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S. Hrg. 116–44

OVERSIGHT OF FEDERAL INFRASTRUCTURE PERMITTING AND FAST–41

HEARING

BEFORE THE

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

MAY 2, 2019

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Committee on Homeland Security and Governmental Affairs

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U.S. GOVERNMENT PUBLISHING OFFICE

36–306 PDF WASHINGTON : 2019

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OVERSIGHT OF FEDERAL INFRASTRUCTURE PERMITTING AND FAST–41

THURSDAY, MAY 2, 2019

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

The Subcommittee met, pursuant to notice, at 10:08 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Rob Portman, Chairman of the Subcommittee, presiding.

Present: Senators Portman, Lankford, Romney, Hawley, Carper, Hassan, and Rosen.

OPENING STATEMENT OF SENATOR PORTMAN[1]

Senator PORTMAN. The hearing will come to order. Thank you all for being here.

Our schedule is a little crazy today. We have votes scheduled for 10:30, and there are enough votes that probably we will be taking about an hour break. Our hope is to get through all of your testimony before we run off to vote, and then if you are willing and patient, we would like you to stay here, and then we will come back and have the opportunity for Q&A.

I know Senator Carper has some opening comments; I have some opening comments. We will go through those quickly, get you all sworn in, and then have the opportunity to run to vote and come back.

First of all, thank you for being here and thanks to my colleagues for being here. I know a couple others are planning to join. This is a very important issue, particularly in light of what is going on this week. We had the President and members of the House leadership meeting about infrastructure. Everybody is looking for more money for infrastructure, right? Infrastructure is what really this hearing is about. It is about permitting of infrastructure, broadly defined. It is about construction projects that play a critical role in all of our day-to-day lives. It is about ports and waterways we use for international commerce. It is about water resource projects to stop flooding from storm surges. It is about energy construction to make sure we have the power we need from solar power plants that we will hear about today to pipelines to nuclear power plant construction. It is about coastal restoration that supports the environment. It is also about broadband Internet

[1] The prepared statement of Senator Portman appears in the Appendix on page 35.

throughout the country, which allows Americans to advance their education and rise in the workforce. It is about ensuring we can move forward with these projects in sensible ways.

Delays and lack of investment in these infrastructure and construction projects have a number of damaging consequences. First, it means fewer jobs, and we will hear from Mr. Knisley and others about that today. It means a weaker economy and a reduced standing in the world. It means we are not making progress on major projects and capital is going elsewhere, including to other countries. It is hurting our economy and our ability to create good-paying jobs. One of the reasons we are having so much trouble is this outdated process we have for granting permits for large projects, construction projects, and infrastructure projects.

Everyone is desperate to find dollars for infrastructure right now, right? This is a way, frankly, for us to ensure that we are smarter in stretching the dollars we have further by not having those dollars be wasted on the delays and the dollars will stay here in this country.

Right now, the World Bank ranks the United States 26th in the world for dealing with construction permits for being able to greenlight a project. Twenty-sixth in the world. That puts us behind Lithuania and Tonga. It is also better than it used to be. We were 39th in the world when Fixing America's Surface Transportation Act (FAST–41), the legislation we are talking about today, was implemented. We have made some progress.

Similarly, there was the 2017 Infrastructure Report Card, the most recent one from the American Society of Civil Engineers. They gave the United States a "cumulative GPA" of D+ ranging "from a B for Rail to D for roads." One reason we are so behind is that it takes so long and it is so costly to be able to permit a project here in the United States. We can do better than this. The rest of the world is doing better, other developed countries, and many of the developing countries. Otherwise, capital goes elsewhere.

Let me be clear: We can fix this permitting process without changing the underlying environmental and safety standards, and that is something we will talk about today. Protecting the environment and protecting people who use our infrastructure is critical. But we need strong standards. The process that we use to meet those standards has simply become too complicated and outdated.

I first got involved with this about 10 years ago when American Municipal Power (AMP)—some of you know that group—came to me. AMP was working on a hydropower project on the Ohio River. They told me the agencies reviewing their permit applications were not talking to each other, and they told me as soon as they finished one permit, there was another permit that came up seriatim rather than having anyone be accountable. They said there were mistakes, delays, redundancies. It took them 10 years to get the permit to put a small hydropower plant on the Ohio River. Frankly, I think they wished they had never even started on this project because it just became too costly.

Capital is not that patient. Ten years is just too long, and no one wants to invest in a project that is not going to be ready for at least a decade.

I reached out to colleagues, including Senator McCaskill from Missouri. We did what legislators are supposed to do: we worked on a bipartisan basis with a whole array of stakeholders to put together a new process for permitting. We worked with environmental groups like the Natural Resources Defense Council (NRDC), business groups like National Association of Manufacturers, labor groups like the The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) Building Trades Council, and we introduced this bipartisan bill as part of this effort called the "Federal Permitting Improvement Act." It is now part of the highway bill, so it became part of the FAST bill, therefore, FAST–41, which is Section 41 of FAST.

Large projects apply to get help from the Council in navigating the permitting process. The agencies involved in that project have to designate a lead agency so a project sponsor can have a single point of contact. One agency is accountable. It is very important to have accountability, we learned. The agency is responsible for coming up with a Coordinated Project Plan (CPP) that they submit to this Federal Permitting Improvement Steering Council (FPISC) that we will hear from today. The plan sets out each permit, all the studies needed, and a timeline for completion. Then, as the process moves along, the Council's Executive Director, who is here with us today, resolves conflicts that might arise between the agencies.

The law also gives accountability in another way. It gives the public more accountability because it requires that agencies post a project's plan on the online Permitting Dashboard so the public can see, so the transparency is there, how that permitting process is going.

By the way, FAST–41 does not guarantee a project is going to get approved. It may or may not get approved. It just helps them get the project moving along. It gives them an answer one way or the other.

It also reduces the statute of limitations for lawsuits. The National Environmental Policy Act (NEPA) statute of limitations for most projects is 6 years. That means that for 6 years after permits are granted, many projects really do not get started—they are waiting because of these lawsuits that might pop up.

For covered projects, under this bill it is a 2-year statute of limitations. That was a compromise. We had initially asked for 150 days and then 180 days. But some groups wanted to be sure it was 2 years. That is still a lot longer than the 150 days for traditional transportation projects. Both the FAST–41 2-year limitation and the MAP–21 150-day statute of limitations were carefully crafted, bipartisan agreements signed into law in the Obama Administration. During the Obama Administration, we limited certain transportation projects under our transportation bill in a bipartisan way to 150 days, and ours is 2 years.

Finally, good news. FAST–41 is working. Over the past few years, the Council has saved projects more than $1 billion in avoided delays. There are now 40 major projects on the Permitting Dashboard, and new sponsors are interested in participating and applying to do so. The Council has helped electricity transmission and pipeline projects, as well as several major environmental res-

toration projects and renewable energy projects. For instance, today we are going to hear from Laura Abram from First Solar about how the Council assisted the Desert Quartzite Project move forward with a 450-megawatt solar power development in California.

I am also looking forward to hearing from Mike Knisley, the executive secretary and treasurer of the Ohio Building Trades. The union has been incredibly supportive of FAST–41, and we are grateful for your support, Michael.

I would also like to say that, after a few years of delays, FAST–41 is going full steam ahead. We had difficulty getting an Executive Director in place. We now have one, Alex Herrgott. We will hear from Alex today. I am really glad he is there. After a 21-month gap in an appointed Executive Director, it is good to have an enthusiastic and energetic leader in that job. We will hear from him today.

We wanted to make sure it would work, so we put a 7-year sunset on the legislation. Now that it is working, Senator McCaskill and I introduced a bill last Congress to remove that sunset and give the Council's Executive Director the ability to give advice to other projects when asked. It also would set a 2-year goal for agencies to finish the permitting process for these projects. Two years. It is not a hard and fast deadline; sometimes projects are going to take longer. It is a goal. But setting that goal will help inject additional accountability, common-sense accountability into this process. Even with its slow start, after just 3 years, FAST–41 is now yielding real results. These results mean certainty for project sponsors, which means more certainty for investors and more certainty for projects that they are going to get built. It means more jobs for the people who build these projects. It means better roads, ports, and energy transmission—all of which spur more economic growth. It means being able to move forward faster with much-needed environmental restoration projects, like the coastline restoration projects in Louisiana and the renewable energy projects we talked about earlier.

Finally, again, it enables us to stretch that dollar further to be able to do more in terms of infrastructure.

Thank you all for being here today. I am looking forward to hearing from the witnesses how they are improving the process and what we can do better going forward. I would ask Senator Carper for his comments.

OPENING STATEMENT OF SENATOR CARPER[1]

Senator CARPER. Thanks. Thanks so much, Mr. Chairman, for pulling this together. To our witnesses, thank you for joining us today. I apologize also for the votes. When the Chairman and I are running the show in the Senate, we will make sure that these hearings are scheduled and the votes are scheduled in ways that are more accommodating to what we are trying to get done here.

Forty-eight hours ago almost to the minute, another meeting was convening in the White House, and the President welcomed 10 of us, House and Senate Members, Democrats, all Democrats, to talk

[1] The prepared statement of Senator Carper appears in the Appenidx on page 40.

about a path forward on infrastructure, broadly—roads, highways, bridges, transit, water projects, deployment of broadband—and also to talk about how much it should be, how vast it should be. We talked about everything except how to pay for $2 trillion worth of infrastructure. That will come soon, I am hopeful.

But in the last decade, we have passed some 35 short-term fixes for transportation before we were able to finally pass the FAST Act, which was, I think, the first long-term bill we passed in about a decade.

However, the FAST Act expires, as you may know, in September of next year, and we have a responsibility to avoid another series of short-term fixes. They waste money; they create uncertainty. They are debilitating and force us to put off needed investments. We need to avoid that.

Numerous studies, as the Chairman knows, tell us that we are falling behind other developed countries when it comes to making these kinds of investments in our infrastructure, writ large. With respect to our roads and highway infrastructure, which the Environment and Public Works (EPW) Committee on which I serve as Ranking Member examined in a hearing last month, the challenge we have before us is clear.

Listen to this. We have an $800 billion backlog of investments that we need to make just in our roads, highways, and bridges. An $800 billion backlog. Many of our highways were built more than a half-century ago, our bridges, too, and as a result they are reaching the end of their useful life. More than 47,000 of our bridges are structurally deficient, most of them in Delaware and Ohio. There are 235,000 bridges in need of repair, replacement, or major rehabilitation.

The consequences of underinvestment are great, as you know. Last year, every American—listen to this. Every American lost 97 hours due to traffic congestion on average—97 hours. It is not just like going along at 5, 10, or 20 miles an hour. Sitting still. I have been there and you have, too. But if you add up the cost of all that sitting there and doing nothing, it comes up to about $87 billion that is estimated nationwide in lost productivity. But all of the time that we spent in our cars, trucks, or vans in traffic also contributes, as we know, to air pollution and increases the cost of goods.

Underinvestment in roads and highways also has had an impact on safety. In 2017, more than 37,000 people died in motor vehicle crashes. That is more than the population of Dover, Delaware. Pedestrian deaths are now at a 25-year high. Think about that. Pedestrian deaths are not going down; they are going up. They are at a 25-year high.

Given all that we need to do to improve and rebuild our highways and other infrastructure, I have thought a lot about how we can build projects smarter and more cost effectively. As our Chairman said, our Committee Members, including at least one other recovering Governor here on my left side, I have also thought a lot about—in fact, two recovering Governors. I have thought a lot about how well the rules and the permitting processes that we have in place actually work and how we might make them work

better. Over the years I have supported reasonable changes designed to improve Federal coordination and efficiency.

We have also made a number of changes to permitting and project approval procedures in the last three highway bills. Before we entertain a whole lot of new ideas, I think it is important for us to first determine whether the provisions that we have enacted—some 60 in all in the last three transportation bills—are being fully implemented and staffed—Alex and people like Alex—and actually paid for. We are trying to make sure that we do all of that and follow up. It is not enough just to authorize something. It is important that we have the right people running the programs, implementing the programs, and paying for them.

I have tried to make it clear in the past, but it bears repeating: I am not going to be supporting further weakening of environmental protections in the name of accelerating project delivery. It is critical that the lion's share of provisions we have already enacted in this area be implemented and funded so that we can better understand what their impact is before we consider adopting a whole lot more. To be able to do that, we need effective oversight like we are considering here today, and this is an important hearing.

I believe that all of our witnesses and our stakeholders my staff and I have spoken to in preparation for this hearing agree that the provisions in FAST–41 do show promise. The permitting dashboard, that the Chairman has alluded, in the law calls for offers needed transparency into the permitting process and should help us hold permitting agencies accountable for meeting deadlines. In addition, the Federal Permitting Improvement Steering Council offers project sponsors and other interested parties a place to turn with questions. The Council also creates a venue where the challenges that inevitably arise as a major project progresses can be discussed and resolved.

That said, it seems that the Council and the implementation of FAST–41 have been held back at least in part due to a lack of funding and a lack of leadership. We hope that is behind us now. The Council recently saw a significant increase in its budget, but in past years it was barely given enough to get by.

In addition, until about 4 months ago, the Council lacked a permanent director, but that was before President Trump appointed our friend, Alex. The Council had been operating with an acting director since the end of the Obama Administration more than 2 years ago now.

As a result, we may not have enough information to know whether FAST–41 is working as intended, especially with respect to some of the most controversial provisions.

Having said that, I look forward to learning more today from all of you, and especially from Alex, and our other witnesses, about the Council's work, as well as the other issues that Congress should consider as we work in the coming months to put together a major, bipartisan infrastructure bill.

Welcome, everyone. Thank you.

Senator PORTMAN. Thank you, Senator Carper.

We will now call on our panel of witnesses for this morning's hearing. First, Alexander Herrgott, who, as referenced earlier, is Executive Director of the Federal Permitting Improvement Council.

Second, Laura Abram. Ms. Abram is director of Project Execution West and Public Affairs of First Solar, Inc.

Next, Michael Knisley. Michael is Executive Secretary-Treasurer of the Ohio State Building Trades Council.

Next, Joseph Johnson, who is executive director for Federal Regulatory Process Review and Analysis at the U.S. Chamber of Commerce.

Mr. Raul Garcia, senior legislative counsel at Earthjustice.

I appreciate you all being here today and look forward to your testimony. Our rules require us to swear in the witnesses. At this time I would ask you to stand and raise your right hand, please. 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. HERRGOTT. I do.

Ms. ABRAM. I do.

Mr. KNISLEY. I do.

Mr. JOHNSON. I do.

Mr. GARCIA. I do.

Senator PORTMAN. Let the record reflect that the witnesses all answered in the affirmative. We will be using a timing system today. I know you are aware of that. All your written testimony will be printed in the record in its entirety. We ask you to try to keep your oral testimony, though, to 5 minutes.

Mr. Herrgott, we will hear from you first.

TESTIMONY OF ALEX HERRGOTT,[1] EXECUTIVE DIRECTOR, FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

Mr. HERRGOTT. Alright. Chairman Portman, Ranking Member Carper, and Members of the Committee, thank you for the opportunity to testify today on how Title 41 of the Fixing America's Surface Transportation Act is improving the Federal permitting process. As you know, enacted by Congress in 2015, FAST–41 established a coordinating framework designed to improve the permitting process for a diverse portfolio of proposed large-scale, complex infrastructure projects across the Nation. A key component of the framework is the Federal Permitting Improvement Steering Council, chaired by an Executive Director appointed by the President. The Permitting Council is an interagency body comprised of 14 Federal agencies, the Council on Environmental Quality (CEQ), and the Office of Management and Budget (OMB). In the last 4 months since I became the Executive Director, we have focused on leveraging this interagency body to bring about a new era of transparency, efficiency, and accountability. We are actively reducing unnecessary red tape, costs, and delays for FAST–41 projects.

As you know, today the Federal infrastructure permitting process can be very fragmented, unpredictable, and inefficient, as you can see by the chart over on the left side of the room. There are many Federal statutes that govern infrastructure permitting, and they

[1] The prepared statement of Mr. Herrgott appears in the Appendix on page 43.

are executed by multiple Federal agencies. In addition, there can be significant overlap in statutory requirements and significant inconsistency in the application of those requirements in the permitting process. FAST–41 provides an interagency mechanism to coordinate implementation of multiple permitting statutes including by providing, very importantly, a single unified schedule.

The permitting process can include compliance not only with numerous Federal statutes, but also State and local laws and ordinances, and may vary significantly depending on the unique nature of infrastructure being proposed, such as its location and potential impacts. For example, one FAST–41 project has 19 cooperating agencies (7 Federal, 3 State, 6 County, and 3 other entities), of which 9 Federal permitting actions are tracked on the Dashboard. Another FAST–41 project involves over 30 Federal permitting actions and over 50 State and local permitting actions, one of which could comprise authorization for 611 water crossings.

In recognition of these complex permitting challenges, FAST–41 established a voluntary program for eligible large, complex infrastructure projects for which the Permitting Council provides a one-stop shop within the Federal Government for coordinating process across all Federal agencies. FAST–41 does not modify any underlying Federal statutes, regulations, or mandatory reviews. In other words, the Office of the Executive Director (OED) serves as an impartial third party that helps shepherd projects to deliver a definitive beginning and a definitive end to the permitting process, something we have long desired.

FAST–41 respects agencies' responsibilities as regulators while also serving as a reliable Federal partner to all stakeholders—State, local government officials, tribes, the public, and all project proponents. FAST–41 project permitting durations are, therefore, on average, 2.3 years shorter than other Environmental Impact Statements (EISs) prior to the commissioning of this Council.

This year, the Permitting Council has grounded its activities on five key principles designed to keep FAST–41 projects on track and on schedule: first, demystifying the permitting process at each agency; two, clarifying roles and responsibilities among Federal agencies to avoid issues that could derail a project; three, aligning agency roles and permitting processes, where possible, in the following ways: with joint and programmatic approaches, getting them to actually talk to each other in the very beginning, improved planning among agencies, and maximization of concurrent permitting actions; four, requiring transparency and accountability in meeting milestones throughout the process; five, sharing lessons learned to facilitate successful adoption and implementation of best practices to improve the permitting process across all agencies.

These principles are carried out through four critical Permitting Council activities that work together to reduce the decisionmaking process without compromising our valued natural, community, cultural, and historic resources. These four activities include our fiscal year (FY) 2019 best practices, which is on our website as of earlier this week. The Office of the Executive Director also issues an annual report to Congress which it transmitted on April 15 of this year. Three, the Office of the Executive Director works in partner-

ship with the Council to provide in-person, hands-on facilitation of interagency permitting, not just here at headquarters but also out in the field. This allows my office to help agencies align their permitting processes and develop a prudent, timely, and realistic permitting schedule. Should conflicts arise, FAST–41 provides a formal dispute resolution process to ensure a final decision is reached in a timely and efficient manner.

Finally, as Chair of the Permitting Council, my office is actively working with the Permitting Council agencies to help support agency field staff responsible for implementing FAST–41 provisions and managing the permitting process. The inherent complexity of these projects combined with the decentralized organizational structure of many agencies provides for inconsistent interpretation of policies and guidance from the headquarters offices. This is the heart of our problem.

To address this, my office is working with the agency staff in the headquarters, regional, and field offices to identify how we can best support consistent implementation of FAST–41 provisions, including on-location meetings with agency staff and community stakeholders.

I look forward to continuing to work with you on implementing FAST–41 through the promotion of reliable and comprehensive permitting schedules and increased coordination and collaboration.

Thank you again for the opportunity to participate, and I look forward to answering any questions.

Senator PORTMAN. Thank you. Ms. Abram.

Senator CARPER. I think you just set a record for the most words in 5 minutes. [Laughter.]

In my 18 years in the U.S. Senate, Alex.

Mr. HERRGOTT. Senator, as you recall, I get paid by the word.

Senator PORTMAN. Ms. Abram.

TESTIMONY OF LAURA ABRAM,[1] DIRECTOR, PROJECT EXECUTION AND PUBLIC AFFAIRS, FIRST SOLAR, INC.

