the EPW Committee heard from Leah Pilconis of the Associated General Contractors, that better shared databases on natural resources, and other such tools could help improve coordination between agencies. Do you agree that this could be helpful, and are there other digital tools or technologies that could help agencies review projects more quickly and effectively?

RESPONSE: Yes. The Service is building efficiencies into our review and permitting processes to improve and expedite review consideration for many projects. For example, our Information for Planning and Consultation (IPaC) online platform allows project applicants to quickly and

easily identify Service-managed resources that may be affected by a project (e.g., threatened and endangered species or National Wildlife Refuges) and, in some cases, seek concurrence that a project is not likely to adversely affect threatened and endangered species or is consistent with a programmatic Endangered Species Act (ESA) consultation. Other streamlining tools and efficiencies include recent Service guidance for expediting ESA consultations for certain restoration and recovery projects; increased use of programmatic consultations that address multiple projects; and large-scale Habitat Conservation Plans that allow for the efficient permitting of numerous individual projects within a geographic area.

One goal of the reforms we're discussing today is to encourage agencies to review projects they have a role in vetting concurrently to the maximum extent possible so that necessary reviews take less time. What progress has the Council made since it began its work in achieving this goal? What obstacles might prevent agencies from coordinating their work so that reviews can be done at the same time rather than back to back?

RESPONSE: The Federal Permitting Improvement Steering Council (Council) issued guidance and best practices for environmental reviews and authorizations in January of 2017. In addition, the Council has issued quarterly assessment reports on each covered project, which provides each agency with information on the progress made to date on the projects and needed improvements. Historically, the agencies were not always aware of individuals in other agencies working on the same project, and this lack of awareness created an obstacle to communication. This problem has been addressed by the Council's Permitting Dashboard (an online tool for Federal agencies, project developers, and interested members of the public to track the Federal government's environmental review and authorization processes for large or complex infrastructure projects), which includes contact information for each of the agencies and has improved project-level communication.

Earlier this year, the Inspector General at the U.S. Department of Transportation reported that DOT had implemented just over half of its planned actions from MAP-21 to accelerate projects, and that the FAST Act changes delayed the benefits of some already-implemented actions. Would you agree that legislative uncertainty and implementation delays can hinder our ability to achieve intended benefits, such as accelerating project delivery and reducing project costs?

RESPONSE: As a general rule, legislative uncertainty and implementation delays can hinder our ability to achieve intended benefits. However, we are not aware of any specific circumstances related to legislative uncertainty or delay that have affected implementation of FAST-41 within the Service.

Our witness on the first panel from the Natural Resources Defense Council argued that infrastructure projects are often held up not because of federal environmental reviews, but because of lack of funding or state and local laws and zoning requirements. When it comes to the latter, I understand that state and local governments are permitted but not required to participate in the Federal Permitting Improvement Steering Council's work. It seems to me that there would be some value in having state and local governments participating as much as possible given the role they play in getting a project off the ground. What are

your thoughts on state and local participation when it comes to coordinating permitting and other reviews and how can we and the Council encourage it?

RESPONSE: Environmental reviews and authorizations result in better outcomes and often proceed more quickly when all stakeholders are engaged early in the project design and review process. For example, early coordination that includes relevant state and local governments helps ensure that project sponsors are not asked or required to implement contradictory measures. The best way the Federal Permitting Improvement Steering Council can encourage local and state participation in coordinating permitting and other reviews is through information sharing and communication. Local and state governments need to be able to see how re-directing resources to increase coordination will result in better outcomes and benefit their communities.

One of the main responsibilities given to the Federal Permitting Improvement Steering Council is to maintain the Permitting Dashboard that shows schedules and other information for agencies' consideration of major projects. What benefits can this transparency bring, and what steps can be taken to improve the Dashboard and the quality of information published on it?

RESPONSE: The Permitting Dashboard provides other agencies, as well as project sponsors, an awareness of the permitting and other review processes required for a particular project or location. In addition, the Dashboard provides contact information for the project sponsors and agency POCs, facilitating communication among all of the project stakeholders.

The Service suggests two potential steps to increase the quality of information on the Permitting Dashboard: (1) increased coordination by agencies submitting data to the Permitting Dashboard; and (2) increased collaboration between the Service and the Federal Permitting Improvement Steering Council regarding appropriate milestones to track on the Permitting Dashboard.

