

**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**

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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 be 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.