Ms. ABRAM. Good morning, Chairman Portman, Ranking Member Carper——

Senator CARPER. This does not count against your time, but I have a member of my staff who just briefs me, and she talks like a million miles an hour. I am always saying, "Diane, I cannot listen that fast." [Laughter.]

Ms. ABRAM. OK. Good morning, Chairman Portman, Ranking Member Carper, and Members of the Committee on Homeland Security and Governmental Affairs (HSGAC) Permanent Subcommittee on Investigations (PSI). I am pleased to be here today to discuss First Solar's experience with FAST–41, the Permitting Council, and recommended solutions to ensure successful and timely permitting of energy infrastructure projects on Federal lands that will create jobs and economic benefits and help our country reach its goal of American energy dominance.

I am the director of Project Execution and Public Affairs for First Solar, and I have worked on solar projects on Federal lands for the past decade. My testimony today will present information from my

[1] The prepared statement of Ms. Abram appears in the Appendix on page 48.

direct experience, with a focus on permitting of the Desert Quartzite Solar Project.

To begin, I would like to provide you with a high-level overview of First Solar. First Solar is an American solar manufacturer and the largest U.S. provider of thin-film photovoltaic (PV) panels. The company has extensive experience and a proven track record developing, constructing, and operating the world's largest solar power plants.

First Solar's world-class 600 megawatt manufacturing facility in Perrysburg, Ohio, employs about 1,250 full-time associates. Last year, I am excited to say that First Solar broke ground on a new 1.2-gigawatt manufacturing facility in Ohio which will directly employ over 500 full-time associates. We have shipped over 20 gigawatts worldwide, have 6,000 megawatts in the United States, and 2,500 megawatts in operation or development on Federal land.

The messages I hope to leave with you today are these:

Number one, photovoltaic solar is one of the lowest-cost energy resources today and is an important part of America's energy mix.

Number two, Federal lands are ideal for responsible solar development, yet we face challenges to utilizing Federal lands, including rents that are not competitive with private lands.

Number three, FAST–41 and the Permitting Council have played an important role in addressing timely permitting of infrastructure projects and should expand its role to further improve interagency collaboration and streamlining of the environmental review and approval process.

FAST–41 and the Permitting Council have supported First Solar in expediting permitting on two projects, including the 100 megawatt Aiya Solar Project, located on tribal land in Nevada, and the 450-megawatt Desert Quartzite Solar Project, located in Riverside County, California.

The Desert Quartzite Project has been in active development for approximately 5 years, and permitting is expected to be complete in October 2019. The project has faced many permitting challenges that have caused up to 2 years in delays; however, FAST–41 and the Permitting Council have provided First Solar with support in helping to navigate the various issues and to assist in keeping the project on schedule. Although First Solar did not have many interagency issues, the Permitting Council did play a key role in supporting us in coordinating across local, State, and Federal levels within the Bureau of Land Management (BLM). First Solar has also received support from the Department of Interior (DOI), which has been responsive to concerns and continues to help facilitate resolution of issues on Desert Quartzite and other solar issues we are working on.

Based on our direct experience, First Solar recommends that FAST–41 and the Permitting Council play an active role in the permitting process from the beginning and assist not only to keep the project on schedule, but to serve as a central point of contact for project proponents to help navigate the complex issues and intergovernmental challenges that can cause project delays. In fact, Desert Quartzite is currently on pause, and close collaboration between FAST–41, BLM, and DOI can help address issues and get the project back on schedule.

In conclusion, responsible construction of solar infrastructure on Federal lands can and should be a bipartisan priority. Many of the challenges can be addressed by FAST–41 and the Permitting Council, but it is important to understand that streamlining alone will not ensure successful development of energy infrastructure projects. It is important to implement more flexible approaches to land availability, ensure rents are competitive with private land markets, and provide adequate staffing.

Thank you very much for the opportunity to testify here today. I would be happy to answer any questions you may have.

Senator PORTMAN. Thank you, Ms. Abram.

Mr. Knisley.

TESTIMONY OF MICHAEL KNISLEY,[1] SECRETARY-TREASURER, OHIO STATE BUILDING AND CONSTRUCTION TRADES COUNCIL

Mr. KNISLEY. Good morning, Senator Portman and Members of the committee. Thank you for your leadership on this issue and for inviting me to testify during this hearing on Title 41 of the Fixing America's Surface Transportation Act. As secretary-treasurer of the Ohio State Building and Construction Trades Council, and on behalf of the 100,000 union construction workers in Ohio that I proudly represent, I am pleased to have the opportunity to appear before this Committee to testify on the outcomes of FAST–41 and its benefits to the Ohio construction industry and those regions in our State which depend on much-needed infrastructure projects for economic survival.

On behalf of the working Ohioans and signatory contractors of the Ohio State Building and Construction Trades, I want to express our gratitude to Senator Portman and Senator Carper and the Members of this Subcommittee for your efforts to modernize the permitting process for major U.S. infrastructure projects. The Committee's commitment to reforming the permitting process through FAST–41 expedites the groundbreaking of major U.S. infrastructure projects, putting tens of thousands of Ohio Building Tradespeople safely and responsibly to work in a timely manner.

Ohio labor leaders, contractors, and project owners strongly support and are grateful for the permitting reforms implemented by FAST–41. To echo Sean McGarvey, president of North America's Building Trades Unions, who testified before the Committee in June 2018, the "permitting process for Federal infrastructure projects must be continually modernized to ensure efficiency, safety, accountability, and transparency."

FAST–41 works for Ohio and the wider Midwestern region our tradespeople serve insofar as it provides increased predictability of project timetables, facilitates coordination between agencies and solves interagency conflicts, sets reasonable deadlines in the permitting process, and reduces drawn-out litigation timeframes. As an organization driven by clear standards and safe, efficient processes, we applaud this.

On behalf of the members and contractors of the Ohio State Building and Construction Trades, we commend the forward-look-

[1] The prepared statement of Mr. Knisley appears in the Appendix on page 54.

ing approach that this Committee, as well as the current and previous Administrations, have taken to reform the Federal project permitting system while maintaining responsible regulations that protect workers, our communities, and our environment. FAST–41 demonstrates that our government can come together in a bipartisan way to reform a broken permitting process without compromising the underlying regulations that keep American workers and their communities safe and healthy.

In Ohio, we see firsthand how crucial such balanced reform measures are—not only for our economic growth and stability, but for the very social fabric of our communities. Particularly in southern Ohio's Appalachian communities, where local economies depend on a major project moving forward, it is very emotional for community members to endure the uncertainty of a broken permitting process.

A project like the American Municipal Power's R.C. Byrd Hydropower development would bring thousands of middle-class construction jobs to the southern Ohio region and spur much-needed economic growth. Before that project was included as a Federal Permitting Improvement Steering Council project, it was held captive by a 10-year licensing process. Redundancies and interagency disputes cost project owner AMP millions of dollars. The dollar figure does not account for the lost opportunity cost caused by a delayed project groundbreaking. When our workers are bringing home a steady paycheck from major projects, their entire communities feel the economic benefits of those earnings. But when communities wait for years and years for a major project to break ground, local businesses and the organizations funded by the tax revenues from these developments also suffer. A stagnant Federal permitting process prolongs economic stagnation in our communities.

It is my professional opinion that had FAST–41 been in place when the R.C. Byrd Hydropower development was proposed in 2007, this project would be well underway. Hundreds of union construction workers from depressed areas of Ohio would be on the job daily, and those union construction wages would flow back into Appalachia's depressed local economies.

I have attended numerous community debates and agency hearings across the State of Ohio for projects similar to the R.C. Byrd Hydropower development. Let me tell you, it is emotional for a community to endure the planning necessary to break ground on a major infrastructure project. Differing factions in a community debate their economic and environmental concerns. Conflict among permitting agencies exacerbates that conflict, fueling misinformation over major projects and pitting neighbor against neighbor through years of uncertainty. This is how real Ohioans experience a dysfunctional permitting process. We see value in stabilizing the public sentiment for development projects, labor, contractors, and owners. When there is delay, and uncertainty, it is felt by our members in the community.

All of you here in Washington have the power to relieve some of that conflict for hard-working people and their local governments. I urge the Federal Government to continue the progress that FAST–41 has started. I urge this body to make permanent the re-

forms of FAST–41, to strengthen its provisions, and to expand its application to more projects.

The Nexus Pipeline is an example of the real benefits FAST–41 reforms have brought to Ohio. The Enbridge gas transmission pipeline improves regional access to clean-burning fuels and was among the initial Fast–41 projects. Ohio Building Tradespeople across numerous communities and local union jurisdictions built the pipeline, which spans from northern Ohio to the western Toledo region. When I spoke with the owners of the pipeline, they felt strongly that FAST–41 brought strong value to the project due to the streamlined permitting processes and Federal interagency collaboration. In contrast to the decade-long R.C. Byrd permitting process, the Nexus Enbridge permitting took only 3 years. Since ground was broken on the pipeline, the project has created more than 6,800 middle-class construction jobs with $650 million in wages plus benefits, the majority of which have been in Ohio. One Ohio school district expects to net $25 million in property taxes over the next 5 years as a direct result of that project being moved in a timely manner.

The owners of this project and the Ohio Building Trades applaud this Committee and the sponsors of FAST–41 for removing the barriers to the project's success. One of the few bottlenecks in the Nexus Pipeline's development was the slowdown caused by a lack of quorum at the Federal Energy Regulatory Commission (FERC) in the final permitting. As a result of the unfilled positions in FERC, 4 to 8 months of delay were added to the pipeline.

The owners have asked me to convey to you their desire to see continued modernization and streamlining through a permanent FAST–41 program. We ask the Committee to reinforce interagency collaboration, and we implore our agencies to strive every day to work more efficiently. The one thing that owners need is certainty in the permitting process. If owners know the timelines, they can work with that information. It is the uncertainty that gives them pause in proceeding with major projects because there is a lot at stake for the owners, contractors, and working people.

I am going to stop right there and thank you for allowing me to voice the Ohio State Building and Construction Trade Council's support for FAST–41. We know there is room for progress, and we applaud this bipartisan proposal to strengthen and expand the FAST–41 policies permanently.

Senator PORTMAN. Thank you, Mr. Knisley.

Dr. Johnson.

TESTIMONY OF JOSEPH M. JOHNSON, PH.D.,[1] EXECUTIVE DIRECTOR, ECONOMIC POLICY DIVISION, U.S. CHAMBER OF COMMERCE

Mr. JOHNSON. Good morning, Chairman Portman and Ranking Member Carper. Thank you for the opportunity to discuss this important issue today. The Chamber applauds your interest and continued efforts to promote and support common-sense Federal permitting reform.

[1] The prepared statement of Mr. Johnson appears in the Appendix on page 58.

My statement today details the Chamber's support for the Federal permit streamlining provisions of FAST–41 and important next steps that are needed to help us modernize America's infrastructure.

FAST–41 established a straightforward process to speed up permit decisions without risking the necessary health and environmental protections afforded by the underlying statutes. It included designation of a lead agency, timetables for projects, coordination between agencies, dispute resolution mechanisms, and judicial review reforms. Importantly, it created the Federal Permitting Improvement Steering Council, the multiagency body that is responsible for leading the process and doing the hard work of ensuring that the process works as intended by the statute.

The Chamber has long stressed the need to streamline the Federal permitting process and was a supporter of FAST–41 from the very beginning because the benefits of permitting reform are overwhelming.

First, as a general principle, government should operate in an open, transparent, accountable manner, and FAST–41 finally delivers this with the environmental review and permitting process where these attributes had historically been lacking.

The Council has worked hard to make certain that agencies set a permitting timetable and stick to it. This effort also helps to ensure a more fair permitting process. Permit applicants deserve to get a decision in a timely manner, not to face an open-ended process fraught with uncertainty. Reducing uncertainty and expediting the permit review process are at the heart of why FAST–41 produces real, measurable benefits. Reducing uncertainty spurs investment, which helps more projects get access to capital and obtain it at a lower cost. Both uncertainty and slow progress reduce expected return on investment, taking many potentially profitable projects off the table due solely to the uncertainty created by the permitting process.

FAST–41 goes a long way to curing this by significantly reducing uncertainty and speeding up the permitting process. Under FAST–41, project sponsors are better able to line up investment on the front end because they know that there will be a clear project timeline, and that even if unexpected delays do crop up, which they inevitably do on such large, complex projects, the Council will work hard to ensure that they are minimized and keep the process on schedule. The end result is that more projects get funded and at lower capital cost, and that helps grow the economy and create jobs.

Getting more projects funded and moving forward is good for the economy, but it is also crucial for renewing our aging infrastructure. FAST–41 is a necessary element in modernizing America's infrastructure. To that end, the Chamber strongly supports the Federal Permitting Reform and Jobs Act. This bill takes necessary steps to strengthen FAST–41 that are needed for infrastructure renewal.

First, it eliminates the 7-year sunset in FAST–41, ensuring that FAST–41 can continue to smooth and expedite permitting for major infrastructure modernization projects into the future.

Second, it expands the range of eligible projects, including to more transportation infrastructure projects, which is also critical for modernizing our infrastructure.

Finally, it sets a 2-year goal for permitting covered projects by requiring agencies to submit a plan to the Council that adheres to that timetable.

The Chamber firmly believes there is no good reason why any Federal permit should ever take longer than 2 years to get a decision on.

The Chamber has produced a four-point plan to modernize America's infrastructure, of which enhancing the usage and effectiveness of FAST–41 is a key component. We believe that the additional steps in the Federal Permitting Reform and Jobs Act are necessary to achieve that goal and should be included in any highway or infrastructure package considered in this Congress. Modernizing America's infrastructure is a truly bipartisan issue, and we urge you to take action on it this year.

We look forward to working with this Committee to ensure that we have the necessary permitting reforms in place to modernize America's infrastructure. Thank you, and I look forward to your questions.

Senator PORTMAN. Thank you, Dr. Johnson.

Mr. Garcia.

TESTIMONY OF RAUL E. GARCIA,[1] SENIOR LEGISLATIVE COUNSEL, EARTHJUSTICE

Mr. GARCIA. Thank you, Chairman Portman, Ranking Member Carper, and Members of the Committee for inviting me to testify today. My name is Raul Garcia, senior legislative counsel at Earthjustice.

NEPA is a tool that gives communities a voice in the development of our national infrastructure. All stakeholders, including industry, labor unions, and, most importantly, front-line American communities, can use NEPA to advance their priorities. NEPA stands for the common-sense principle that we all learn as children: Look both ways before you cross the street. That is what NEPA is. It allows us to examine the impacts of our actions to see the best way to build a project and not get run over.

Moreover, contrary to what you have heard here today, NEPA is not the source of delay in infrastructure development. Countless studies by the Government Accountability Office (GAO) and the Congressional Research Service (CRS) all say that the primary causes of infrastructure delays are lack of funding and changes in project design.

You have already heard today about some of the good things that FAST–41 brings to the table. The existence of the Permitting Council itself will increase coordination between agencies, project sponsors, and, when implemented properly, front-line communities. The Dashboard creates more transparency. We would encourage further investment into this tool so that the public knows the status of those projects in their communities.

[1] The prepared statement of Mr. Garcia appears in the Appendix on page 63.

Nonetheless, the conversation here today and the ones happening within the Council itself are incomplete. The text of FAST–41 does, in fact, curtail environmental and public input protections. For example, provisions in FAST–41 arbitrarily shorten the public comment period for NEPA reviews. This is particularly problematic because we are dealing with the most complex projects in our country. Other provisions attack alternatives offered by the public as well as public access to the courts.

To put things in perspective, though, we have to talk about the everyday person who has to take care of their family, who has to hold down one or more jobs, read the most complex environmental review documents in the country, and then come up with comments, all within 45 to 60 days. Oh, and if they cannot get that done, FAST–41 eliminates their right to stop any potentially illegal project in court, projects that can have significant impacts on the very families that they care for.

Make no mistake. These provisions are an attack on communities, their health, safety, and their voice. They should be stripped away or allowed to sunset.

Turning to the implementation of FAST–41, it is at best inadequate, delayed, and incomplete. The Council went almost 2 years without a Chair when the President did not even need Senate confirmation in order to appoint somebody. Throughout this Administration, it has lacked funding and staff. In fact, instead of providing a Chair and resources for the Council, the Administration increased delays by creating a duplicate council within the Department of Commerce that subtracted importance and resources from the FAST–41 Council. Most importantly, although front-line communities will inevitably bear the impacts of FAST–41 projects, the Council is systematically excluding their voices from the process.

Last Tuesday, the Council held its only stakeholder hearing so far. In panel after panel, we heard how the Council worked for projects sponsors, but there was almost no discussion of how community stakeholders could reach the Council. After attending, I can certainly understand why a project sponsor would want to partake in FAST–41, but never heard about how local communities could do the same.

Overall, there is a particular lack of engagement with communities of color and low-income neighborhoods. Crucially, most projects with negative impacts are usually built within these communities. It is alarming to see that their input is excluded by the Council.

On Tuesday, not one panel—not one—mentioned communities of color or low-income in their prepared remarks. To the best of my knowledge, not a single member of these communities spoke on the panels. The Council should be a tool for everyone to get information and guidance to navigate the permitting process. Profit-driven project sponsors should not be the only ones with access to this entity.

To be clear, profits for project sponsors should never come at the expense of the health and safety of the communities our infrastructure needs to serve. Under its current form, we have to ask ourselves: Who does the implementation of FAST–41 actually benefit?

Taking all these factors into consideration, I have two asks from Earthjustice. Congress should strip the provisions that limit public input, judicial review, and alternative analysis from FAST–41. FAST–41 should be adequately and equitably implemented and its impact studied before Congress considers making it permanent.

Thank you very much for your attention, and I look forward to your questions.

Senator PORTMAN. Thank you.

We are going to literally make a run for the vote. We will be back as soon as we can, and I think it will be about 45 to 50 minutes. I appreciate Senator Hawley being here. I think we have three votes. OK, so less time than that. I thought we had four. We will see you shortly, and I appreciate Senator Hawley being here, and I hope you will be able to come back to ask questions as well. I will prioritize you over me.

Thank you all.

[Recess.]

Thank you all for your patience. I appreciate it. I thank Senator Carper for rushing back as well. We have some other colleagues who have told me they are going to try to get here for questions, and if they cannot get here, they would like to submit some questions for the record, which is, I hope, something you all will respond to.

On FAST–41, the key is that we have a process that works, and I expressed my frustration, as some of you know, during that 21-month hiatus when we did not have an Executive Director. I am glad, again, we have somebody in place now. I am really impressed with the report and the fact that we are able to say that we have saved about $1 billion in avoided costs for FAST–41 projects. That is the kind of——

Senator CARPER. Real money.

Senator PORTMAN. Real money—results that we are looking for. We still have a process in place to make sure that more people know about this, that projects can apply. We need to get information out. We had a good stakeholders' meeting—Alex, when was that? The day before yesterday—the General Services Administration (GSA), and there were about 250 people there, including a lot of agency representatives. It was open to everybody. In other words, there were people there from environmental groups. Raul, I do not know if you were there or not. You were there? There were people there from business groups, there were people there from labor groups who were kind of just doing a check-in. I was delighted to go and just talk about what the intention was initially, what our legislative intent was, how this had been bipartisan from the start, and how we spent a couple years putting together what we thought was a fair way to try to streamline these major projects.

I guess what I would first do is I would just like to ask you, Mr. Herrgott, since you are the Executive Director now in place, what progress have you made in the last year in helping projects move forward in the permitting process? How would you describe it?

Mr. HERRGOTT. Thank you, Senator Portman. Just to be very clear, the world that existed prior to the Council was a legacy, paper-based, opaque process. It existed in the Dark Ages. In many

cases, when a project was ready for a major environmental impact statement, the notice of intent is published in the Federal Register. It could be buried within 10,000 pages. What the Council primarily does, and what I believe it does in its truest form, is increases engagement at all levels, because this Dashboard right next to us is the single point of contact that lists in real time, immediately, all facets and all dependencies within that project throughout the entire 2-, 3-, 4-year process so that the entire world can see.

