

**BEFORE THE U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON
THE JUDICIARY, SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW**

H.R. _____, Permitting Litigation and Efficiency Act of 2018

Hearing on April 12, 2018

Testimony of William L. Kovacs

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Good morning, Chairman Marino, Ranking Member Cicilline, and distinguished members of the House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust law. My name is William L. Kovacs. Thank you for inviting me to discuss H.R. ____, the “Permitting Litigation Efficiency Act of 2018”. This committee is to be commended for its work over the years to bring statutory time-limits, structure and efficiency to the federal permitting process. Its efforts first started in 2012 when members of this committee introduced the permit streamlining concept in H.R. 4377, (113th Congress), the “Responsibly and Professionally Invigorating Development Act” (“RAPID Act”) which focused on placing administrative time limits on environmental reviews and establishing a substantially reduced statute of limitations for challenging final agency action on environmental reviews.

The Permitting Litigation Efficiency Act of 2018 addresses the difficult questions of unreasonable delay in the federal permitting process. It does so by deeming unreasonable delay of final agency action to occur if an agency: (1) fails to act by the deadline for final agency action set by a presidentially designated official, or (2) within two years of the submission of a completed permit application. It also requires that challenges to the unreasonable delays in agency action be filed within sixty days of the failure of the agency to act within the established deadlines.

I. BACKGROUND

As this committee knows well, permit streamlining has been a bipartisan effort in Congress since the 2009 debate over the American Recovery and Reinvestment Act (“The Recovery Act”) which was enacted, in part, to address the high unemployment levels of the great recession.

During the debate on the Recovery Act, Senators Barrasso (R-WY) and Boxer (D-CA) recognized that there were flaws in the permitting process that made it difficult to move infrastructure projects forward in a reasonable time frame, i.e. several years versus a decade, due to delays in the environmental review process. The Senators worked together to develop an amendment to the Recovery Act requiring the National Environmental Policy Act (“NEPA”) process be updated to require that environmental reviews be conducted “on an expeditious basis” (i.e. that the shortest existing applicable process be used). The Barrasso–Boxer amendment was enacted into law and had a dramatic impact on the implementation of the Recovery Act. According to Council on Environmental Quality (“CEQ”) data, out of the 192,707 NEPA

environmental reviews conducted on Recovery Act projects, 184,733 were satisfied through the use of categorical exclusions. Only 841 required an Environmental Impact Statement (“EIS”), the longest process under NEPA.

After passage of the Recovery Act, the U.S. Chamber of Commerce prepared an extensive study of the difficulties inherent in securing permits to construct electric energy projects. The report titled “*Project – No – Project*” identified 351 energy projects across the nation that were stalled due to the many challenges made under the Federal government’s environmental review process, as well as state and local barriers. The stalled projects, if permitted, would have produced a direct investment totaling \$577 billion at a time when the economy desperately needed investment. The report estimated that this \$577 billion direct investment would have generated a \$1.1 trillion short term boost to the economy and created 1.9 million jobs annually during the projected seven years of construction. The report became an important resource used by both houses of Congress to develop legislation to address the long permitting delays.

The Chamber recognized that all of the studied projects would not be approved, and that some should not be approved however, it prepared alternative scenarios to demonstrate the positive economic impacts of differing percentages of the projects being approved.

In 2012, members of the House Judiciary Committee introduced H.R. 4377, “Responsibly and Professionally Invigorating Development Act” (“RAPID Act”) to streamline the nation’s environmental permit review process. While the House passed RAPID in both the 113th and 114th Congresses, the Senate did not address the issue until the 114th Congress when it introduced the “Federal Permitting Improvement Act.” The Senate quickly reported it out of committee so that it could be incorporated into its version of the highway transportation bill known as “Fixing America’s Surface Transportation” Act or “FAST Act”. The permit streamlining parts of the Senate version of the highway transportation bill were adopted by an informal conference with several amendments made by the House of Representatives. On December 4, 2015 President Obama signed the FAST Act into law containing the permit streamline provisions supported by both the House and Senate. The permit streamlining provisions became known as FAST – 41 for the title it occupies in the FAST Act.

The enactment of FAST- 41 was the first time since the passage of a 1969 federal law requiring environmental reviews of major infrastructure projects having federal involvement, that a structure was established for the management, coordination, timing and transparency of the environmental review process for such projects. It also shortened the statute of limitations for lawsuits challenging agency action from six years to two years.