This hearing has focused on the risks and uncertainties for projects prior to being built, which is important. However there can also be risks to infrastructure once it is built, particularly in low-lying areas that may see impacts from sea level rise. How do you believe that public agencies and project sponsors should be integrating climate change projections and sea level rise into project reviews?

RESPONSE: The Service recommends that public agencies and project sponsors use the best available scientific information when planning, reviewing, and implementing projects.

As we consider the potential for FAST-41 to improve the permitting process for an array of infrastructure projects, I believe we should pay particular attention to those projects that protect, restore, and enhance our natural infrastructure. Several projects currently covered under FAST-41 involve significant ecological restoration and resiliency components, including projects in areas ravaged by previous storms and hurricanes. One of these — the Mid-Barataria Sediment Diversion in Louisiana — is specifically designed to, among other things, re-establish natural processes needed to build wetlands and reverse habitat losses on the lower Mississippi River. So delays on a project like this could have

severe ecological consequences. Can you offer your perspective on opportunities we might have to expedite projects like this under FAST-41?

RESPONSE: Inclusion as a covered project under FAST-41 provides a variety of opportunities to expedite project reviews. For example, the increased early coordination associated with FAST-41 will help ensure that potential issues are identified early in the process, thereby avoiding potential delays. As another example, inclusion of the project on the Permitting Dashboard will provide an awareness of the various permitting and other review processes, as well as a mechanism for accountability.

From Senator Steve Daines

Mr. Frazer, thank you for testifying. I am engineer by trade. I am not a career politician, rather an engineer who spent 28 years in the private sector identifying and fixing inefficiencies.

As we work towards President Trump's goal of a one trillion dollar infrastructure package, a surefire way to make the American taxpayers dollars go farther is to eliminate redundancies and streamline the Federal permitting process.

Mr. Frazer, you mentioned that the Fish and Wildlife service is currently participating in numerous FAST-41 projects across all of your service regions. How successful has FAST-41 been in streamlining the review process and are there any areas in which you would recommend improvement?

RESPONSE: FAST-41 is well positioned to deliver enhanced communication, coordination, transparency and accountability for covered projects, providing an effective framework for streamlining environmental reviews and authorizations. The increased early coordination associated with FAST-41 will help ensure that potential issues are identified early in the process, thereby avoiding potential delays. Additionally, inclusion of a project on the Permitting Dashboard will provide an awareness of the various permitting and other review processes, as well as a mechanism for accountability. However, FAST-41 is relatively new and to recommend specific improvements at this time is premature.

The Service is currently a participating or cooperating agency in 22 covered projects "in progress" on the FAST-41 Permitting Dashboard (see attached list).

From our limited experience working on FAST-41 covered projects, the Service suggests two potential steps to increase the quality of information on the Permitting Dashboard: (1) increased coordination by agencies submitting data to the Permitting Dashboard; and (2) increased collaboration between the Service and the Federal Permitting Improvement Steering Council regarding appropriate milestones to track on the Permitting Dashboard.

"IN PROGRESS' FAST-41 PROJECTS WITH CURRENT SERVICE PARTICIPATION OR COOPERATION

Alaska LNG Project

Atlantic Coast Pipeline, Atlantic Coast Pipeline Amendment, Supply Header, and ACP-Piedmont Lease Project

Boardman to Hemingway Transmission Line Project

Cardinal Hickory Creek Transmission Line Project

Chokecherry-Sierra Madre Wind Energy Project

Denbury Riley Ridge to Natrona CO2 Pipeline Project

Desert Quartzite Solar Energy Project

Gateway West Segments 8 & 9 Transmission Line Project

Gulf LNG Liquefaction Project

Jordan Cove LNG Terminal and Pacific Connector Gas Pipeline Project

Liberty Development and Production Plan

Mid-Barataria Sediment Diversion Project

Mountain Valley and Equitrans Expansion Project

Penn East Pipeline Project

Plains and Eastern Clean Line Transmission Project

R.C. Byrd Project

Swan Lake North Pumped Storage Project

Ten West Link Transmission Line Project

Tennessee Gas Abandonment and Capacity Restoration Project

Transwest Express Transmission Line Project

Venture Global Calcasieu Pass Terminal and TransCameron Pipeline Project

WB Xpress Pipeline Project

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