All you need to do is Google the project name, and the Permitting Dashboard will be called up, and then you can see anything that would potentially impact your community, as opposed to where we were before where you might have a NEPA public meeting that is at 11 o'clock on a Wednesday that was very difficult to get to and it was very difficult to discern what was actually going to happen to your community, to your State, to your county, or to your private property. Now we have an unprecedented level of transparency and accountability at all levels, not just on State/county officials but also on the Federal Government that makes it much easier to make informed decisions, because at the very base of NEPA it is to use all relevant information to bring it to the surface so that we can make informed decisions as policymakers while engaging all facets of the community. What that has done for us is ensure that these projects are inoculated from criticism that we did not engage fully at all levels. Because what we have seen, and what is borne out in facts and not theoretical criticisms, is that the projects that are on this Dashboard are of a nature in which I do not believe, at their conclusion, there will ever be any doubt that they fulfilled the entire spirit and the intent of what was intended, not only by NEPA but by the spirit of FAST–41. In no way are any of these projects curtailing any engagement at any level. In fact, it is the way we always should have been doing business, and I am proud to ensure that we continue to bring all folks in as ensuring that folks that come to the Council, that elect to be part of this Dashboard, are getting the kind of service from their government that they deserve.

Senator CARPER. Could I just say something?

Senator PORTMAN. Yes.

Senator CARPER. I will say this to Senator Lankford. I was kidding Alex earlier when he gave his opening statement. I said he crammed more words into a 5-minute statement than——

Senator LANKFORD. He gets paid by the word.

Senator CARPER. That is what he said. I just want to say, Alex, that was great.

Senator PORTMAN. How many projects are currently on the Dashboard?

Mr. HERRGOTT. Thank you. We have 18 completed projects. We have 17 active. We have about two planned. On the phone during your break, we were talking to two potential project sponsors that are looking to join the Council. Part of the reason we had the stakeholder engagement on Tuesday was to ensure that those that are actually putting capital at risk—mayors, Governors, and stakeholders—know that this service exists. At the end of the day, those are our customers.

Senator PORTMAN. How can the public access this Dashboard?

Mr. HERRGOTT. All they need to do is go to permits.performance.gov and email us, fast.fortyone@fpisc.gov.

Senator PORTMAN. Performance.gov.

Mr. HERRGOTT. Permits.performance.gov. When we say the one-stop shop, the user interface, as I always said, if an eighth grader cannot understand it, then it is too complicated. That is a systemic problem with most environmental documents. However, when you go to the Dashboard, anybody can readily understand whether a project is affecting them.

Senator PORTMAN. Which goes to the transparency, but also accessibility and inclusion.

Senator Lankford is here, and I want to get to his questions, so I am going to stop here and come back and ask questions of everybody. Again, thank you for your patience. Senator Carper.

Senator CARPER. If Senator Lankford is ready to ask questions, I would be happy to yield to him.

Senator LANKFORD. Clearly you are the senior Member, so feel free to ask your questions—I am going to stick around—because I want to hear your questions, anyway.

Senator CARPER. Alright. Great.

Alex, a first question for you. In Delaware, we have many people who spell their last name H–E–R–R–G–O–T. We pronounce their name "ergo," like Monsieur Herrgott. How do you pronounce your name?

Mr. HERRGOTT."Her-got."

Senator CARPER. Why? [Laughter.]

Mr. HERRGOTT. I often say the second "T" is silent, but I guess that is what my father always called me.

Senator CARPER. OK.

Mr. HERRGOTT. But a Jesuit priest in my upbringing used to call me "Mister Got" as that is the definition in German.

Senator CARPER. Fair enough. Everybody, thank you again for coming today and for your testimonies and for your patience with us. Mr. Herrgott, you mentioned to our staff this week, I think both Senator Portman's staff and mine, that the lack of resources and other constraints have limited the Council's ability to focus on more than maybe 10 or so projects that it has seen through the permitting process to date. Could you just take a minute and elaborate and talk a bit about the resources you believe that you and the Council need to ramp up the work you are actually able to do? There is a lot out there, as you know.

Mr. HERRGOTT. Sure, and I think it is important to set the record straight. Much of the $1 billion in additional avoidance costs happened prior to me actually being appointed to the Council. In fact, although it has been——

Senator CARPER. Sure you want to give credit to somebody else?

Mr. HERRGOTT. My team behind me—in fact, I have many detailees from other agencies——

Senator CARPER. Would the team and the detailees raise your hands? Alright, good.

Mr. HERRGOTT. It is important to recognize that I have not cornered the market on good ideas, and that in order to solve many of these problems, you have to look through a practitioner's mindset. These are the individuals out in the field that have actually

done EISs, who have actually solved problems. That is why operationalizing the FAST–41, the virtues, and realigning everyone's definition of success is very much a behavioral and cultural issue out within the agencies, and you can do no better than having extremely skilled senior-level executives within the agencies out in the field touting what we actually are able to accomplish.

But to be very clear, the Council has been working for 2 to 2½ years, as was intended. Just because I was appointed does not mean that all of a sudden we started at a new beginning. In fact, what we are doing now is broadening our marketing to ensure that the entire world knows that this service is being offered. We have close to $175 billion——

Senator CARPER. Let me interrupt. I want to come back to my question.

Mr. HERRGOTT. Yes.

Senator CARPER. I was not there, but my staff tells me that you mentioned to them that a lack of resources and other constraints have limited the Council's ability to focus on more than 10 or so projects that it has seen to date. I just wanted you to talk about the resources that have been provided and their adequacy or maybe inadequacy. Just focus on that, please.

Mr. HERRGOTT. Sure. In recognition of——

Senator CARPER. Just do it slowly.

Mr. HERRGOTT. In recognition of the imperative of the Council, in this year's appropriations bill Congress awarded us with $6 million, which more than quadruples our current funding level. With that, we have been able to acquire reimbursable agreements where we are actually paying agencies to bring on these detailees behind you. We expect, as the Council continues to grow, that we are going to have more than the nine projects that we have acquired voluntarily over the last year and a half and that we fully expect to be up at 15, 20, or 25 additional projects over the next year, year and a half. The $6 million, the resource constraints we had previously had now have been augmented so that we can address the challenges in the future.

Senator CARPER. Alright. Thank you.

Mr. Garcia, thanks again for being here today and for your help. You have talked in the past—and here today as well—about some of the provisions in FAST–41 that concern you and, I know, others and that you think the Congress ought to reconsider. You seem to agree, though, with most of this panel, however, that Mr. Herrgott's Council plays a positive role in the permitting process. What do you think that you and your organization would need to see to be able to say that the Council should be maybe extended or even made permanent?

Mr. GARCIA. Yes, I think that we have to decouple the provisions of Title 41. There are some that are extremely well thought out and are going to have very good impacts when implemented properly, and then others that do attack environmental protections, and that means attacking public health protections. But in terms of the Council itself, we think it is generally a great idea. We encourage conversations to happen early and often. I think that our ask is to make sure that these conversations are not just happening between project sponsors and agencies, but that communities on the ground

are being met at their level. That means going out into the community and actually asking communities on the ground what is needed, what infrastructure actually makes sense in their own towns and their own back yards.

Senator CARPER. Thank you. This is an issue we want to explore with you further as we go along.

The Federal Permitting Improvement Steering Council has been working with temporary leadership and a limited budget, Alex, until you were named the Executive Director a couple of months ago. Would you take another minute or so and just talk about the steps you have taken since you started in your current role to ramp up the Council's activities? You mentioned some of the human beings that are sitting right there behind you. Going forward, this is really a key question. How do you measure success? I love to ask that question: Well, how do you measure success? But just talk about that.

Mr. HERRGOTT. That is a very good point, and I think what some of the project sponsors and others have mentioned is in the absence of the Council, in the absence of having a reliable Federal partner, much of which is not seen are the projects that would have not otherwise happened, go/no-go decisions, in particular, since many of these projects are based on the possibility of raising additional tax revenue or going to the debt and equity markets. In the absence of having the predictability provided by this Council, we would never have these projects. That is somewhat of a subjective positive, that is not necessarily encapsulated in the $1 billion in savings, and that is very important that we point out.

I spent about 3 weeks traveling to about 40 cities in 25 days—cities that I did not even know existed—on outreach out in the West, ensuring that I was going to field offices and engaging directly with the public, with tribes, and with low-income and disparate populations to ensure that they understood that we existed and that we were a transparency tool, to help explain that this is an unprecedented level of accountability that the government has not traditionally had. I think as we continue to gear up and we continue now that we have demonstrable results at headquarters, as we push this out to the field, since many of these project managers are at field offices, those are the ones that have the fiduciary and regulatory responsibility to sign on the dotted line. Those are the ones that we need to get to to ensure that they are engaging at the very front end of the process with these coordinated project plans, which require full community engagement. The project sponsor, and all of the relevant Federal agencies on day one actually sit across from each other, not just passing emails back and forth but sit across from each other and establish their roles and responsibilities to solve problems. At the end of the day, I always say we are not trying to force yeses, we are just trying to force decisions. That is where I think, as we continue to gear up and build on the successes of the past, that our incubation of this methodology and the existence and the recognition that we exist and we are here to serve you is going to be essential to our continued success.

Senator CARPER. Maybe that could be part of our guidelines here. We are not trying to force yeses; we are trying to enforce decisions. That is good. Thank you. Thank you all.

Senator PORTMAN. Senator Lankford.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Mr. Chairman, thank you.

I would say the number one thing I hear from most folks that deal with the Federal Government, whether that is a constituent calling me about an issue with VA or Social Security or their Federal retirement, or that is a business owner who is in the process of expansion, is: "I just need an answer."

Mr. HERRGOTT. Yes.

Senator LANKFORD. Almost every constituent call that we get on all of our casework is not about "I need preference for one way or the other." It is just, "I cannot get an answer." To talk about a process that has been created, that is being tested and evaluated, that hopefully we are learning from to try to develop a process to where the Federal Government gets to an answer is one of the things that my constituents in Oklahoma are screaming for. I am grateful to see that there is an ongoing experiment to see how this is working.

Let me run a couple of questions past you, Alex. One is: What have you seen so far in going through this process multiple times that we need to revisit that is a barrier to collaboration, a barrier to getting to decisions, whatever that decision is, that if this is reauthorized we need to address in the next reauthorization?

Mr. HERRGOTT. Thank you for that. As was mentioned earlier, the Council does sunset in 2022, 7 years after it was enabled by the FAST Act. We have already seen from project sponsors that have a 3-to 4-year horizon on delivering their projects, they are already concerned about whether or not the Council will be in existence 2 to 3 years from now. It is already having a cooling effect on the excitement of projects that are a year out.

The other challenge is in our ability to coordinate at all levels of government. As you might imagine, there are more than 30 Corps offices across the country, 50 different forest supervisors, all of which have a responsibility. It is going to be a challenge for us as we continue to enable and empower these chief environmental review and permitting officers (CERPOs), which are the certified environmental specialists that are one under the Deputy Cabinet Secretary which are a member of our Council, to ensure that they are able to drive the milestones and drive the timelines throughout their agency.

I think in the past not many folks within the agencies understood what the Council was about. We are not an accusatory entity. We are a facilitator. Our power is in the power to convene. I think that now that we have the resources to fully enable the vision that we have, that as we continue to make our way as we take this to the field, it is going to be extremely important, because that is what the project sponsors are asking for. That is what they have determined gives us value for them to join.

Senator LANKFORD. I am trying to read between the lines here. One of the things you are saying that may be a problem is we get another year or two down the road, the Council is not going to be as effective because more people are not going to use them because

they do not know if they are going to outlive the Council. Action from Congress to decide——

Mr. HERRGOTT. Yes.

Senator LANKFORD [continuing]. If this is going to continue needs to be sooner rather than later.

Mr. HERRGOTT. Yes.

Senator LANKFORD. Which is a challenge for us to be able to get to decisions as well one way or the other, which also bleeds over into everything else. I think that is what Senator Carper was alluding to as well. That is one of the things that we need often, is a nudge to be able to get to that decision faster.

Is this an area that should be expanded to other programs? Are folks coming to the Council saying, "Why don't you do this for this?" Is that coming up or not?

Mr. HERRGOTT. It is, and we do have a process. We will be having a Council meeting, which, as I mentioned, is the Deputy Secretaries of all the Cabinet members. We will be sitting down in a meeting where we could potentially add new sectors. We have the ability to do that. However, I must point out that FAST–41 is not just about highways and bridges. We are broadband, we are hydroelectric, we are transmission lines. The full breadth of the projects that we have brought in, I do not think, has fully maximized or optimized what we currently are able to do. I think that we could do far more now that we have the resources.

The question is not do we need to add new sectors, but what we need to do is convince project sponsors that we exist and that the water is warm and that they should join the Dashboard.

Senator LANKFORD. Ms. Abram sitting next to you can definitely testify that it is not just about highways and bridges.

Mr. HERRGOTT. Yes.

Senator LANKFORD. It is solar power as well and electricity generation. Let me ask you an unfair question, but it is PSI so we get to ask unfair questions. Which agencies are not working with you well?

Mr. HERRGOTT. I think all agencies have their challenges. I think the largest agency——

Senator LANKFORD. Which agencies are not working with you well?

Mr. HERRGOTT. They are all working with us well within the constraints of what I think they can do. However, I will point out that agencies like the Department of Interior and others that have a diffuse network of responsibilities and legal responsibilities spread across five different agencies within the overarching Interior Department, that is where much of the coordination and what we have seen has the greatest room for improvement.

Senator LANKFORD. OK. What areas of concurrent permitting are working? What areas of concurrent permitting are not?

Mr. HERRGOTT. That is a good question. I would have to think about that one. I think that what is happening is in many cases—to give you an example, Fish and Wildlife Service (FWS) has jurisdiction over trout. The Department of Commerce, the National Marine Fisheries, has jurisdiction over salmon. The fact that we would have two biological opinions paid for by taxpayers for two different analyses done by the same Ph.D. biologists on the same

project at the same time sequentially by missing a spawning period, the fact that that has happened up until about 6 months ago. Now we are forcing a recognition of the importance of staging resources in a constrained environment within agencies to do things rationally and prudently to ensure that we are giving the best rate of return on the permitting dollar, and that is really what is not necessarily seen from the outside. We are finally getting agencies to look at their competencies and align them together so that we can make sure that the administrative record is as strong as possible while recognizing that all environmental statutes were met.

Senator LANKFORD. Absolutely it is not a question on trying to be able to hit all those. Some of those concurrent things, though, build on one another. While we are trying to be able to work through concurrent permitting on that, that sounds great in theory. I guess my question is: Are you finding an area in practice where you really need this complete before this can be done, they really cannot be concurrent——

Mr. HERRGOTT. Let me just take the Army Corps 404 process, which you know all too well. Even though on the Dashboard it used to show—or you would get a call saying, "My 404 permit has not been issued." Now on the Dashboard, when you click on the 404, it will show that there is a responsibility and a requirement from the Environment Protection Agency (EPA), also from the U.S. Fish and Wildlife Service, and then also from a separate side of the Corps, on the 408, which is the engineering side. Before, you would just be blaming the Corps for not getting your 404. Now all the dependencies are out there for the world to see, and so that concurrence is now facilitated in a way where we can actually troubleshoot where the problem is. Instead of having agencies pointing fingers at each other, we can actually fix the problem. That did not exist up until a year or two ago.

Senator LANKFORD. That is a huge asset. I would tell you, one of the frustrations that I get from tribes consistently on any major project that they do, especially from the tribes, is that they are required to do a NEPA evaluation at the beginning. Great. They do it. Then it drags on through the process so long, it expires. They do another one, and then it drags on forever again. Then at the very end, they come back and say, "We need you to do that one more time."

Mr. HERRGOTT. That is a good point, and I——

Senator LANKFORD. They have never minded doing it. They hate doing it three times.

Mr. HERRGOTT. Well, and I will point out that although we have talked about NEPA and the environmental impact statements, there are up to 50 other Federal permits and authorizations that could be required after your record of decision. Typically, agencies—it is a lead agency. Their job is done after the record of decision, and then you are walked off a cliff of uncertainty where you have to hire consultants and others to try and figure out where your disparate permits are in different stages and/or call your legislative members.

That is not what we do. We have everything on the front end so that you can figure out where all those issues are on the back end

so we can bring them to the front end and ensure an end-to-end solution. That is at the heart of what we are doing.

Senator LANKFORD. Great. Thank you.

Mr. Chairman, thank you.

Senator PORTMAN. Thank you. Really good questions. I mentioned earlier I got involved in this initially with a hydroelectric project on the Ohio River. Yes, we have moving water on the Ohio River, and it is great for hydro. It was a lock and distributor and manufacturer. And, 10 years to get through this process. At that point they wished they had never even entered into it. Incredible costs and delays. This is for a small municipality who was trying to figure out away to get in this case, cleaner energy.

Ms. Abram, I thought that the question that was asked about the sunset was really important, and I want to ask you—I do not know what your answer is going to be. If you were to think about another project today, knowing that the current sunset expires in 2022, would you submit that project if it was a complicated project, say one of your big ones in Nevada or California, to the Council? Or would you be concerned that 2022 is coming too quickly and that it might be a waste of time for you to engage with the Council?

Ms. ABRAM. Thank you for your question. Yes, first of all, I would want to submit that for FAST–41 because I do think there is tremendous potential, and I think we are just getting started. If I were to submit a project and I knew it was going to sunset and I would be in the middle and could not take advantage of that, that would be problematic.

I think it is really important to continue this. As I said, I think we are just getting going. I think it can bring tremendous benefit, particularly in just helping to facilitate even within the Department of Interior. I mentioned that in my comments between Federal, local, and State levels, just to work through issues. Keeping to schedule is one thing, but problems come up. Working through those and being able to do those quickly and efficiently and getting the help really just to facilitate that, I think getting engaged there—and it is, as you said, not to oversee or—it is really just to help everyone work better together and faster, and that is something I would like to see more of. I would like to see you let more companies besides us know about this. People have asked me questions, and they are very interested.

Senator PORTMAN. With regard to the sunset, maybe to you and the other members, what would it mean for a project sponsor being interested in using FAST–41 if there was not a 7-year sunset and instead there was permanence? What would that mean to a project sponsor like you? What would it mean to your building trades guys, Michael. Go ahead.

Ms. ABRAM. Yes, for me what it would mean is that I would have more certainty that I would be able to get a project hopefully through the permitting process faster. I also want to emphasize that it is not to short-cut the important environmental review and also community engagement. I want to make that point because, for myself personally, for First Solar and the work I have done over this decade, I am really proud of our engagement. We engage early and often with communities, with environmental groups, and with

tribes to really understand what the concerns are and to be able to—I have changed project footprints and reduced them and moved them to be able to account for that.

I just wanted to make that point, but to have the ability——

Senator PORTMAN. FAST–41—sorry to interrupt, but FAST–41, our intent was to provide a more transparent way for precisely that kind of outreach, and the previous system for these major projects was much more opaque. Now you have the ability, as you can see on that Dashboard—well, you cannot see it because the writing is too small, but you could see if you got up close that, you have the ability now to access online through electronic means the progress and to have your input be recorded.

Ms. ABRAM. That is right. I think that that helps a lot. The NEPA process itself requires that kind of engagement and output, and the FAST–41 just makes it easier, I think, to access it for folks. It is also important for project sponsors like First Solar to be actively engaged and to listen, and it makes our projects better.

Senator PORTMAN. Yes. Mr. Knisley, can you explain why it is important for building trades folks you work with to have some certainty in the permitting process?

Mr. KNISLEY. Absolutely. Chairman Portman, when I look at the sunset provision, if this would happen, on a simpler note it looks like you just gave up, this Committee, the government, that you have put forth all these efforts and you have seen it has made efficiencies, transparencies, and taken project timelines. We look at the Byrd project, 10 years. When I first saw that—the information was given to me by AMP—I was astounded. Then you go to the Nexus Pipeline Project, less than 3 years with that.