With the enactment of FAST- 41 and other targeted permitting statutes, Congress enacted permit streamlining provisions and shortened time-periods for parties seeking the review of agency actions for environmental reviews, highway construction, and waterways development. The introduction of the Permitting Litigation Efficiency Act of 2018 however, is the first attempt by Congress to extend its permit streamlining efforts to the judicial review of all federal agency permitting activities by defining “unreasonable delay” and applying the reduced statute of limitations of one hundred and eighty days to all federally permitted activities not covered by specific statutes.

II. CURRENT COVERED PROJECTS– THE FAST-41 PROCESS IS A LEGISLATIVE SUCCESS

Based on the current Federal Permitting Infrastructure Steering Council dashboard there are currently thirty-six “covered projects” that have undergone or are currently under FAST-41 review. This first tranche of projects was taken from existing pending projects, which had an environmental review or authorization pending before a Federal agency ninety day after the enactment of FAST- 41. Unless those projects already had a draft environmental assessment (EA) or a draft EIS released, they must develop a “coordinated project plan”, including a permitting timetable. The current “covered projects” include among other things interstate natural gas pipelines (10), electricity transmission lines (8), solar energy projects (3), hydropower (4), liquefied natural gas terminals (3), combined license/construction for nuclear facility (3) community planning and development projects (3) energy generation (2). These projects are located throughout the country, from New York to Florida to Oklahoma and Oregon. The dashboard also contains a map showing the location of the projects, descriptions and background on each project, the lead agency and additional non-FAST- 41 projects such as highway projects.

Out of the 36 projects on the dashboard fifteen are complete: pipelines (5), electricity transmission (4) nuclear energy license/ construction (3), and renewable energy (3). The Federal Energy Regulatory Commission leads all agencies by processing to completion seven applications. It is followed by the Nuclear Regulatory Commission with 3 and the Bureau of Land Management with 2. Other agencies that have processed one application are: Bureau of Indian Affairs, United States Forest Service, and the Department of Energy.

III. WHY IS H.R. ____ NEEDED IN LIGHT OF OTHER PERMIT STREAMLINING MEASURES?

The Permitting Litigation Efficiency Act of 2018 is needed for three primary reasons. First and foremost, to clearly define “unreasonable delay” in the federal agency review of permit applications. Second, to set a uniform statute of limitations for reviewing the actions of all agencies regarding the timing of judicial review in their permitting activities. Thirdly, while FAST- 41 is the most comprehensive of the permit review statutes it has several serious limitations that would be remedied, to some degree by the Permitting Litigation Efficiency Act of 2018. Specifically:

- 1.The most significant flaw in FAST- 41 is that it sunsets in seven years, i.e. December 4, 2022, which means that all covered projects that did not receive approval by December 4, 2022 will not get the benefit of the streamlined permitting process and the reduced statute of limitation provision. Moreover, the permitting process will revert to the pre-FAST– 41 process that had few time limits on environmental reviews. Also, the current two-year the statute of limitations will revert back to six years.
2. The two-year statute of limitations in FAST- 41 is statutorily limited to certain projects; those costing over \$200 million or having a complexity that necessitates coordination of the actions of multiple agencies in the permit review process. The Permitting Litigation and

Efficiency Act of 2108 would ensure that all delayed permitting activities have the benefit of the reduced statute of limitations, including what would be a “covered project” today should FAST- 41 expire.

3. Many of the details of FAST– 41 that allow smaller projects into the streamlined process are addressed by Executive Order 13807 which helps coordinate FAST– 41 covered projects with high-priority projects recommend by Governors and the Council of Environmental Quality. As we all know an Executive Order can change from administration to administration which in this case could leave all non-covered projects outside of the scope of the statute and subject to a 6-year statute of limitations.

Notwithstanding the deficiencies in FAST- 41, its provisions provide significant reform in federal permitting actions. Specifically, FAST- 41 imposes a two - year statute of limitations for any claims arising under Federal law seeking judicial review of any authorization issued by a Federal agency for a covered project” for which an agency has published notice in the Federal Register of the final record of decision or approval or denial of a permit. The two - year statute of limitations begins to run when the notice of the authorization is published in the Federal Register. Previously, reviews done pursuant to NEPA – which is silent on the timing of a statute of limitations – were subject to a six-year statute of limitations under the general statute of limitations for suits against the federal government. By reducing the statute of limitations for claims under FAST- 41 brings more certainty and finality to permitting decisions for major infrastructure projects.

The FAST- 41 also mandates that only a party that submitted a comment during the environmental review may file a legal challenge to a NEPA review for a covered project. This will prevent third parties, who did not participate in the review process, from weighing in for the first time on a FAST- 41 covered project through a lawsuit filed after final agency action. The primary purpose of this provision is to ensure the agency is given notice of the alleged deficiency in the environmental review so it might be able to remedy it.