To our members, they look at this, too, this would be devastating. It would be devastating to the communities. It would send a strong message, because in Ohio we have a lot of multinational corporations. I look at my hometown in Lima, Ohio, with Husky Energy from Canada. It sends the wrong message even to international corporations. You know that investment dollars are very fluid, and they can go anywhere. They look at what is the best place we want to do our business.

I cannot emphasize enough that we need to keep this going, remove the sunset provision, and allow this to keep working. It has already shown you have a new Director. I just met Alex today, and he looks like a fine young man who is going to make strides with this thing. Just keep the process going. Do not give up on it.

Senator PORTMAN. Do you think he talks fast enough? [Laughter.]

Mr. KNISLEY. Maybe. I do not know where Alex is from. In the Midwest, we are little slower. You could see by my comments. I went into overtime with that.

Senator PORTMAN. You did fine, Mike.

Mr. KNISLEY. If I could, because in my comments I talked about the local communities, how devastating this is. I come from a small town, Lima, Ohio, about the same size as Senator Carper's town of Dover. In fact, I have an older brother that works for Christiana Care up in Wilmington, and his family is down in the Dover area. These towns, they just hook their wagons onto what the government is doing. When a press release comes out and it says—and

I will use Shadyside, Ohio, the $10 billion ethane cracker project, they look at this thing. This community is devastated not because of policies on coal, just cheap natural gas. They were a one-trick pony. If you did not mine it, if you did not haul it, if you did not work in the building trades, if you did not work at the power plants, there was no diversification like we have in Lima, Ohio, even Columbus where we reside now. They hang on every word that comes out of the government, every word that comes out of the press.

I remember in Lima, Ohio, in 2005 we had an ethanol plant coming in, and it was called the "Indiana bat," and it lived in one tree——

Senator CARPER. Indiana what?

Mr. KNISLEY. Indiana bat, a bat that flies around. It lived in one tree on this site of land that they needed for this. Because of environmental regulations and different groups, that ethanol plant that was well over a $150 million investment to the Lima community almost stopped dead in its tracks. The community, I watched it just hang on this thing, on every word: Is it going to go? Is it not going to go? I know maybe I am a little bit emotional, but because I travel around the State of Ohio and we have areas that are doing very well, and then in southeastern Ohio, I am watching the population just leave. They hang on every word here. They watch what the government is doing. Can we do it better? Could we just get this thing going?

I implore you, do not sunset this. Let the kid do his job, and just keep making it better.

Mr. HERRGOTT. If I may point out, on the Nexus project alone, we saved 6 months and $300 million, and I think oftentimes what individuals forget, that is either borne by the taxpayer or by the ratepayer. It is not done in a vacuum. Those are real savings. Those avoidance costs bear out in the cost of electricity.

Senator PORTMAN. Yes. I want to quickly get back to the discussion about covered projects because you talked about some energy projects that are important, and you talked about the need to expand what the Council does.

Here is what the legislation language says and what we intended: Authorization of Environmental Review by a Federal Agency: Construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation—which is huge—aviation, ports and waterways, water resource projects—and there are a number of them; we talked about the flooding earlier, mitigating flooding—broadband, huge potential there in the rural areas of Ohio and around the country. Pipelines we have talked about. Manufacturing, and there really are not any manufacturing projects right now as far as I know, Alex, on the Dashboard. And any other sector as determined by a majority vote of the Council.

There is potential to do more. If we can show continued progress and if we can get rid of this arbitrary deadline, which is going to lead major projects to be hesitant to join, because in 2022 they might think this thing is going away, I think we can have even a bigger impact on more jobs. Yes, doing it safely, following the rules, and being sure that we were taking care of the environmental con-

cerns, the safety concerns, but getting the United States in a position where we are global leader rather than one of the countries that is toward the back of the line in terms of providing a green light for good projects. Senator Carper.

Senator CARPER. Thank you.

On Tuesday, Tuesday of this week, about 25 hours ago, I was sitting in the White House with the President and a bunch of my colleagues, and we were talking about infrastructure, and we were talking about what should it cover, how broad. The President, he is one person who goes in a lot of different directions, and some people say he has a little bit of a short attention span. Maybe we all do. One of the areas we went off into was the United States-Mexico-Canada Agreement (USMCA), the follow-on to The North American Free Trade Agreement (NAFTA), NAFTA 2.0. He mentioned that it had good environmental protections and labor provisions, which were appealing to both Democrats and Republicans, but we said it is not enough just to have the language, the boilerplate language in the agreement, but the enforceability was really important. We came back to it again and again. I think he got the point. That probably is a point that is germane here as well.

The other thing I would say, I was a naval flight officer (NFO), went to Ohio State, Navy The Reserve Officers' Training Corps (ROTC) midshipman, and went off right at the height of the Vietnam War, graduated, ended up three tours in Southeast Asia, and when the war was winding down, came back to the United States and moved to Delaware. I used to think Delaware was a little town just north of Columbus. Later on I found out that it was a whole State and they might need a treasurer, Congressman, Governor, and Senator. I showed up and volunteered there.

I went to business school at Delaware, and one of the courses I took in my last year in business school was we had to pick a product to manufacture, not literally, physically, but to come up with on a paper a way to manufacture a product. I chose solar panels in 1975. I think I was ahead of my time. I have been hugely interested in cost-effective energy but also energy that is good for our environment. I applaud the work that you are doing. You introduced in your testimony some interesting thoughts and approaches to these issues that we are considering, so thank you for that.

Ms. Abram, as we prepared for this hearing, I think you indicated to our staffs that staff turnover and the lack of resources at the agencies, your company he works with have played a role in delaying the permitting process for your solar projects. You mentioned that a little bit earlier, but could you take a minute or two and talk about how staffing and resource constraints have held you back in the past and made the permitting process longer or maybe more burdensome? What can the Council do to help in this area?

Ms. ABRAM. Yes, thank you for your question. It is really very important to have staffing and resources at the local level, in particular where you have people that are doing the archaeology or you have biologists reviewing things. As well as we may do on keeping on schedule, if we do not have the budget to staff adequately—we used to have these "RECO," we call them—renewable energy offices, but just have energy offices that can be focused on

renewables and make sure—or other types of energy, whatever it may be, but make sure they are focused and that they are staffed well so that they can expedite quickly. We can say, "Hey, we are falling behind," or, "We need to focus on this or that." But if we do not have the resources to do that, we will not be able to get there.

In terms of turnover, what we saw with the Desert Quartzite Project is we were 2 years into the project, we were ready to get our draft out, and then there were changes at the local office. There was a while where I was not sure who was on point or to be responsible. Changes happen. I understand that. However, when those changes occurred, there was also a change in how they were approaching the draft, and people had different opinions. At that time, too, there was something called the "Desert Renewable Energy Conservation Plan," which looked at where solar should go, but it also had conservation management actions.

We were expressly exempt from that, and we felt that the draft we did complied with what we needed to. However, the BLM that came in disagreed with that. It took 2 years to work through that before we could come out with—they came out with a third alternative. We had an alternative, but they came out with a third one that was more——

Senator CARPER. A third what?

Ms. ABRAM. A third project alternative. As part of the NEPA process, you have to have different alternatives to consider. That was why the delay was caused. I think if we had someone like Alex more involved or, someone that helped to facilitate some of those discussions, perhaps that could have been short-cut.

Senator CARPER. OK, thanks. Anyone else on the panel, Dr. Johnson or anyone else want to comment on this same issue? If you do not want to, that is quite all right, but if you do, speak now or forever hold your peace.

[No response.]

OK. Mr. Garcia, Mr. Herrgott seems to be interested in having the public and some of the communities you have spoken about participate in this Council's activities. What advice would you give to him and to us as we try to bring low-income communities to the table and others into the process and give them a say as decisions are made on some of these major projects?

Mr. GARCIA. Thank you, Senator. We have to meet them where they are. We have to get to know them in their language. It was not until recently that the Citizens Guide for NEPA was translated into Spanish, for example. If we are going to have a project that is——

Senator CARPER. Would that be from Greek? No, I am just kidding.

Mr. GARCIA. Right. That document only exists right now in English and Spanish, so how many other languages are being excluded from that publicly available document that should be available for everybody in the country to understand and partake in this process.

It also means being culturally sensitive, right? The idea of having a hearing in the middle of a work day sometimes simply does not work for people who have to go to work and they have to have

that job. Making sure that that happens also after hours, that the agency is able to talk and that there are avenues for the public to call them up. Just like any project sponsors can call up two of the staffers in the Council, making sure that the public can call up the Council. That requires, for example, in terms of resources, having staff there to take those calls and having staff that is culturally competent to answer those calls and be able to speak in the language of the communities on the ground themselves.

That also lends certainty and it lends buy-in for a project to have support and build consensus so that it is not an antagonistic relationship. We heard from the panel. The goal is not to curtail environmental and human health protections. Then let us strip that out. Let us strip that out. Let us let the Council do its work. Let us fund it. Let us see what it actually does full-fledged and funded, and then let us see what the actual impacts on the ground are going to be. Then we are happy to have that conversation.

Senator CARPER. Good. Thank you. That was very helpful.

Let me just say to you, to Michael, do people ever mispronounce your last name?

Mr. KNISLEY. "Nice-lee."

Senator CARPER. Knisley. Do they mispronounce it nicely?

Mr. KNISLEY. For the last 58 years they have, Senator. But I am OK with that. [Laughter.]

Senator CARPER. Alex? Monsieur Herrgott?

Mr. HERRGOTT. Actually, we would like to point out——

Senator CARPER. Go ahead.

Mr. HERRGOTT. First of all, we have an open door to figure out how to get this right, to ensure that all affected individuals are adequately consulted.

I will also point out part of the statute and a more accurate reading is that these extensions of comment periods are extended on a routine basis, and even in the statute, there is an "or." There is not a mandatory restriction on the comment period. It says, "For good cause, at any point a lead agency, in concurrence with other agencies, may extend the comment period." However, I will point out the fact pattern with the projects that have been on the Council is that this has not been an issue; and should it become an issue, we would be more than willing to change it. It is not an attempt to attack alternatives or to restrict a process. We believe that with this transparency that we are night and day from where we were 3 years ago on engaging the public. However, we are trying to bring all vested interests along in this process. This is not an opportunity to strong-arm to deliver projects.

Keep in mind that more than half of these projects on the Dashboard are renewable energy, and that is something where we are agnostic. We are politically agnostic, and we are just trying to ensure that the process—not the policy because we do not make policy—the process is robust. In doing so, we have to bring everyone along, which is why the door is always open to take criticism and to change the process and to advocate for what makes the most sense for everybody.

Senator CARPER. Our colleagues and our staffs have heard me say many times, "Find out what works, do more of that." The other thing is I would just urge you and maybe Mr. Garcia to exchange

contact information, if you have not done that already, so that this dialogue can continue. I think that might be real productive for everybody. Thank you.

Mr. Chairman, it was a good hearing. I want to thank our staffs for pulling these folks together. Now that I have learned how to pronounce their names, the next time I see they will be more familiar. Thank you very much.

Senator PORTMAN. I have a couple more questions regarding some of the issues that were raised. I think Senator Carper may have to leave us. Do you have any closing comments you would like to make?

Senator CARPER. Believe it or not, we have a Bible study that meets once a week at this time. It is Democrats and Republicans. We meet with the Senate Chaplain, Barry Black, a retired Navy admiral who is now the Senate Chaplain. Usually seven or eight of us show up, like we need the most help. But we are going to pray for wisdom, and so maybe some of the wisdom has been imparted to us by all of you. This is something I will take with me and pray on it. Thank you very much, all of you.

Senator PORTMAN. Thank you for including us in your prayers this afternoon.

Senator CARPER. I will also say to Alex, my wife has said to me for years, "Talk slower. Talk slower." I try to talk slower now, and I have gotten elected 14 times now that I talk slower. But you answered the questions great.

Mr. HERRGOTT. I will try.

Senator PORTMAN. One of the issues that has been raised today is the statute of limitations, and we mentioned earlier, when I was talking about some of the projects that came to me, that got me started on this whole exercise, was people saying, "We go through the NEPA process. It takes forever. We finally get our permits." By the way, for some environmental projects or energy projects, prior to the Council, for major projects, and continuing for those that are not part of this process, it is permit after permit, so it is seriatim. In other words, it is not concurrent. I remember one person coming to me from Ohio had an energy project and said there are now 35 different Federal permits that we can count that we have to go through. As was said by Senator Lankford, sometimes you get to the end of the process, and now it is time to go back through the process again because you had a change in leadership or you have just expired your existing permit.

Obviously, there is a need for this. I do not know how anybody could argue that that system is not absurd. But they also said the statute of limitations issue, if you have a 6-year statute of limitations in bringing a lawsuit, in many cases the project does not get going when you get the permit because you have to worry about a lawsuit.

Dr. Johnson, you have not had the opportunity to answer a question today, so maybe I will ask you this. It may not be your expertise, and maybe others can chime in. But have you heard that, that because of the statute of limitations, which we went from 6 years down to 2 years in the statute, so that is what it is for these projects. We initially wanted 180 days. I mentioned that under the bipartisan MAP–21, it is 180 days, which is for a sort of traditional

transportation project that was done in the Obama Administration. But here we went down to 2 years because working with some of the environmental groups, including NRDC, they wanted a longer period. But it is not 6 years, which is a big improvement.

Can you speak to that, Dr. Johnson, why that is important?

Mr. JOHNSON. Absolutely. Thank you, Senator. It is not my area of expertise, as you mentioned, but I will give an opinion on it nevertheless. We have heard a lot about the statute of limitations, and certainly as you said, it was one of the biggest complaints that we heard from project sponsors and just individuals involved when we first started looking into this issue.

My fellow panelist earlier mentioned that GAO found that access to capital or lack of funding was the primary impediment to getting projects done. What he failed to say was that one of the primary reasons that people could not get their projects sponsored was because of the permitting process, and the incessant drag-on of the potential for lawsuits was a part of that. We were looking at projects that were delayed 10 years, and when you think of it, 6-year statute of limitations, that is a substantial part of that potential delay, and adding to that the sequential nature that you have noted about how permits sometimes keep dragging on in the approval process. You really run into a problem where you cannot get a permit in a reasonable amount of time that allows you to also attract funding. No one wants to fund a project—whether it is a civic project or whether it is an energy project or whether it is an environmental renewal project, no one wants to fund a project that they are not going to see any kind of payback on for an undefined and potentially very long period of time.

The statute of limitations plays specifically to that issue and shortens the amount of time. It gives certainty. Having a deadline that is not too far off in the future is certainly important. Frankly, yes, I think we would like to see the matching statute of limitations of 180 days to the MAP–21 process. But 2 years is better than 6 years.

Senator PORTMAN. Do you have any examples of that?

Mr. HERRGOTT. I would just like to point out that NEPA and the associated regulations were written in a time before the Internet, and the access to the information was inhibited by the access to understanding where these complicated environmental documents were. The recognition in 2012 when I was helping at that time as a staffer to craft that language and then again in 2015 while working on the Environment and Public Works Committee, in concert with Senator Boxer, who was the Ranking Member at that time, was that there needed to be some sort of reasonability, and that at some point you should not have to wait 6 years for the clock to expire to put a shovel in the ground, and that at some point there has to be an end to the process to give certainty. Two years was what was agreed upon by the trial bar, the environmental community, and all those parties engaged. To date, we have seen that there has been no issue in which that has prevented any additional challenge, whether it be in the courts or otherwise, for appropriate risk.

Senator PORTMAN. Mr. Garcia, do you want to comment on that? Because earlier you talked about the statute of limitations.

Mr. GARCIA. Yes, absolutely. This is my area of expertise, and I can tell you that actually having a limitation on the ability to sue can actually backfire and cause more delays, because instead of plaintiffs waiting to see whether they actually have a claim or not against a project, they would sue trying to get their foot in the door in court before the statute of limitations runs out. That could actually backfire on a practical level.

But on a more pragmatic level, we are talking about challenges to potentially illegal projects. Those are projects that could harm the community and that are done in violation of the law. I think we should all agree that illegal projects should not move forward, and that is what the judicial review process is meant to address.

I also have to say that when we talk about certainty, we have to provide certainty not just for project sponsors. We need to provide certainty for the communities on the ground. I would say the communities on the ground would really care about certainty that a pipeline being built was properly analyzed and that it is not going to leak or explode in their back yards.

When we talk about certainty, I think that we also have to include the public here. I understand the challenges that project sponsors have, and I can say that if working with the community—and I think the solar projects are a good example—that if you work with the community, you actually reduce the risk of any litigation because you are building consensus. Again, regarding legal challenges, there is no other way to stop an illegal project than to go to court. If we take that away, we are essentially taking away the right of communities on the ground to do that.

Senator PORTMAN. Just to be clear, nobody is taking it away. The question is why you apparently do not support the bipartisan agreement in the Obama Administration with Senator Boxer and others for 150 days for MAP–21. We are just talking about 2 years, after going through the whole process where every consideration you just talked about is essentially worked out in advance. I mean, that is the idea. That is why you have to go through the NEPA process. But, I would hope you would support us for 2 years because that was the compromise we made with the environmental community at the outset, not 150 days, which is what we had in our legislation, our bipartisan legislation, but 2 years, which is certainly plenty of time, and no one should be filing a preemptive lawsuit to ensure that they cannot do something in 2 years. That is after the whole permitting process is finished.

Anyway, thank you all, every one of you, for your testimony today. I really appreciate it. I think this is an opportunity for us to review where we are, but also talk about how to ensure we can get rid of the sunset, because if we do not, I fear that very soon you are going to see a lot of major projects just saying, "Why would I enter into this thing when I know that it is going to end in 2022?" The way Congress operates, it is hard to give them much certainty unless we show there is a bipartisan interest in extending it. One reason I wanted to have this hearing was the opportunity to talk about that.

I want to thank my colleagues who showed up. Some of them told me that they wanted to ask questions, so some may submit some questions for the record to each of the five of you.

I want to really thank the witnesses for being here. I thought it was very helpful. I am encouraged. I am encouraged by the progress. As I said when I spoke to the group on Tuesday, I am encouraged that it is starting to work precisely the way we had talked about in terms of more input, more transparency, but getting to a decision yes or no, and I think we can make many more strides. I talked about the broad range of projects that are eligible. And, the Council can add even more with a majority vote, but the broad range that are not currently making application to become part of that Dashboard, so I think there is a great opportunity. I am glad that you, Mr. Herrgott, are out there doing the awareness raising as well, just to let people know what is available here. I am glad that you are doing the outreach, too, because I agree with what Mr. Garcia said, you are going to avoid a lot of problems by doing the outreach early on and ensuring that you do not have lawsuits filed or have other permitting problems.

There is a lot more we can do to make the process more efficient and more effective. I look to this report from the World Bank. The United States is still ranked 26th in the world in dealing with construction projects. That is a lot of countries that are developing countries that are ahead of us, and most developed countries, because they have figured out it makes more sense for them to figure out a cost-effective, efficient way to get to a decision because that way they will get more capital into infrastructure and construction permits and construction projects.

There is more to do. There remains unnecessary red tape. There remains bureaucracy. There remains duplication. There remain delays. Some of them lead to the projects never being started in the first place, so we do not even know the impact of that. Others lead to more costs in those projects, which is leading to taxpayer costs, project costs, fewer jobs, and we are just looking for a way to greenlight projects in a responsible way and one that I think the Council has already made a lot of progress toward.

The Subcommittee is going to continue to be interested in this, seek ways to support the efforts of the Council. You have to let us know how we can be helpful.

The hearing record will remain open for 15 days, so if you have any additional input, we are happy to get it from you. With that, thank you for your patience today.

This hearing is adjourned.

[Whereupon, at 12:36 p.m., the Subcommittee was adjourned.]

APPENDIX

1

STATEMENT OF CHAIRMAN ROB PORTMAN
U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
Oversight of Federal Infrastructure Permitting and FAST-41
MAY 2, 2019

Our nation's construction projects play a critical role in every American's day-to-day life.

It's the ports and waterways we use for international commerce.

It's other water resource projects to stop flooding from storm surges.

It's energy construction, from solar power plants to pipelines to nuclear power plant construction.

It's coastal restoration that supports the environment.

It's also broadband internet access throughout the country, which allows many Americans to advance their education and rise in the workforce.

Delays and lack of investment in national infrastructure and construction projects have a number of damaging consequences.

It means fewer jobs.

It means a weaker economy and a reduced standing in the world.

It means we are not making progress on major projects and capital is going elsewhere.

It's hurting our economy and our ability to create good-paying jobs.

And one of the reasons we're having so much trouble is our outdated process for granting federal permits for large scale projects.

Everyone is desperate to find federal dollars for infrastructure. Reducing the inefficiencies in permitting is a smart way to stretch the dollars we invest.

The World Bank ranks the United States 26th in the world for dealing with construction permits.

That puts us behind Lithuania and Tonga.

That's better than 39th, which is where we were two years ago—before FAST-41 was fully implemented—but that's still a long way from number one.

Similarly, 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."

One reason we are behind is that it takes so long to permit a project in the United States.

We can do better than this. And we have to do better. Otherwise, capital will continue to go elsewhere.

Let me be clear: We can fix the permitting process without necessarily changing the underlying environmental and safety standards.

Protecting the environment and protecting people who use our infrastructure is critical.

We need strong standards.

But the process we use to meet those standards has become too complicated and outdated.

Almost 10 years ago, I learned how complicated the process can be.

I heard from a company called American Municipal Power, or "AMP" in Ohio.

AMP was working on a hydropower project on the Ohio River.

They told me that the agencies reviewing their permit applications didn't talk to each other, resulting in mistakes, delays, and redundancies.

It took AMP 10 years to get the permits they needed to move forward with their hydropower project. Ten years!

3

Capital just isn't that patient—no one wants to invest in a project that won't be shovel ready for a decade.

So I reached out to Senator McCaskill and we did what legislators are supposed to do: we worked closely with each other and the whole array of stakeholders who have interests in the permitting process.

We worked with environmental groups like the NRDC to business groups like NAM, to labor groups like the AFL-CIO Building Trades Council.

We introduced a bipartisan bill called the Federal Permitting Improvement Act, which is now called FAST-41.

FAST-41 created the Federal Permitting Improvement Steering Council, which is comprised of representatives from all of the major permitting agencies.

Large projects apply to get help from the Council in navigating the permitting process.

The agencies involved in that project designate a lead agency so a project sponsor can have a single point of contact. And the agencies come up with a Coordinated Project Plan.

That plan sets out each permit, all the studies needed, and a timeline for completion.

And then, as the process moves along, the Council's Executive Director—who's here with us today—resolves conflicts that arise between the agencies.

The law gives accountability, too.

Agencies have to post a project's plan on the online Permitting Dashboard so the public can see how the permitting process is going.

And by the way—FAST-41 doesn't guarantee a project will be approved.

It just helps them get an answer, one way or the other.

It also reduces the statute of limitations for lawsuits. The NEPA statute of limitations for most projects is six years—that means that for six years after permits are granted, the project can't really get started because a lawsuit might stop it.

For covered projects, it's two years—which is still longer than the 150 days for some transportation projects. Both the FAST-41 two year limitation and the MAP-21 150-day statute of limitation were carefully crafted, bipartisan agreements signed into law under the Obama Administration.

And I've got good news: FAST-41 is working.

Over the last few years, the Council has saved projects more than $1 billion in avoided delays. There are now **40 projects** on the Permitting Dashboard, and more new sponsors are interested in participating.

The Council has helped electricity transmission and pipeline projects, as well as several major environmental restoration projects.

Today, we'll hear from Laura Abram from First Solar, about how the Council assisted the Desert Quartzite project move forward with a 450-megawatt solar power development in California. First Solar, by the way, already has a big factory in Ohio, and it's building the second largest solar factory the western hemisphere in Lake Township, Ohio.

I'm also looking forward to hearing from Mike Knisley [*Nis-lee*], the Executive Secretary and Treasurer of the Ohio Building Trades. The union has been incredibly supportive of FAST-41, and we are grateful for that support.

I'm glad to see after a few years of delays that FAST-41 is going full steam ahead. I'm especially glad that the President appointed Alex Herrgott [*Her-got*] as Executive Director. After a 21-month gap in appointed executive directors, it is good to have an enthusiastic and energetic leader for the Permitting Council. And he is taking FAST-41 to the next level.

We wanted to make sure it would work, so we put a seven-year sunset clause in the original bill.

Now that it is working, Senator McCaskill and I introduced a bill last Congress to remove the sunset and give the Council's executive director the ability to give advice to other projects when asked.

It also would set a two-year goal for agencies to finish the permitting process for these projects.

It's not a hard and fast deadline; sometimes projects take longer.

But setting a goal helps inject accountability into this process.

Even with its slow start, after just three years, FAST-41 is yielding results. These results mean certainty for project sponsors, which means more certainty for investors, and more certainty that projects will be built.

That means more jobs for the people who build these projects, and it means better roads, ports, and energy transmission—all of which spur more economic growth.

It means being able to move forward faster with much-needed environmental restoration projects, like the coastline restoration projects in Louisiana, and renewable energy projects like First Solar's Desert Quartzite projects.

Thank you all for being here today. I am looking forward to hearing the witnesses' testimony about how FAST-41 is improving the process, and what we can do better going forward.

Opening Statement of Ranking Member Carper

"Oversight of Federal Infrastructure Permitting and FAST-41"

May 2, 2019

Thank you, Mr. Chairman. My thanks, as well, to our witnesses for joining us today for this very timely hearing.

As you know, Mr. Chairman, I also serve as Ranking Member of the Senate Committee for the Environment and Public Works. Two days ago, I joined Speaker Pelosi, Leader Schumer, and a number of our colleagues at the White House to discuss with President Trump our country's infrastructure and the need for us to come to agreement this year on a bill that would make urgently needed investments in our nation's infrastructure, including our roads, highways, bridges, and transit systems.

In the last decade, we passed 35 short-term fixes for transportation before we were able to pass the FAST Act, which was the first long-term bill in a decade. However, the FAST Act expires in September of 2020. We have a responsibility to avoid another series of short-term fixes, which waste money, create uncertainty, and force us to put off needed investments.

Numerous studies, as the chairman knows, tell us that we're falling behind other developed countries when it comes to making these investments. With respect to our road and highway infrastructure, which the EPW Committee examined in a hearing last month, the challenge we have before us is clear.

We have an $800 billion backlog of investments needed to improve our highways and bridges. Many of our highways were built more than a half-century ago, and as a result are reaching the end of their useful life. More than 47,000 of our bridges are structurally deficient, and there are 235,000 in need of some repair, replacement, or major rehabilitation.

The consequences of underinvestment are great. Last year, every American lost 97 hours due to traffic congestion on average, costing us $87 billion nationwide in lost productivity. All of this time spent in a car or truck sitting in traffic also contributes to air pollution and increases the cost of goods.

Underinvestment in roads and highways also has had an impact on safety. In 2017, more than 37,000 people died in motor vehicle crashes. Pedestrian deaths are now at a 25-year high.

Given all we need to do to improve and rebuild our highways and other infrastructure, I've thought a lot about how we can build projects smarter and more cost effectively. I've also thought a lot about how well the rules and permitting processes that we have in place actually work, and how we might make them work better.

Over the years, I've supported reasonable changes designed to improve federal coordination and efficiency.

We've already made a number of changes to permitting and project approval procedures in the last three highway bills. Before we entertain new ideas, we should first determine whether those provisions – some 60 in all – are fully implemented and how effective they've been.

I've made it clear previously but it bears repeating: I will not support further weakening of environmental protections in the name of accelerating project delivery.

It is critical that the lion's share of provisions we've already enacted in this area be implemented so that we can better understand what impact they'll have before we consider adopting more. To be able to do that, we need effective oversight like we're conducting here today.

I believe all of our witnesses and the stakeholders my staff and I have spoken to in preparation for this hearing agree that the provisions in FAST-41 show some promise.

The permitting dashboard the law called for offers needed transparency into the permitting process and should help us hold permitting agencies accountable for meeting deadlines. In addition, the Federal Permitting Improvement Steering Council offers project sponsors and other interested parties a place to turn with questions. The Council also creates a venue where the challenges that inevitably arise as a major project progresses can be discussed and resolved.

That said, it seems that the Council and the implementation of FAST-41 have been held back at least in part due to a lack of funding and a lack of leadership.

The Council recently saw a significant increase in its budget, but in past years had been given barely enough funding to get by.

In addition, until about four months ago, the Council lacked a permanent executive director. Before President Trump appointed Mr. Herrgott, the Council had been operating with an acting director since the end of the Obama Administration more than two years ago now.

As a result, we may not have enough information to know whether FAST-41 is working as intended, especially with respect to some of the most controversial provisions.

Having said that, I look forward to learning more today from Mr. Hergott and our other witnesses about the Council's work, as well as the other issues that Congress should consider as we work in the coming months to put together a major, bipartisan infrastructure bill.

HERRGOTT 4_30_19

Federal Permitting Improvement Steering Council

Executive Director Alex Herrgott

Written Submitted Testimony

Before the Senate Committee on Homeland Security and Governmental Affairs
Permanent Subcommittee on Investigations

Chairman Portman, Ranking Member Carper, and Members of the Committee, thank you for the opportunity to testify today on how Title 41 of the Fixing America's Surface Transportation Act (FAST-41) is improving the Federal permitting process. Enacted by Congress in 2015, FAST-41 established a coordinating framework designed to improve the permitting process for a diverse portfolio of proposed large-scale, complex infrastructure projects across the nation. A key component of this framework is the Federal Permitting Improvement Steering Council (Permitting Council), chaired by an Executive Director appointed by the President. The Permitting Council is an interagency body comprised of 14 Federal agencies, the Council on Environmental Quality, and the Office of Management and Budget.[1] In the 4 months since I became Executive Director, we have focused on leveraging this interagency body to bring about a new era of transparency, efficiency, and accountability. We are actively reducing unnecessary red tape, costs, and delays for FAST-41 projects.

As you know, today, the Federal infrastructure permitting process can be very fragmented, unpredictable, and inefficient. There are many Federal statutes that govern infrastructure permitting, and they are executed by multiple Federal agencies. In addition, there can be significant overlap in statutory requirements and inconsistency in application of those requirements in the permitting process. FAST-41 provides an interagency mechanism to coordinate implementation of multiple permitting statutes including by providing for a single unified schedule.

For major Federal actions requiring an environmental impact statement (EIS) pursuant to the National Environmental Policy Act, the Council on Environmental Quality has reported that, across agencies, the average time for completing EISs was 4.5 years for the period 2010 through 2017.[2] Half of the 1,161 EISs reviewed took more than 3 years and 7 months to complete; a quarter took more than 6 years to complete.

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[1] Permitting Council Agencies: Advisory Council on Historic Preservation, Department of Agriculture, Department of the Army, Department of Commerce, Department of Defense, Department of Energy, Department of Homeland Security, Department of Housing and Urban Development, Department of the Interior, Department of Transportation, Environmental Protection Agency, Federal Energy Regulatory Commission, General Services Administration, Nuclear Regulatory Commission.
[2] https://www.whitehouse.gov/wp-content/uploads/2017/11/CEQ-EIS-Timelines-Report.pdf

The permitting process can include compliance with not only numerous Federal statutes, but also State and local laws and ordinances, and may vary significantly depending on the unique nature of the infrastructure project being proposed, its location, and potential impacts. For example, one FAST-41 project has 19 cooperating agencies (7 Federal, 3 State, 6 County, and 3 other entities), for which 9 Federal permitting actions are tracked on the Permitting Dashboard. Another FAST-41 project involves over 30 Federal permitting actions and over 50 state and local permitting actions, one of which could comprise authorization for 611 water crossings.

In recognition of these complex permitting challenges, FAST-41 established the Permitting Council to provide a one-stop resource within the Federal government for coordination across Federal agencies in a way that respects agencies' responsibilities as regulators while also serving as a reliable Federal partner to all stakeholders – state and local government officials, tribes, the public, and project proponents. In other words, the Office of the Executive Director serves as an impartial third party that helps shepherd projects to deliver a definitive beginning and end to the permitting process.

FAST-41 is a voluntary program for eligible large, complex infrastructure projects that provides oversight, strengthens cooperation and communication among regulatory agencies, enhances transparency, and emphasizes concurrent processing of environmental reviews and authorizations. FAST-41 does not modify any underlying Federal statutes, regulations, or mandatory reviews.

The FAST-41 project inventory has a total investment value of $174 billion, with an average project investment value of $4.25 billion. One of the benefits of tracking these projects on the Permitting Dashboard, according to coordinated project plans, is shown in the NEPA process for FAST-41 projects. While the number of projects currently represented on the Permitting Dashboard continues to grow, some initial observations can be made. Projects that voluntarily applied to become covered under FAST-41 are shown on the Permitting Dashboard to take an average of 2.2 years to complete a Record of Decision. For FAST-41 legacy projects that were identified by agencies as an initial inventory of FAST-41 projects, the Permitting Dashboard shows the NEPA process to take 4 years. FAST-41 project permitting durations are therefore on average, 0.5 to 2.3 years shorter[3] than other EISs.

This year, the Permitting Council has grounded its activities on five key principles designed to keep FAST-41 projects on track and on schedule by (A) breaking down silos across Federal permitting agencies through enhanced coordination, (B) identifying and implementing intra- and inter-agency efficiencies in the permitting process, and (C) providing oversight and issue resolution. These principles include:

[3] https://www.permits.performance.gov/projects

1. Demystifying the permitting process at each agency;
2. Clarifying roles and responsibilities among Federal agencies to avoid issues that could derail the project;
3. Aligning agency roles and permitting processes, where possible, in the following ways: joint and programmatic approaches, improved planning among agencies, and maximization of concurrent permitting actions;
4. Requiring transparency and accountability in meeting milestones throughout the process; and,
5. Sharing lessons learned to facilitate successful adoption and implementation of best practices to improve the permitting process across the agencies.

These principles are carried out through **four** critical Permitting Council activities that serve as the pillars of FAST-41 to deliver real-time, predictable results - reducing the decision-making time for projects without compromising our valued natural, community, cultural, and historic resources. These four activities include:

First, the Permitting Council agencies have developed best practices that address these principles in the Fiscal Year 2019 Best Practices report, which will be published this month. For example, the first principle – demystifying the permitting process at each agency – is addressed through the following best practice for Permitting Council agencies:

> Provide the project sponsor/applicant and all cooperating and participating agencies of a FAST-41 covered project information about the environmental review and authorization processes, including all steps, by the time the initial coordinated project plan (CPP) or project management plan is completed. Provide updated schedule to the project sponsor and the other governmental entities with environmental review and authorization processes when substantive changes occur. Substantive change is when any Agency or the project sponsor does not conduct or complete on time a scheduled activity or milestone upon which another entity is dependent.

Second, the Office of the Executive Director issues an Annual Report to Congress, which serves as the only interagency tool assessing agency progress in implementing the best practices identified by the Permitting Council agencies for that fiscal year. The Annual Report to Congress for fiscal year 2018 was submitted to Congress on April 15, 2019.

Third, the Office of the Executive Director works in partnership with Council agencies to provide in-person facilitation of interagency permitting processes. The Permitting

Council uses the Permitting Dashboard and interagency meetings facilitated by my office that discuss critical issues and deadlines for FAST-41 projects' permitting processes. This allows my office to help agencies align their permitting processes, and develop a prudent, timely, and realistic permitting schedule that effectively addresses any statutory, regulatory, or procedural overlap, redundancies, and inconsistencies. Should conflicts arise, FAST-41 provides a formal dispute resolution process to ensure a final decision is reached in a timely and efficient manner.

Fourth, and finally, as Chair of the Permitting Council, my office is actively working with the Permitting Council agencies to help support the agency field staff responsible for implementing FAST-41 provisions and managing the permitting processes for FAST-41 projects day to day. The inherent complexity of these projects combined with the decentralized organizational structure of many agencies can lead to inconsistent interpretation of the policies and guidance issued from Headquarters offices. Illustrating the opportunity for inconsistent application, many agencies have divisions, regional offices, districts, and field offices across the country, where several can be responsible for permitting for the same project.

To address this problem, my office is working with the agency staff in the headquarters, regional, and field offices to identify how we can best support consistent implementation of FAST-41 provisions, including on-location meetings with agency staff and community stakeholders to build a strong foundation and identify a clear path forward for each new FAST-41 project. My office is also focused on proactively developing relationships between Federal, State, local and tribal governments around the country.

Together, these four activities support our efforts to increase Federal coordination in the permitting process. Looking ahead, the Permitting Council will continue to strongly support initiatives that will enable agencies to further improve their processes and promote the efficient and effective use of agency resources.

- Encourage the expanded use of non-Federal funds, using existing authorities, to support accelerated development and review of permit applications and other environmental documents, where appropriate.
- Explore ways to enhance the coordination of Federal environmental laws with State, local, and tribal governments. The goal is to prevent unnecessary conflict or duplication of efforts.
- Ensure access for State and local governments and tribes to FAST-41 tools and best practices, as appropriate, and assist with their environmental reviews and authorizations.
- Harness the use of technology through expanded use of technology such as web tools, online applications and assistance, and geographic information systems (GIS) (as appropriate) to increase transparency and efficiency.

In summary, through partnership with Federal agencies, State, local, and tribal governments, as well as the private sector, the Permitting Council is accelerating the delivery of complicated environmental reviews and authorizations for critical infrastructure projects.

I look forward to continuing to work with you in implementing FAST-41. Through the promotion of reliable and comprehensive permitting schedules and increased coordination and collaboration, we will continue to improve the permitting process for these unique and complex infrastructure projects.

Thank you again for the opportunity to participate today and I look forward to your questions.

Testimony of Laura Abram

Director of Project Execution and Public Affairs - First Solar, Inc.

United States Senate Committee on Homeland Security and Governmental Affairs'

Permanent Subcommittee on Investigations

Hearing on Oversight of Federal Infrastructure Permitting and FAST-41

May 2, 2019

Introduction

Good morning Chairman Portman, Ranking Member Carper and members of the Committee on Homeland Security and Governmental Affairs' Permanent Subcommittee on Investigations. I am pleased to be here today to discuss First Solar's experience with FAST-41 and the Permitting Council and recommended solutions to ensure successful and timely permitting of energy infrastructure projects on federal lands that will help our country reach its goal of American energy dominance.

My name is Laura Abram and I am the Director of Project Execution and Public Affairs for First Solar. For more than a decade, I have had the privilege to collaborate across federal agencies within the Department of Interior (DOI) to develop the first and largest solar power plants on federal lands, including in collaboration with tribal communities. My testimony today will present information from my direct experience, with a focus on permitting of the Desert Quartzite Solar Project.

The messages I hope to leave with you today are these: Number one, solar is one of the lowest cost energy resources today and is an important part of America's energy mix. Number two, federal lands are ideal for responsible solar development that avoids or minimizes resource conflicts. Yet we face challenges to utilizing federal lands because certain policies in place today have created substantial hurdles including burdensome permitting processes, lack of resources to ensure timely completion of Right of Way grants, access to available land, and high rents that are not competitive with private lands. Number three, FAST-41 and the Permitting Council have played an important role in addressing timely permitting of infrastructure projects and should expand its role to further improve inter-agency collaboration and streamlining of the environmental review and approval process. This is a critical component in enabling federal lands to continue to be used to meet America's energy demands.