Another judicial review improvement contained in FAST - 41 is that, when injunctions against a project are sought, courts must consider the employment impacts of the project. Specifically, the court must consider “the potential effects on public health, safety, and the environment, and the potential significant negative effects on jobs resulting from an order or injunction,” and the court cannot presume that any of those harms are repairable. Consequently, courts will have to address jobs that could be lost if FAST- 41 projects are blocked through the issuance of a preliminary injunction.

The above provisions in FAST – 41 are generally incorporated into the Permitting Litigation Efficiency Act of 2018.

Before moving on to how the Permitting Litigation and Efficiency Act of 2018 fosters permit streamlining efforts and provides backup support for streamlining efforts should FAST- 41 expire, let me empathically state that FAST – 41 is a well drafted statute, with bipartisan support, easily comprehended and sets reasonable time-frames for permit review. As such the easiest way

to address “environmental reviews” is to make FAST – 41 permanent. While this would not address delays in the permitting process for non-environmental matters or non-covered projects, it would go a long way to addressing time delays in projects that need environmental review or the coordination of environmental reviews involving multiple agency action. The Permitting Litigation Efficiency Act of 2018, if enacted, would benefit all federal permit applications by defining “unreasonable delay” and providing a shortened statute of limitations for all federal permitting activities not covered by a specific permit streamlining statute.

IV. H.R. ____ PROVIDES CERTAINTY FOR THE CURRENT REVIEW OF AGENCY ACTION

Section 2 of H.R. ____ sets forth a clear policy for the courts to determine when agency actions are either “unreasonable delayed” or “unlawfully withheld.” Specifically, section 706 of the Administrative Procedure Act (“APA”), Scope of Review, would be amended to deem an agency’s failure to take final action upon a federal permit application to be unreasonable delay if the agency fails to act:

1. by the deadline for final agency action set in a schedule determined by a presidentially designated official, provided the schedule contains deadlines for final action and a date prior to such date for final determination of the scope of any statutorily required environmental review and final action on the permit; or
2. in the absence of such a date for final action on the application, the date is two years after the date the completed application was filed, unless the agency is acting under the time-limits established by the FAST – 41, section 41003; sec. (2); MAP-21 (23 U.S.C. sec. 139); or section 2045 of the Water Resources Act of 2007.

The Permitting Litigation Efficiency Act of 2018, also amends section 706 of the APA by establishing a uniform statute of limitations of one hundred and eighty days for lawsuits challenging agencies’ final permitting decisions. This new statute of limitations for challenges to final permitting actions streamlines the currently applicable statute of six years and is consistent with congressional efforts to reduce the statute of limitations applicable in numerous other settings, in order to bring finality to the federal permitting process.

The Permitting Litigation Efficiency Act of 2018 also amends section 705 of the APA to require courts, in considering motions to enjoin the issuance of a permit to consider the potential benefits and harms of issuing the injunction, including the impact on public health, safety, the environment and on the employment. Section 3 would also mandate that the courts not presume that the harm from the delay is reparable.

The job impact considerations and injunctive relief provisions in H.R.____, the Permitting Litigation and Efficiency Act of 2018 are similar to the provisions in FAST – 41 at section 42 USC section 4370m-6 (b). By enacting H.R.____, the Permitting Litigation and Efficiency Act of 2018, Congress would be conforming the judicial review of agency action on permit

applications throughout the code so that non-covered projects would generally receive similar judicial considerations as the larger-scale covered projects and should FAST-41 expire the reduced statute of limitation provisions of H.R.____ would become the default statute of limitations.

Finally, since FAST – 41 and the Permitting Litigation Efficiency Act of 2018 condition the right to challenge an agency’s permitting decision on participation in the administrative permitting procedures of the agency, the parties will be familiar with the contents of the permit, therefore a one hundred and eighty day statute of limitations for challenging such actions is reasonable.

V. RECOMMENDATIONS

1. Remove the seven- year sunset provision from FAST – 41 and make it permanent.
2. Enact the Permitting Litigation Efficiency Act of 2018:
 - a. so that courts have a clear standard for determining when “unreasonable delay” occurs in the permitting process.
 - b. to provide a reduced statute of limitations for all federal permitting activity, other than for projects subject to specific statutes, so as to ensure prompt action of federal permits.
 - c. to ensure that the impact on jobs is considered in lawsuits filed seeking to enjoin projects.

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