To begin with, I would like to provide you with a high-level overview of First Solar. First Solar is an American solar manufacturer and the largest U.S. provider of thin-film PV panels. First Solar has extensive experience and a proven track-record developing, constructing and operating the world's largest solar power plants. We have shipped over 20 gigawatts (GW) worldwide, and have over 6,000 megawatts (MW) of technology in operation, construction or contracted development across the U.S, including 2,500 MW on federal land. The company has created American jobs and economic benefits across the value chain, including approximately 30 million construction workhours, equivalent to 15,000 one-year construction jobs. Over $1 billion is spent annually with U.S. suppliers in over 35 states,

resulting in over 7,000 indirect jobs. First Solar's world-class 600 MW manufacturing facility in Perrysburg, Ohio has been in operation since 2002 and employs about 1,250 full-time associates. Last year First Solar broke ground on a new 1.2 GW manufacturing facility in Ohio which will directly employ over 500 full-time associates. Shortly after, Pilkington glass announced a $265 million investment in the first new float glass factory built in over a decade to service our Ohio operations. These investments were the result of strong demand, competitive corporate tax rates and solar tariffs designed to level the playing field with foreign competition.

Solar Technology Growth, Economic and Job Benefits

Over the past decade, solar technology and efficiency has dramatically improved and the cost of solar has rapidly decreased, driving increased utility and commercial demand. While conventional baseload resources have historically been used to ensure a cost-effective power mix, large-scale solar power prices have plummeted in the last few years, making it one of the lowest-cost sources for electricity generation available today. There are more than 35,000 MW of large-scale solar projects in operation today, with another 74,000 MW under development. Additionally, the solar industry fuels the economy and creates American jobs. In 2018, the solar industry generated a $17 billion investment in the American economy. It ranks third in total employment among energy industries, behind only petroleum and natural gas. Since 2010, solar employment has grown 159%, from just over 93,000 to more than 242,000 jobs in all 50 states. Veterans now make up 9% of solar workers, compared to 7% of the overall U.S. workforce.

Solar on Federal Lands and Importance of FAST-41 and the Permitting Council

As demand for solar energy continues to grow, it places more importance on the availability of federal lands due to their high solar insolation values, topography, access to available transmission, and location near high-energy load centers. In 2010, BLM approved the 50 MW Silver State North Project, developed and constructed by First Solar, which was the first solar project on federal lands. As of March 2018, BLM approved 25 solar projects, totaling 6,319 megawatts (MW) of installed capacity. This includes the 550 MW Desert Sunlight project developed and constructed by First Solar. The project is located in Riverside County, CA and is the largest solar plant on federal land and one of the largest in the world. Several projects are currently proposed by solar developers, including three in Riverside County, Calif., four in Nevada near Las Vegas, and one in southern Wyoming. Together, these projects are expected to generate more than 2.5 GW of solar power capacity. One of these projects in Riverside County, the 450 MW Desert Quartzite project, is being developed by First Solar and is a FAST-41 project.

It is critically important to ensure responsible development of large-scale solar on federal land that avoids, minimizes and mitigates impacts in compliance with the National Environmental Policy Act (NEPA). However, the NEPA process can take many years and cost companies millions of dollars before gaining approval to begin construction of a project on public land. Establishment of the FAST-41 and Permitting Council in 2015, as well as new regulations implemented by the current administration that require NEPA to be completed within one year, have begun to streamline the permitting process. These

changes should not short-cut environmental review, including sufficient studies critical to protecting resources, but they can help to more efficiently expedite the permitting process.

Fast-41 and the Permitting Council have supported First Solar in expediting permitting on two projects including:

- The 100 MW Aiya Solar Project, located on tribal land owned by the Moapa Southern Paiute Tribe – received its Record of Decision in 2016
- The 450M MW Desert Quartzite Solar Project, located on BLM land in Riverside County, California – in development

The Aiya solar project on tribal land was led by the Bureau of Indian Affairs (BIA) and permitting was completed in approximately 1.5 years. This demonstrates a very fast process due to its FAST-41 status and excellent collaboration between the BIA, BLM, the Moapa Band of Paiutes and First Solar.

The Desert Quartzite project has been in active development for approximately five years and permitting is expected to be complete in September 2019. This project has faced many permitting challenges that have caused up to two years in delays, however FAST-41 and the Permitting Council have provided First Solar with support in helping to navigate the various issues and to assist in keeping the project on schedule. Although First Solar did not have many inter-agency issues, the Permitting Council did play a key role in supporting us in coordinating issues across local, state and federal levels within the BLM. First Solar has also received support from the Department of Interior and BLM who have been responsive to concerns and have helped facilitate resolution of issues.

While the original Plan of Development for Desert Quartzite was submitted in 2008, First Solar did not move forward with active permitting until 2014 due to other project priorities. In 2016, after two years of studies and completion of scoping meetings, BLM was planning to publish the Draft Environmental Impact Statement (DEIS). At that time, there were BLM resource constraints and turnover in personnel. The new team decided to withhold publication of the DEIS to ensure that it considered Conservation Management Actions (CMAs) outlined in the Desert Renewable Energy Conservation Plan (DRECP) published in 2016 at the end of the Obama Administration. First Solar raised concerns with this approach because the Desert Quartzite project was expressly exempted from the DRECP; however BLM believed that the CMAs represented best science and asked First Solar to do a comprehensive analysis of which CMAs the project complied with.

Unfortunately, this caused significant delay in the schedule and the DEIR was published two years later in August of 2018. First Solar met with the FAST-41 Permitting Council several times to get support in addressing these issues. The Permitting Council was very responsive in tracking progress and checking in frequently with BLM and First Solar to ensure the project stayed on schedule. Due to the Government shutdown and additional permitting issues, the project was put on Pause by BLM for approximately 2.5 months. Challenges are common in large, complex solar infrastructure projects and therefore, it is important to have the support of the Permitting Council to help resolve inter-governmental issues

quickly and effectively. It is also important to estimate approximate times for permit completion and ensure a new schedule can be put in place rapidly to keep the project moving forward. First Solar would like to thank the Permitting Council for its hard work and diligence in helping to address schedule challenges, the Department of Interior for collaborating with us to address issues and concerns, and the BLM for their continued hard work and dedication to expedite the required Desert Quartzite federal permits.

Based on our direct experience, First Solar recommends that FAST-41 and the Permitting Council play a more active role in the permitting process from the beginning and assist, not only to keep the project on schedule, but to serve as a central point of contact for project proponents and to help navigate the often complex issues and inter-governmental challenges that can cause project delays. For example, if the Permitting Council could have played a role in facilitating a decision on whether to delay the project for two years to analyze permitting conditions from which the project was exempted, perhaps this delay could have been avoided or reduced. As another example, the Permitting Council should intervene when a project schedule is put on an extended or ill-defined Pause preventing a revised schedule from being updated on the permitting dashboard. In addition to FAST-41 and Permitting Council support, more resources are needed to adequately staff agencies that support the NEPA process including resource and cultural specialists at local BLM offices and timely coordination with the Fish and Wildlife Service. Re-establishment and staffing of Renewable Energy Coordination Offices would also be key to making permitting more efficient.

Federal Land Cost and Land Availability Challenges

It is important to understand that streamlining permitting alone will not ensure successful development of energy infrastructure projects on federal lands. Solutions must be implemented to ensure projects are cost competitive and there is access to enough available land to meet growing American energy demands. Currently, companies are moving away from development of solar and wind projects on federal land and this will not change unless these issues are addressed.

A series of land use planning actions by the BLM has resulted in the majority of federal land in the Western U.S. being declared off limits for development of large-scale solar facilities. The Programmatic Environmental Impact Statement (PEIS), which began a decade ago, and the Desert Renewable Energy Conservation Plan (DRECP) intended to conduct landscape level planning that would provide dedicated land for the development of utility-scale renewable energy generation and transmission, while simultaneously providing for the long-term conservation and management of federal lands to protect environmental, cultural, and physical resources. While this is a worthy goal, the final plans imposed a variety of arbitrary exclusions and setbacks unrelated to any science. As a result, far less land is available today than is needed to meet the public's growing demand for solar energy, and far more could be made available without loss of resource values. Lands in the Development Focus Areas (DFAs) under the DRECP are encumbered with Conservation Management Actions (CMAs) that make development impossible. Similarly, decisions by BLM in Southern Nevada have in practice sharply restricted solar

development in an area with growing commercial demand and a newly enacted 50% renewable portfolio standard requirement.

Solar technology and construction practices have significantly changed since the PEIS was developed in 2009, which excluded lands that did not have enough solar irradiance or the slope of the land was too steep. Solar projects are developed across the U.S. in areas that have far less solar irradiance and steeper slopes and can still deliver cost-competitive and reliable energy to the electric grid. Additionally, construction practices that once scraped the land have now evolved to "light-on-the-land" site preparation techniques that keep the root structure in place or just mow the existing vegetative growth without impacting the natural landscape. In fact, at some sites such as the Topaz Solar Farm in San Luis Obispo California, sheep are used to maintain growth of grasses under the panels, and kit fox-friendly fences allow the kit fox to return to the site and thrive in the shade of the panels. A site that was originally thought to be a threat to kit fox is now the haven for many of them. Pollinator-friendly solar sites are also being developed to support healthy bee populations and ecosystem.

It is important for BLM, the conservation community and the solar industry to take a step back and re-evaluate land use planning efforts so they align with current technology and construction practices and impose restrictions only as necessary for conservation of important resources. In 2017, BLM issued a request for comments to begin re-evaluation of the DRECP and has begun to evaluate some of the more problematic CMAs. It is important for any changes made to balance both conservation and solar development goals in a way that is a win-win for both.

As we work to address these public land use issues, we must also be sure that solar projects developed on BLM land are cost competitive. A project is not viable if it does not have a power purchase agreement with utilities, Community Choice Aggregators (CCAs) or corporate buyers for the sale of the energy generated. The BLM's Solar and Wind Energy Rule was intended to support solar development on BLM-managed land, but instead resulted in charging rents that vastly exceed fair market value, megawatt capacity fees that unnecessarily increase the cost of land and are not found in private land contracts, and excessive bonding requirements. This has made development on public land uncompetitive with private land. For example, the BLM land Lease and Megawatt Capacity annual fee in Zone 8 (Riverside County) where the Desert Quartzite project is located, is 150% greater than a competitive private land solar project.

To address these issues, on June 6, 2018, the U.S. Department of the Interior Royalty Policy Committee (RPC), including representatives of government, tribes, and renewable energy companies, unanimously approved recommendations related to both the Bureau of Land Management's (BLM) rule on Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections, 81 Fed. Reg. 92,122 (Dec. 19, 2016) (the "Rule"), including for those projects subject to the BLM's Western Solar Plan. The discussions in the RPC document are consistent with this testimony regarding rents and bonds, and should be implemented.

Conclusion

Many developers are now avoiding development on public lands because of these challenges. Responsible construction of solar infrastructure on federal lands can and should be a bipartisan priority. Many of the challenges can be addressed by FAST-41 and the Permitting Council, rules that provide streamlined permitting, more flexible approaches to land availability, ensuring that rents and other commercial issues are competitive with private land markets and re-establishing and adequately staffing Renewable Energy Coordination Offices to enable thorough consideration of resource issues and timely, effective and efficient permitting and issuance of ROW grants. These solutions represent a bipartisan and coordinated approach to the advancement of American energy development.

Thank you very much for the opportunity to testify here today. I would be happy to answer any questions you may have.

Ohio State Building and Construction Trades Council

Statement of Michael Knisley
Secretary-Treasurer, Ohio State Building and Construction Trades Council

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

Hearing on
Oversight of Federal Infrastructure Permitting and FAST-41

Thursday, May 2, 2019

Good morning, Senator Portman and members of the committee, thank you for your leadership on this issue and for inviting me to testify during this hearing on Title 41 of the Fixing America's Surface Transportation (FAST) Act. As Secretary-Treasurer of the Ohio State Building and Construction Trades Council, and on behalf of the 100,000 union construction workers in Ohio that I proudly represent, I am pleased to have the opportunity to appear before this committee to testify on the outcomes of FAST-41 and its benefits to the Ohio construction industry and those regions in our state which depend on much-needed infrastructure projects for their economic survival.

On behalf of the working Ohioans and signatory contractors of the Ohio State Building and Construction Trades, I want to express our gratitude to Senator Portman and Senator Carper and the members of this subcommittee for your efforts to modernize the permitting process for major U.S. Infrastructure projects. This committee's commitment to reforming the permitting process through FAST-41 expedites the groundbreaking of major U.S. infrastructure projects, putting tens of thousands of Ohio Building Tradespeople safely and responsibly to work in a timely manner.

Ohio labor leaders, contractors, and project owners strongly support and are grateful for the permitting reforms implemented by FAST-41. To echo Sean McGarvey, President of North America's Building Trades Unions, who testified before this committee in June of 2018, the "permitting process for federal infrastructure projects must be continually modernized to ensure efficiency, safety, accountability, and transparency."

FAST-41 works for Ohio and the wider Midwestern region our tradespeople serve insofar as it provides increased predictability of project timetables, facilitates coordination between agencies and solves interagency conflicts, sets reasonable deadlines in the permitting process, and reduces drawn-out litigation timeframes. As an organization driven by clear standards and safe, efficient processes, we applaud this.

On behalf of the members and contractors of the Ohio State Building and Construction Trades, we commend the forward-looking approach that this committee, as well as the current and previous administrations, have taken to reform the federal project permitting system while maintaining responsible regulations that protect workers, our communities, and our environment. FAST-41 demonstrates that our government can come together in a bipartisan way to reform a broken permitting process without compromising the underlying regulations that keep American workers and their communities safe and healthy.

In Ohio, we see firsthand how crucial such balanced reform measures are—not only for our economic growth and stability, but to the very social fabric of our communities. Particularly in southern Ohio's Appalachian communities, where local economies depend on a major project moving forward, it's very emotional for community members to endure the uncertainty of a broken permitting process.

A project like the American Municipal Power R.C. Byrd Hydropower development would bring thousands of middle-class construction jobs to the southern Ohio region and spur much-needed economic growth. Before that project was included as a Federal Permitting Improvement Steering Council project, it was held captive to a ten-year licensing process. Redundancies and interagency disputes cost project owner AMP millions of dollars. This dollar figure does not account for the lost opportunity cost caused by a delayed project groundbreaking. When our workers are bringing home a steady paycheck from major projects, their entire communities feel the economic benefits of those earnings. But when communities wait for years and years for a major project to break ground, local businesses and the organizations funded by the tax revenues from these developments suffer. A stagnant federal permitting process prolongs economic stagnation in our communities.

In my professional opinion, had FAST-41 been in place when the R.C. Byrd Hydropower development was proposed in 2007, this project would be well underway. Hundreds of union construction workers from depressed areas of Ohio would be on the job daily – and those union construction wages would flow back into Appalachia's depressed local economies.

I've attended numerous community debates and agency hearings across the state of Ohio for projects similar to the R.C. Byrd Hydropower development. Let me tell you: It's emotional for a community to endure the planning necessary to break ground on a major infrastructure project. Differing factions in a community debate their economic and environmental concerns. Conflict among permitting agencies exacerbates that conflict, fueling misinformation over major projects and pitting neighbor-against-neighbor through years of uncertainty. This is how real Ohioans experience a dysfunctional permitting process. We see value in stabilizing the public sentiment for development projects, labor, contractors, and owners. When there is delay, uncertainty, it is felt by members of the community.

All of you here in Washington D.C. have the power to relieve some of that conflict for hard-working people and their local governments. I urge the federal government to continue the progress that FAST-41 has started. I urge this body to make permanent the reforms of FAST-41, to strengthen its provisions, and to expand its application to more projects.

The Nexus Enbridge Pipeline is an example of the real benefits of FAST-41 reforms have brought to Ohio. The Enbridge gas transmission pipeline improves regional access to clean-burning fuels, and was among the initial Fast-41 projects. Ohio Building Tradespeople across numerous communities and local union jurisdictions built this pipeline, which spans northern Ohio from our eastern border to the western Toledo region. I spoke with the owners of the pipeline. They felt strongly that FAST-41 brought strong value to the project due to the streamlined permitting processes and federal interagency collaboration. In contrast to the decade-long R.C. Byrd permitting process, the Nexus Enbridge permitting took three years, from August 2014 through August 2017. Since ground was broken on the pipeline, the project has created more than 6,800 middle class construction jobs with $650 million in wages plus benefits, the majority of which have been in Ohio. One Ohio school district expects to net $25 million in property taxes

over the next five years as a direct result of this project having moved forward in a timely manner.

The owners of this project and the Ohio Building Trades applaud this committee and the sponsors of FAST-41 for removing the barriers to this project's success. One of the few bottlenecks in the Nexus Pipeline's development was the slow-down caused by a lack of quorum at Federal Energy Regulatory Commission in final permitting. As a result of unfilled positions in FERC, 4 to 8 months of delay were added to the pipeline's permitting process.

Pipeline owners have asked that I convey to you their desire to see continued modernization and streamlining through a permanent FAST-41 Program. We would ask this committee to reinforce the interagency collaboration, and we implore our agencies to strive every day to work more efficiently. The one thing owners need is certainty in the permitting process. If owners know the timelines, they can work with that information. It's uncertainty that gives them pause in proceeding with major projects. There's a lot at stake in these projects for owners, contractors, and working people.

Ohio's Building Trades strive to facilitate smooth partnership between our 137 local unions, contractors, project owners, and governmental and regulatory bodies. Our processes are designed to drive economic growth while respecting the regulations that protect workers, environments, and the public. The initial outcomes of FAST-41 prove that the federal government is capable adapting to the speed of business in the 21st century. Through FAST-41, you have created the imperative for federal agencies to be agile and responsive to the needs of our businesses, workers, and communities. To the degree that you can strengthen and expand FAST-41 you will have removed significant barriers to the infrastructure development projects that are a primary driver of our local, state, and national economies.

Thank you for allowing me to voice the Ohio Building and Construction Trades Council's support for FAST-41. There is room for more progress, and we applaud the bipartisan proposal to strengthen and expand FAST-41 policies permanently.

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

Statement of Joseph Johnson

May 2, 2019

Good morning, Senator Portman, Ranking Member Carper, and distinguished members of the Senate Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations. My name is Joe Johnson and I am an executive director in the Economic Policy Division 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 the Committee 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 (FAST-41).

My statement details the Chamber's continued support for the federal permit streamlining provisions in FAST-41 and the additional measures that we believe are necessary to ensure that America's infrastructure can be funded and built in the most efficient way possible.

FAST-41 is key to modernizing America's infrastructure by maximizing the use of limited resources. FAST-41 works because it ensures that environmental reviews and permit decisions are expedited by coordinating efforts, minimizing duplicative effort, and eliminating waste, not by cutting corners or reducing necessary protections of health and the environment.

As the Chamber has repeatedly stated, it should never take more than two years to complete all federal permits needed for an infrastructure project.

Background

The permit streamlining provisions of FAST-41 bring greater efficiency, transparency, and accountability to the federal permitting review process. Some of the key provisions of FAST-41 include:

- 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;

- Establishing the Federal Permitting Improvement Steering Council (FPISC or "the Council"), comprised of representatives from the participating federal agencies and tasked with facilitating coordination among agencies, handling dispute resolution when needed, establishing best practices for agencies, and overseeing adherence to the requirements of the program.
- Designating 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.

FAST-41 Is Beneficial to Business and the Economy

The U.S. Chamber of Commerce has been supportive of FAST-41 and of the progress in implementing the program thus far. The reasons why the Chamber has been so enthusiastic about this basic reform are simple, but bear repeating:

1) One reason why we believe so strongly in the FAST-41 program is that it creates a general expectation for fairness in the permitting process that businesses, organizations, and individuals seeking permits need and deserve. Simply put, any business or individual that desires a permit requiring environmental review that properly files should get a prompt decision. The FAST-41 permitting timetable provides permit applicants with a reasonable and transparent expectation as to when they can expect a decision and how the process is progressing.

2) Openness, transparency and accountability are fundamental principles of good government that should underlie any government program. FAST-41 finally brings these principles to the environmental permitting process, which has been lacking those principles for too long. The permitting dashboard and project timeline under FAST-41 are readily accessible to anyone interested in a particular project and help ensure that the process is carried out as Congress intended.

3) Reducing uncertainty and expediting the permit review process spurs investment, which in turn helps grow the economy. Uncertainty and open-ended timelines are two proven impediments to investment, keeping willing investors on the sidelines instead investing in lucrative projects. Both uncertainty and slow progress drastically reduce expected return on investment, taking many potentially profitable investments off the table due only to the uncertainty created by uncertainty in permitting. FAST-41 creates certainty and speeds up the permitting process. With this program in place, project sponsors are better able to line up investment on the front end because investors know that there will be a clear, fixed project timeline and that even if unexpected delays crop up, the Council will work to ensure that they are minimized. The end result is that more projects end up getting funded and undertaken because of the increased access to investment.

   Additionally, the Chamber represents many contractors, subcontractors, and suppliers in infrastructure development in addition to project sponsors. While they often do not deal directly with the permit process, they too benefit from the transparency and certainty that FAST-41 delivers. More investment in more projects means more work for all industry sectors that contribute to infrastructure development. This leads to more jobs, more spending in the local economy where projects are located, and greater economic growth.

4) Permitting reform is necessary to modernize our infrastructure, which is in dire need of renewal and modernization. Whether talking about improving roads and transportation networks by performing long-delayed maintenance and repair or updating energy infrastructure to take advantage of new technologies and improved efficiency, permit delays cause major cost overruns and delay the implementation of new, more advanced infrastructure. FAST-41 provides an effective solution that should be applied across the board to all major infrastructure projects.

FPISC Successes in Implementing FAST-41 and Improving the Permitting Process

Since the FPISC was established, the Council has been hard at work implementing the permit streamlining provisions of FAST-41. In 2017 the FPISC, the Office of Management and Budget (OMB), and the Council on Environmental Quality (CEQ) jointly issued guidance for federal agencies on how to carry out their duties under FAST-41.[1] The FPISC also issued recommendations to agencies on permit timetables and best practices for agencies to improve their permitting process to meet the requirements of FAST-41.[2]

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[1] *See* https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/Official%20Signed%20FAST-41%20Guidance%20M-17-14%202017-01-13.pdf.

[2] *See* https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/FPISC%20Best%20Practices-%20FINAL%2001182017%283%29.pdf and

The Council has also been active in ensuring that all participating agencies are cooperating effectively and adhering to best practices. For example, after releasing the best practices guidelines in early 2017 to establish benchmarks for agency performance, the FPISC that covered agency performance had improved dramatically by the end of the fiscal year, with 97% of covered projects having project timetables.[3] Project timetables were a crucial first step in ensuring that the process would and could meet its intended goals of keeping permit reviews on track and ensuring transparency in the process.

More recently the Council has continued to refine the process and improve performance through additional coordination and oversight of agency performance and cooperation. In addition, FPISC has increased proactive communication and information sharing, not only with covered agencies but also with project sponsors. While they may not have quantitative metrics attached to them, these additional steps taken to improve the process are critical in ensuring that permitting reforms under FAST-41 live up to their potential. These additional improvements come from providing leadership throughout the process and doing the hard work day in and day out to deliver results, The Chamber commends the FPISC leadership and covered agencies for following through and making this program such a success.

Last but not least, the Council also began the process of establishing a program fee structure to provide self-funding for the FPISC into the future. This step was critical in ensuring that the Council has needed funding to continue operations into the future, as FAST-41 authorizing statute envisioned.

Next steps to improve the permitting process

Despite the success of FAST-41 thus far, there remain ways to further improve and modernize the federal permitting process. Some key improvements that the Chamber strongly supports include:

- Eliminating the seven-year sunset in FAST-41: The sunset provision creates a perception that FAST-41 is a test case and therefore reduces the incentive for project sponsors to invest the time and effort needed to begin using the process. Eliminating the sunset is likely to encourage more project sponsors to use the process moving forward. Removing the sunset also ensures that the FAST-41 process can continue and serve as the foundation for additional permitting reforms. It is important to note that the seven-year sunset is fast approaching, and action to eliminate it sooner rather than later is important to ensure a smooth transition to permanent status for the program.
- Expanding the statutory definition of covered projects: FAST-41 should be expanded to include all major infrastructure projects, including transportation infrastructure projects.

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https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/FPISC%20Performance%20Schedules-%20FINAL-%2001182017-final.pdf.

[3] *Id.*

While transportation infrastructure projects are covered by MAP-21 and some water infrastructure projects are covered by permitting provisions in the Water Resources Development Act (WRDA), FAST-41 is a superior model for permit streamlining and access should be expanded to include all infrastructure projects that could benefits from multi-agency coordination. Expanding the range of projects eligible for FAST-41 leverages the existing framework to quickly and efficiently improve infrastructure permitting and help make needed infrastructure expansion and modernization a reality.

- Setting a two-year goal for permitting covered projects: A two-year goal for getting a permit decision for covered projects is a worthy and achievable target. The Chamber believes that there is no good reason for why any federal permit should take longer than two years to obtain. Two years is a reasonable period that would bring the U.S. into parity with our global economic competitors, like Germany, Canada, and Australia.

S. 3017, the "Federal Permitting Reform and Jobs Act," previously introduced in the 115th Congress, includes all of the above measures and is a vital update of FAST-41. The FAST-41 improvements in this bill would provide a vital component for infrastructure modernization. The Chamber strongly supports the reintroduction and passage of the Federal Permitting Reform and Jobs Act in this Congress and urges you to ensure that it is part of any infrastructure package the Senate passes.

Conclusion

The Chamber believes that that permitting reforms in FAST-41 are crucial for modernizing U.S. infrastructure. Our members are optimistic that further improvements and refinements in implementation would deliver impressive results with respect to shortening the time it takes to get a permit and adding certainty and transparency to the process.

Looking forward, the improvements in the Federal Permitting Reform and Jobs Act would further enhance the permitting process and are needed to ensure that future permitting reforms are built on the framework developed under FAST-41. The FAST-41 system works, and has proven to be the best model for improving the permitting system. Enhancing the system with the commonsense improvements in the Federal Permitting Reform and Jobs Act would allow a broader range of projects to take advantage of the increased efficiency and transparency in the permitting process and ensure that these advantages continue to be refined and perfected without the clock running out on FAST-41.

Permitting reform is one part of the Chamber's four-point plan to modernize America's infrastructure (www.letsrebuildamerica.com). Enhancing the usage and effectiveness of FAST-41 is a key component.

We look forward to working with this Committee to ensure we have the necessary tools to modernize America's infrastructure.

TESTIMONY OF RAUL GARCIA
SENIOR LEGISLATIVE COUNSEL
EARTHJUSTICE

BEFORE THE UNITED STATES SENATE
HOMELAND SECURITY AND GOVERNMENT AFFAIRS PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
"OVERSIGHT OF FEDERAL INFRASTRUCTURE PERMITTING AND FAST-41"

MAY 2, 2019

Good Morning Chairman Portman and Ranking Member Carper:

Thank you for inviting me to testify today. My name is Raul Garcia and I am a Senior Legislative Counsel at Earthjustice, the nation's oldest and largest non-profit environmental law organization. Thank you for the opportunity to provide testimony for the Subcommittee's May 2, 2019 hearing "Oversight of Federal Infrastructure Permitting and FAST-41." Please accept this testimony for the hearing's official record. My testimony addresses the importance of the National Environmental Policy Act (NEPA) for infrastructure projects and refutes false narratives that claim it as the main source of delay in the permitting process. It also discusses the changes that Title 41 of the FAST Act made to the NEPA process, highlighting both its benefits and our serious concerns with provisions that curtail the public's voice in government decisions.

I. Robust Environmental Reviews under NEPA Produce Better Projects that Save Taxpayer Dollars and Protect Frontline Communities

There is no question that our nation needs transportation infrastructure. Our nation also needs this infrastructure that is safe, intelligently planned, and ultimately effective in responding to public necessities. Much has been argued over the speed with which our infrastructure is built—making the permitting process an easy scapegoat for delays—but not as much has been said about how the permitting process under NEPA makes our infrastructure development smarter, safer, fairer, and more effective.

Careful compliance with NEPA is fundamental to making sound decisions on federal infrastructure projects. NEPA ensures that the public and agency decision-makers will have the information they need to understand the impacts of a proposed action and to know whether reasonable alternatives exist to achieve the project goals while incurring fewer environmental, social, cultural, and economic costs.

Robust environmental review and meaningful public input under NEPA lead to better, more effective infrastructure projects. Indeed, as eight past chairs of the Council on Environmental Quality have concluded, NEPA review is a prerequisite for responsible agency action:

> [C]onsideration of the impacts of proposed government actions on the quality of the human environment is essential to responsible government decision-making. Government projects and programs have effects on the environment with important consequences for every American, and those impacts should be carefully weighed by

> public officials before taking action. Environmental impact analysis is thus not an impediment to responsible government action; it is a prerequisite for it.[1]

For example, the Los Angeles County Metropolitan Transportation Authority's (LACMTA) Crenshaw/LAX Transit Corridor project is an 8.5-mile light-rail metro extension that serves the cities of Los Angeles, Inglewood, Hawthorne, and El Segundo by offering an alternative transportation option to congested roadways. Through the NEPA process, the LACMTA determined that a five-mile stretch of the project could utilize a rarely-used existing freight rail line corridor, instead of building new tracks in that section. The railroad agreed to abandon the line and allow LACMTA to use it. That decision decreased project costs, saved time, and reduced disturbances for the nearby community by using an existing right-of-way, while providing significant environmental benefits, economic development, and employment opportunities throughout Los Angeles County.[2]

The LAX Transit Corridor project shows how NEPA ensures frontline communities have a voice in the decision-making process and highlights how communities on the ground can contribute to our infrastructure development. In a recent Hill op-ed, Angelo Logan, the Campaign Director of the Moving Forward Network –a network of environmental justice organizations that build partnerships between community leaders, academia, labor, big green organizations and others to protect communities from the impacts of freight— explained the importance of NEPA to frontline communities, stressing that "NEPA is one of the most effective tools in the fight against environmental racism. It is essential to ensuring that communities of color, who so often bear a disproportionate pollution burden, get a say in the decision-making processes that are most likely to affect their health, resiliency, and vitality. And without robust NEPA requirements, policymakers are left to make decisions that will have real impacts without a full understanding of the consequences."[3]

Frontline communities like those represented by the organizations in the Moving Forward Network consistently use the NEPA process to protect the air they breathe, the water they drink, and places they hold dear. Without NEPA communities would be displaced or attacked without any consideration for their health and safety or for their voice in the decision-making process. Overall, it is hard for agency staff and elected officials in Washington, DC to imagine how a port expansion, a new rail line or a new powerplant will impact the people on the ground, but NEPA forces government to ask those communities having to live with the consequences of infrastructure projects day in and day out. NEPA plays a very important role in making sure that our government listens to its people during public comment periods and project analysis. In fact, in many instances where local communities with better alternatives to a project design that either better safeguarded

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[1] September 19, 2005 Letter to the Honorable Cathy McMorris, Chair of the Task Force on Improving the National Environmental Policy Act from Russell E. Train (CEQ Chair 1970-1973), Russell W. Peterson (CEQ Chair 1973-1976), John Busterud (CEQ Chair 1976-1977), Charles W. Warren (CEQ Chair 1977-1979), J. Gustave Speth (CEQ Chair 1979-1981), Michael R. Deland (CEQ Chair 1989-1993), Kathleen A. McGinty (CEQ Chair 1995-1998), George T. Frampton Jr. (CEQ Chair 1998-2001), Gary Widman (CEQ General Counsel 1974-1976), Nick Yost (CEQ General Counsel 1977-1981) (emphasis added).

[2] FEDERAL TRANSIT ADMINISTRATION, RECORD OF DECISION ON THE CRENSHAW/LAX TRANSIT CORRIDOR PROJECT (Dec. 30, 2011), http://media.metro.net/projects_studies/crenshaw/images/20111230_CrenshawLAX_Record_of_Decision.pdf.

[3] Logan, Angelo & Patrice Simms, *Trump Chips Away at the Shield Against Environmental Racism*, The Hill, March 4, 2019 *available at* https://thehill.com/opinion/energy-environment/432532-trump-chips-away-at-the-shield-against-environmental-racism.

impacted people, cost less money, or took less time to build – all while still achieving the goals of the original project. NEPA continues to stand for the basic democratic principle that our government should listen to its people. NEPA ensures that the critical infrastructure government builds is responsive to the needs of its people and not at their expense.

Effective environmental reviews are critical for infrastructure projects that often have a profound effect on the environment and on public safety. Effective NEPA reviews expose the true cost of environmentally damaging and ill-conceived proposals, leading to the development of improved and far less damaging projects and substantial savings for federal taxpayers. As the Crenshaw/LAX Transit Corridor project demonstrates, the public's local expertise often improves projects, lowering their cost and actually shortening the time they take to complete. Similarly, as Angelo Logan noted, NEPA can empower local communities by giving them the information they need to make the best decisions for their communities.

In testimony before the House Armed Services Committee regarding plans to address problems with obsolete nuclear reactors at the Savannah River site, then Secretary of Energy Admiral James Watkins, testified:

> "Looking back on it, thank God for NEPA because there were so many pressures to make a selection for a technology that it might have been forced upon us and that would have been wrong for the country."[4]

When resource agency concerns are ignored or necessary studies are not done, the results can be devastating. Prior to construction of the Mississippi River Gulf Outlet (MRGO)— a channel that provided a shorter route between the Gulf of Mexico and New Orleans' inner harbor in Louisiana— the U.S. Fish and Wildlife Service raised serious concerns and recommended additional environmental and hydrologic modeling, but the Army Corps of Engineers ignored this advice. By 2000, the MRGO had impacted over 600,000 acres of coastal ecosystems surrounding the Greater New Orleans area and destroyed over 27,000 acres of wetlands that once served as an important buffer from storm surge. During Hurricane Katrina, the MRGO funneled Katrina's storm surge into New Orleans, resulting in devastating and deadly flooding in St. Bernard Parish and the lower Ninth Ward.

Still, NEPA provides more than just a voice for the environment. State, local and tribal agencies, private property owners, labor unions, and business associations routinely rely on NEPA to express their views and impact agency decisions. It also gives a voice to the most impacted and historically underrepresented, especially to the communities who usually have to bear the most burden of where federal projects are proposed in the first place. NEPA reviews are typically the only opportunity for members of the public to provide input on these projects Overall, it allows citizen oversight, ensuring public resources are used in a way that is responsive to what the public needs and wants.

II. Evidence Demonstrates that the NEPA Review Process is Not the Source of Delay

Over the last few years, a number of Members of Congress and witnesses before this committee have claimed that NEPA and other regulations were a major cause of delay in infrastructure

[4] Hearings on National Defense Authorization Act for Fiscal Year 1993 - H.R. 5006, and Oversight of Previously Authorized Programs before the House Committee on Armed Services, 102nd Cong. 912 (1992).

projects. This theory has been comprehensively examined and rebuffed by numerous studies, including studies conducted by the Congressional Research Service (CRS) and the U.S. Department of the Treasury.

The most recent report was released by the Treasury Department in December 2016. This report, like the others, found that "a lack of funds is by far the most common challenge to completing" major infrastructure projects.[5] The report listed three additional challenges to large-scale infrastructure projects in order of their impact on the project development process: a lack of consensus when multiple public and private entities and jurisdictions are involved; capital costs increasing at a greater rate than inflation; and the last, and smallest challenge by far, to large-scale infrastructure projects was the environmental review and permitting process.

The Congressional Research Service (CRS) has likewise concluded, on multiple occasions, that NEPA is not a primary or major cause of delay in project review. In fact, CRS has found that the most commonly identified causes of delay are completely unrelated to the NEPA review process. In one report, CRS concludes that for transportation projects, the lack of funding, securing community consensus, and accommodating affected stakeholders, including utility companies and railroads, account for the vast majority of delays.[6] In another report, CRS determined:

> "[T]here is little data available to demonstrate that NEPA currently plays a significant role in delaying federal actions" and "factors *outside the* NEPA process were identified as the cause of delay between 68% and 84% of the time."[7]

In a 2012 report, CRS also concluded that about 90% of federally-assisted highway projects are conducted under a Categorical Exclusion (CE), essentially allowing them to move forward without an environmental review process. Moreover, only four percent of projects required a detailed Environmental Impact Statement (EIS) to be prepared.

Overall, the overwhelming evidence demonstrates that NEPA is not a primary source of delay when it comes to infrastructure projects. Therefore, we urge Congress to further address the known causes of delay identified by CRS and others, principally the lack of funding in federal infrastructure development and the need for better coordination among agencies.

IV. Concerns with FAST-41 Provisions

While FAST-41 takes important steps for improved management and transparency through codifying the Permitting Council and the Dashboard, we are deeply concerned that other provisions within the title will inevitably curtail public engagement inherent in NEPA process, harm the quality of the environmental review, and undermine the security of the projects themselves. Our concerns include, but are not limited to, the specific impacts that FAST-41 will have on public input, environmental review, and government accountability.

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[5] Toni Horst, et al., *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*. AECOM, (2016). https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf (last accessed March 20, 2016).

[6] Congressional Review Service (CRS), Accelerating Highway and Transit Project Delivery: Issues and Options for Congress 1 (Aug. 3, 2011), available at http://www.aashtojournal.org/Documents/August2011/CRSinfrastructure.pdf.

[7] CRS, The National Environmental Policy Act: Background and Implementation 28, 30 (Feb. 29, 2008), available at http://www.cnie.org/NLE/CRSreports/08Mar/RL33152.pdf.

First, regarding public input, 42 USC 4370m-4 of FAST-41 places arbitrary limitations on the amount of time the public has to comment on environmental review documents. Specifically, the law limits comments on Draft Environmental Impact Statements to 60 days and to 45 days for Supplemental documents. The only circumstance in which an extension is available is upon agreement by the project sponsor. Although these times periods may be reasonable within very specific circumstances, this provision eliminated the flexibility that agencies had to expand the public comment periods for complex or controversial projects that merit giving the public more time to study the proposals before providing their input. This is particularly problematic when we put ourselves in the shoes of an everyday person who is forced to study and write comments to some of the most complex infrastructure projects in the nation in a very short period of time – all while taking care of their families and working one or more jobs. Shortening the public comment period comes at the cost of silencing countless stakeholders, including local communities and local governments.

There is little to no justification for discouraging the public from weighing in on a project, more so when the public itself will bear the burdens or benefits of the project. The public should not be dependent upon the wishes of an often profit-driven project sponsor. Project sponsors and the federal government have fundamentally different responsibilities. Project sponsors look after their shareholders while the government should be accountable to the public impacted by projects.

Second, regarding the consideration of alternatives, FAST-41 now allows decision-makers to consider the preferred alternative to a higher level of detail than all other alternatives, including those offered by the public. For good reason, the CEQ regulations refer to the consideration of alternatives as the heart of the NEPA process and require agencies to consider *all* reasonable alternatives with equal scrutiny. On point, the CEQ regulations rightly describe the consideration of alternatives as the "heart of the environmental impact statement" because they provide "a clear basis for choice among options by the decision-maker and the public."[8] The regulations explicitly warn against prematurely obligating resources to only one specific alternative, noting that "[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision."[9]

In the case of FAST-41, the agency can proceed to develop the preferred alternative with a higher level of detail, giving reason to think that equal resources have not been committed to other potentially better alternatives, thus prejudicing the viability of those other alternatives. Advancing the preferred alternatives essentially puts a heavy thumb on approving the preferred alternative even when there may be better, cheaper, and less burdensome alternatives available.

Despite legislative language that requires impartiality from the agency when doing this, as a matter-of-fact, an environmental review that devotes more attention to one alternative will never be impartial. Although the savings clause states that nothing in the title "creates a presumption that a covered project will be approved or favorably reviewed by any agency," it is not sufficient to counter the pressure on agencies that the bias towards project approval that FAST-41 institutionalizes in the administrative process.

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[8] 40 CFR § 1502
[9] Id.

Third, regarding the limitations on judicial review, we have very significant concerns with three provisions within FAST-41 that restrict the public's access to the courts to seek remedies against illegal projects. Specifically, FAST-41 precludes any claim in court by anyone who did not submit a comment during the public comment period, potentially excluding the people and local governments with legitimate claims from any legal redress. This is especially problematic because it requires any potential plaintiffs to comment on the project during the comment period when the public comment period itself is being shortened. In essence, this provision compounds the problem of excluding the public from participating in the NEPA process. Commenting on a project is a requirement to challenge it in court. However, the amount of time given to a person, who has to raise a family and hold one or multiple jobs, take the time to review and comment on the most complicated infrastructure projects, is arbitrarily shortened.

Another problem is adding the consideration of "potential for significant effects on jobs resulting from an order or injunction." This adds an extra burden for any plaintiff seeking a preliminary injunction, now having to prove that significant negative effects on jobs are not likely. In practice, this is likely to result in the denial of preliminary injunctions, allowing potentially illegal and harmful projects to be completed while litigation is pending. This language adds an additional burden on the plaintiff seeking to pause a potentially illegal project by making an already difficult standard to meet, nearly impossible.

Finally, FAST-41 shortens the statute of limitations for any NEPA claim from the six years under the Administrative Procedures Act (APA) to an arbitrary two years. This section dramatically curtails the public's access to the judicial system to redress illegal project development.

Despite the savings clause stating that nothing changes NEPA, this is *defacto* amendment to the law itself as it redefines the decision-making architecture outlined by NEPA for the most complex, costly and controversial projects in our national infrastructure. As the committee moves forward on considering implementation and further legislation this matter, we urge that these provisions be stripped out of the law and allows for the full implementation and study of the other provisions before considering any extension of Title 41 of the FAST Act beyond the 2022 sunset.

V. Incomplete Implementation of FAST-41

Aside from our concerns with the provisions included in FAST-41, the implementation of the Permitting Council and other mechanisms created by the law are incomplete and simply too recent for us to know what results they are creating. For example, although the Permitting Council was created in 2015, when the FAST Act became law, and it was already in place when the Trump Administration came to power, it existed without an appointed Chair for nearly two years. Appointment of the Chair of the Permitting Council does not require Senate confirmation, and the Council worked without a Chair to for no other reason than because President Trump did not get around to picking a one. In our humble opinion, if the Council is supposed to speed up the permitting process, the first action that the President should have taken was to appoint a chair.

The lack of a Chair for the majority of its existence is not the only unmet need of the Council. As I mentioned before, the primary cause of project delay is lack of funding, so when the Council was created by Congress, it was understood by those leading the effort that more funding and more staff were needed to conduct permitting and environmental reviews. The loss of agency expertise and the lack of staff support for NEPA and permitting in the agencies are responsible for many problems in

implementing NEPA. Therefore, a key reform in the FAST-41 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.

We have all heard the President talk about launching a trillion-dollar infrastructure program. For this to succeed, it is our estimation that the permitting board needs close to $30 million to get up and running. We have to compare that figure with the $1 million that the Council received in its first year under this Administration and the $6 million that it received in the most current year. It is barely enough to hire a few staffers and very likely inadequate to carry out even its most basic statutory duties in hosting the Permitting Dashboard's tracking of projects.

Instead of appointing a Chair for the Council and adequately funding it, 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. If the objective is to improve infrastructure project reviews and permitting, then right now Congress' most important challenge is to exercise oversight of 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 Congress would be continued oversight and adequate funding of the administrative processes. The reality is that we do not yet know what the impacts of FAST-41 will be because it is not fully implemented. While we have significant concerns about the protections and safeguards that specific provisions erode, the Permitting Council and the Dashboard have not been functioning at full capacity for enough time to determine its actual impacts. Since we don't yet know whether provisions like the Council and the Dashboard will actually speed up projects and protect the public health and safety, it would be premature to mandate its permanence or expansion. We encourage Congress to wait until the Administration fully implements FAST-41 and Congress and the public has reasonable time to observe and evaluate its provisions before further legislative action is taken.

VI. Further Reforms Will Only Complicate and Confuse the Process

In light of the concerns outlined above, we are certain that further reforms to the NEPA process will only complicate and confuse project sponsors and diminish the role of the public. Congress has already made significant changes to the permitting process under NEPA but many of these changes have not been implemented yet so there is no evidence to show that further changes are needed. As the Committee is aware, changes to the NEPA process for infrastructure projects were enacted in the Moving Ahead for Progress in the 21st Century Act (MAP21), the Water Resources Reform and Development Act of 2014 (WRDA), and the Fixing America's Surface Transportation (FAST) Act.

Additional changes to the review process for infrastructure projects prior to the implementation of legislatively-mandated regulations have led to confusion. DOT's Inspector General (IG) found that although the Department has completed most of the reforms mandated by MAP21, the Department

was forced to delay the implementation of the others because they must be revised to also comply with the additional changes in the FAST Act.[10]

In fact, further changes to the NEPA process at this time would only complicate and possibly undermine the way the already approved ones work. In fact, the IG stated that, because of the interruptions caused by the additional FAST Act reforms, "the Department may not achieve all of the intended benefits under MAP-21…such as accelerated project delivery, reducing costs, and ensuring that the planning, design, engineering, construction, and financing of transportation projects are done in a more efficient and effective manner."[11] Essentially, the IG's statement demonstrates that piecemeal legislative attacks not only constrain flexibility but they also complicate and unnecessarily delay implementation by creating new burdensome NEPA requirements.

VII. Conclusion

To ensure that infrastructure decision-making is conducted in a transparent and informed fashion, Congress should ensure robust environmental reviews that fully comply with the National Environmental Policy Act. It would be premature to legislate further changes until FAST-41 has been fully implemented and the results have been assessed. We look forward to working with you to achieve these important goals.

Sincerely,

Raul Garcia
Senior Legislative Counsel
Earthjustice

[10] Office of the Inspector General. "Vulnerabilities Exist in Implementing Initiatives Under MAP-21 Subtitle C to Accelerate Project Delivery." March 6, 2017.
[11] *Id.*

Post-Hearing Questions for the Record
Submitted to Alexander Herrgott
Executive Director
Federal Permitting Improvement Steering Council
From Chairman Rob Portman and Ranking Member Thomas R. Carper

"Oversight of Federal Infrastructure Permitting and FAST-41"
May 2, 2019

1. In your testimony, you repeatedly stated that the goal of FAST-41 and the FPISC are not to get to a "yes", but to simply get a decision in a faster period of time. Since NEPA is designed to be an impartial decisionmaking tool, such statements are encouraging. However, concern remains that several provisions in FAST-41 seem to place a heavy thumb on faster approvals by prioritizing the concerns of project sponsors over the public. For example, FAST-41 allows the preferred alternative to be developed "to a higher level of detail than other alternatives." Despite statutory language requiring that this not impact impartial decisions or public input, this structurally changes how decisions are being made and potentially limits consideration of any citizen-offered or other reasonable alternatives. Additionally, project sponsors are given priority in determining both the timeline for a project and whether public comment periods can be extended. These provisions should be considered with judicial review provisions that likewise shift the balance away from the public impacted by projects towards project sponsors profiting from projects by now forcing courts to consider economic impacts irreparable.

   These provisions and others, when considered in the aggregate, raise serious concerns that so-called permitting process improvement provisions are fundamentally altering the architecture of the decisionmaking process under NEPA to the benefit of projects sponsors, at the expense of the public. Can you think of: (1) any reason why the law should not guarantee the public a seat at the table in setting permitting timetables, (2) why the law should not allow the public to have a voice in whether to extend comment periods, and (3) provide any examples of abuse of the previous preliminary injunction standard by plaintiffs in NEPA cases? Additionally, are there any projects covered under FAST-41 that have been denied a permit by the FPISC? If so, which ones and why?

   Response: FAST-41 encourages "enhancing early stakeholder engagement, including fully considering and, as appropriate, incorporating recommendations provided in public comments on any proposed covered project," which is the first statutory category for best practices, as addressed in the following FPISC report: Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2019. (https://www.permits.performance.gov/node/49231/)

FAST-41 contains provisions regarding the public comment period that parallel standard practice for Federal agencies involved in the environmental review and authorization process, where the lead agency extends the deadline for good cause (under FAST-41, for a Draft Environmental Impact Statements (DEIS), this extension is done in consultation with cooperating agencies). Public commenters can request an extension to the public comment period for DEISs, and the lead agency may grant such extension requests.

This mirrors the provisions created by Congress for highway projects covered under the 2005 SAFETEA-LU bill. Excerpts from these statutes are provided below.

FAST-41:

(d) Environmental review comments
(1) Comments on draft environmental impact statement
For comments by an agency or the public on a draft environmental impact statement, the lead agency shall establish a comment period of not less than 45 days and not more than 60 days after the date on which a notice announcing availability of the environmental impact statement is published in the Federal Register, unless—
(A) the lead agency, the project sponsor, and any cooperating agency agree to a longer deadline; or
(B) the lead agency, in consultation with each cooperating agency, extends the deadline for good cause.

(2) Other review and comment periods
For all other review or comment periods in the environmental review process described in parts 1500 through 1508 of title 40, Code of Federal Regulations (or successor regulations), the lead agency shall establish a comment period of not more than 45 days after the date on which the materials on which comment is requested are made available, unless—
(A) the lead agency, the project sponsor, and any cooperating agency agree to a longer deadline; or
(B) the lead agency extends the deadline for good cause.

SAFETEA-LU:
"(A) For comments by agencies and the public on a draft environmental impact statement, a period of not more than 60 days after publication in the Federal Register of notice of the date of public availability of such document, unless— "(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or "(ii) the deadline is extended by the lead agency for good cause. "(B) For all other comment periods established by the lead agency for agency or public comments in the environmental review process, a period of no more than 30 days from availability of the materials on which comment is requested, unless— "(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or "(ii) the deadline is extended by the lead agency for good cause.

FPISC does not have statutory authority to approve or deny permits. The Department of Justice defends federal agencies that issue permits (or other authorizations) against NEPA challenges. Under the Federal Rules of Civil Procedure and federal law, the Department of Justice has authority to take appeals from district court rulings that award preliminary injunctive relief and to seek stays of the injunctions pending appeal. Appellate courts overturn such rulings when the federal judge has abused his or her discretion in applying the preliminary injunction standard.

2. What is the status of any proposed rule to add the hardrock mining sector to FAST-41? Are there any other proposals, initiatives, or discussions to further expand FAST-41 to other sectors, including the hardrock mining sector? If so, which ones?

   Response: During the Third Quarter Permitting Council meeting, held on May 12, 2019, a majority of Council members voted on a non-binding resolution instructing FPISC Office of the Executive Director (OED) to proceed with exploring methods to add mining as a covered sector consistent with the Administrative Procedures Act. For any additional sectors, FPISC will follow the standard operating procedure as previously adopted by FPISC for adding a sector under FAST-41. (https://www.permits.performance.gov/tools/sop-add-sector).

3. In your testimony, you state that the FPISC has saved in excess of $1 billion in excess permitting costs. From 2016-2018, please provide a list of the federal projects that the FPISC has saved money by expediting the permitting process that includes: project name; a brief description of the project; how the permitting council expedited the permitting process; and, the estimated amount of taxpayer money saved. Also, please provide the methodology and cost breakdown supporting the $1B estimate.

   Response: FPISC OED has contributed to streamlining covered projects by spearheading interagency efforts to increase transparency, accountability, predictability, and concurrent processing to reduce avoidable permitting delays for FAST-41 projects. Due to the proprietary nature of costs associated with individual covered projects, FPISC cannot provide a project-specific breakdown of the $1 billion estimate.

   In some cases the estimate is calculated based on the capital costs the sponsor would incur if the project were delayed. These included:

   - Contractual standby costs to ensure availability of qualified contractors as the issue is being resolved.
   - Avoided additional costs for working outside of the normal summer construction season and having to move contractors and equipment around where permitting conditions allow for construction instead of being able to start at one point and work continuously through a linear project.

In other cases, the estimate is calculated based on the damages that would arise from a delay of the in-service date of the project. For example, for a pipeline, the project sponsor would have shipment contracts to provide customers with oil or gas, and the project sponsor will lose money each month that it is not shipping the product to these customers.

The current figure is based on some initial projects where we have been able to track and estimate cost savings. As we continue to work with specific projects, we expect to be able to expand our ability to estimate the cost savings for more projects, so this number is only going to grow.

Some examples of FPISC OED's role in keeping FAST-41 projects on track and on schedule through FAST-41 oversight and issue resolution are provided below.

- FPISC OED facilitated cooperation among agencies involved in the Nexus Gas Transmission Line FAST-41 project to ensure an efficient and timely Section 106 review under the National Historic Preservation Act (NHPA). FPISC OED and FPISC member agencies cooperated with the project sponsor to facilitate delivery of information necessary to expedite Federal Energy Regulatory Commission's (FERC's) completion of the review, allowing subsequent authorizations to move forward and, as relayed by the project sponsor, saving an estimated 6 months and $300 million in capital costs to the project.

- Furthermore, FPISC OED's oversight role and involvement led to the successful drafting and implementation of a Programmatic Agreement for Section 106 of the NHPA for two FAST-41 projects, and supported the Advisory Council on Historic Preservation (ACHP) in playing a key role in resolving issues with FERC, the U.S. Forest Service (USFS), the National Park Service (NPS), and the states that were involved.
    - For one of these projects, Atlantic Coast Pipeline, the completion of the Programmatic Agreement allowed other Federal permitting actions to move forward. This in turn allowed the permitting process to be completed in time to utilize that year's tree clearing window for construction activities, preventing a delay of a year.

- The Mid-Barataria Sediment Diversion project was the first project to voluntarily apply to the FAST-41 process, and is a key example of the successful implementation of Federal-State coordination on a FAST-41 project by creating and implementing the first FAST-41 MOU. This MOU established Federal and State roles and responsibilities for both Federal and State agencies including their specific permitting responsibilities. In addition, my office identified complex questions not yet resolved by the agencies related to NEPA implementation, and worked with the Council on Environmental Quality (CEQ) to provide subject matter expertise to the agencies to assist them in determining their next steps.

4. In your testimony, you state that you recently embarked on 3 weeks of travel across the country to 40 cities to meet with the public, tribal groups, low-income, and disparate populations about the federal permitting process. As you know environmental justice is a core concern of the NEPA process. Please provide details on the cities you visited along with the "tribal groups, low-income, and disparate populations" you met with and where those meetings were held. Also, please provide concrete examples of stakeholder feedback and whether you made any language accommodations at meetings to ensure that persons with disabilities and communities needing information in languages other than English were able to participate.

Response: FPISC OED is leading the effort to implement one of the FAST-41 cornerstones for systematic change to the permitting process. This is accomplished through the Best Practices Report, in which FPISC issues recommendations on best practices for environmental reviews and authorizations common to covered projects. One of the best practices focuses on enhanced public participation across agencies for maximum impact in addressing common stakeholder concerns. It is through agency-wide implementation of these best practices that improvements in the permitting process will be realized. FPISC OED has spoken to number of governmental agencies at various levels and has taken a number of trips to educate local, regional and agency stakeholders on this process.

Recent outreach activities include presentations, or meeting with, groups such as:

- National Association of Counties (membership of 3,064 county governments)
- National Governor's Association
- National League of Cities (membership of over 2,000 cities of varying sizes)

Recent stakeholder engagement with city, county, and state officials includes, but is not limited to the following areas:

- Oklahoma – Tulsa
- Wyoming – Casper, Cheyenne, Rock Springs, Big Piney, Boulder, Jackson
- South Carolina – Charleston
- California – LA, Sacramento
- Louisiana – New Orleans
- Nevada – Reno

FPISC 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.

FPISC 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 FPISC member agencies with detailed metric information and advised them they will be evaluated on how they "develop or utilize mutually acceptable standards and protocols with Federally Recognized Indian Tribes for the identification and treatment of resources that might be affected by infrastructure projects." Agency performance was assessed in the FPISC Fiscal Year 2018 Annual Report to Congress:
https://www.permits.performance.gov/about/news/fast-41-annual-report-congress-fy-2018.
This continues to be a best practice as identified in FPISC's Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2019:
https://www.permits.performance.gov/about/news/fy-2019-recommended-best-practices-report.

The FPISC Executive Director also met with approximately 30 Tribal Historic Preservation Officers during the 2019 Arizona Historic Preservation Conference this month (June 13, 2019), during which an approximately three hour listening session was held, during which the provisions of FAST-41 were also discussed. This opportunity came as a result of a meeting FPISC OED had a month or two prior, with representatives from the National Association of Tribal Historic Preservation Officers, here in Washington, DC on May 7, 2019.

Although no language accommodations were requested or needed for these particular meetings to ensure robust discussion, FPISC OED wants to ensure all stakeholders have an effective voice at the table and will consider potential language accommodations in future communications. For example, FPISC OED is currently working on a Spanish translation of the FAST-41 fact sheet. FPISC OED will continue to work with agencies and NGOs to better understand how FPISC's unique platform can better serve all stakeholders.

5. The Permitting Council deals primarily with covered projects in excess of $200 million, many of which have the potential to have profound impacts on the environment and climate. For these reasons, it is especially important that these larger projects undergo robust NEPA analysis to identify and disclose to the public any significant contribution these projects will have to climate change, as well as how future climate change may impact these projects. What mechanisms does the Permitting Council have in place to ensure covered projects are reviewed for their impact on climate change (including but not limited to direct, indirect, and cumulative impacts) as required by law under NEPA?

   Response: FAST-41 promotes robust analysis for all applicable environmental reviews and authorizations so that agencies are able to make informed permitting decisions. However, each agency has its own statutory and regulatory responsibility in performing climate change analyses. FPISC does not have a role in ensuring the content of this impact analysis, but in providing oversight to ensure the process of conducting the analyses and coordinating with other agencies is efficient and transparent.

6. Do you believe the Permitting Council is adequately funded currently? If not, how much money does the FPISC need to ensure staff capacity to perform the tasks that Congress envisioned?

   Response: FPISC will continue to use the FAST-41 tools of oversight, transparency, collaboration, and accountability to improve the permitting process. The President's FY 2019 Budget Request provided the funding support necessary to fully use these FAST-41 tools and institutionalize these improvements across the entire Federal permitting process. For example, the FPISC OED is working with Council Member agencies to help support the agency field staff responsible for implementing FAST-41 provisions and managing the permitting processes for FAST-41 projects day to day, including on-location meetings to build a strong foundation and identify a clear path forward for each new FAST-41 project. In addition, FPISC OED through interagency agreements, is fully funding senior-level agency practitioners to work as detailees within FPISC. Going forward, in addition to the reforms and activities mentioned, our capacity and resources over the next year, including fully funding the FY 2020 President's Budget request of $7.1 million for the Environmental Review Improvement Fund through appropriations, will determine our ability to provide the promised benefits of FAST-41 to covered projects.

7. As you know, the tribal-federal relationship is unique. One of the tenets of this relationship is meaningful consultation. Recently, the GAO issued a report on improving tribal consultation, available at: https://www.gao.gov/mobile/products/GAO-19-22. The report issued recommendations to several federal agencies and departments, including recommendations for FPISC.

   a. Do you believe that the development of a central federal information system that keeps track of tribal areas of interest and points of contact for consultation by the FPISC would

improve tribal consultation? What role should FPISC play in development and management of a central federal information system?

Response: Yes, FPISC believes that the development of a central federal information system will facilitate improved tribal consultation with member agencies. FPISC OED is working collaboratively with FPISC member agencies to develop a plan to establish this system and to identify the resources necessary for its ongoing management. In general, FPISC's role in the environmental review and authorization process is as a facilitator within the decision-making process.

b. Once the central federal information system is established, how should the Executive Director work collaboratively with FPISC members to facilitate communication with and involve tribes in order to ensure they maintain accurate tribal data in the system?

Response: If a central federal information system is established, FPISC-OED will continue to facilitate discussions among FPISC member agencies on additional initiatives FPISC can undertake to better improve the process for tribal participation in the Federal permitting process, while continuing to promote FAST-41's provisions for early stakeholder engagement.

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