

BROOKINGS

Report

A quick, bipartisan fix for America's slow infrastructure permitting

Philip A. Wallach and Nick Zaiac Friday, June 8, 2018

Editor's Note:

This report is part of the Series on Regulatory Process and Perspective and was produced by the Brookings Center on Regulation and Markets.

Fixing America's aging infrastructure is one of the most reliably popular policy ideas out there, so why do we seem to make so little progress on it? In short, we've made the process of planning and carrying out infrastructure projects extremely difficult. Building new roads, levees, and rail lines requires conformity to layers of permitting requirements and regulations. While much of the burden comes from local and state approvals, the federal permits needed for large projects can take years to procure and often lead to further delay. To give a sense of the magnitude of the problem, a set of reform proposals released by the group Common Good in 2017 was titled "Two Years, Not Ten Years." Beyond permitting, other factors, lack of financing, high construction costs, and failed coordination between states and municipalities can all mean concrete never gets poured.

Fortunately, federal permitting reform is among the few issues that Congress has been able to address in a bipartisan manner in recent years. Most importantly, in December 2015 Congress passed (and President Obama signed into law) the Fixing America's Surface Transportation Act (FAST Act), which reauthorized and funded federal highway programs for five years. Title 41 of the Act, which incorporated a Senate bill sponsored by Senators Rob Portman (R-OH) and Claire McCaskill (D-MO), established a Federal Permitting Improvement Steering Council (FPISC). FPISC is meant to provide a "one-stop-shop" capable of coordinating permits across different federal agencies, thereby streamlining and shortening the overall process for some large projects.

The law also established the “FAST-41 Permitting Dashboard,” which seeks to make federal infrastructure permitting more transparent to the public. Today, 97 percent of projects listed on the dashboard have a timetable for when permits will be approved. With few exceptions, the permitting timeline may not be extended by more than 50 percent of the overall time once established. If federal agencies miss these deadlines, they are required to send monthly updates to the Permitting Council until permits are approved (see § 41003(c)(2)(F)). This has produced some significant gains. For example, in an April press release, the Permitting Council touted time savings of 22 months for a major sediment diversion project in Louisiana’s Mississippi delta, putting it on-pace to have all permits by 2020.

Like any new program, FPISC and the dashboard have a few limitations. They are set to sunset after 7 years if not renewed. Currently, for a project to be considered for expedited permitting, the host state must agree to participate in the process in order to allow coordination between state and federal permitting officials. This coordination is important to minimize overall permitting delays by allowing concurrent state and federal reviews. Beyond this, individual projects must apply to the Permitting Council to be considered.

Senators Portman and McCaskill have recently released draft legislation that would expand the reach of the law. First, it would make FAST-41 permanent. Second, it would modestly expand the legislation to cover some projects that the original law excluded. Third, it would codify the permitting council’s consultation authority. Finally, it would set a goal of two years for the permitting process to be completed. Each of these aspects would build on the existing work of the Federal Permitting Improvement Steering Council.

1. **Permanence.** Making the FAST-41 Act permanent adds certainty to the building process. A seven-year sunset for permitting is a short time span for infrastructure assets that will be built to last 40, 50, or even 100 years in the case of bridges. Under current law, project sponsors would need to apply in the next year or two if they hope to have their permitting process done before the current law expires. Building durable assets is made more efficient when the laws that govern infrastructure are similarly durable.
2. **Broadening Scope of the Law.** The FAST-41 Act excludes projects covered by existing permit-expediting processes. These include two types of projects, highway and

navigable waterways projects. As a result, projects addressed in FY 2017 did not include any where the Department of Transportation is the lead agency. Broadening the scope of the most universal permit expediting body to include such projects could remove a potential pitfall should a project sponsor apply to the incorrect program, leading to the kind of delays the FAST-41 Act seeks to avoid.

3. Clarifying Executive Review. The Trump administration created some confusion with Executive Order 13807, issued in August of 2017, which contemplated a separate body similarly tasked with streamlining federal permitting. The Permitting Council and the White House have worked to harmonize their missions, but it would be better for Congress to simply clarify the situation, which Portman and McCaskill's bill would work toward even if the bodies exist in parallel.
4. Formalizing the 2-year window. The proposed legislation sets a two-year goal for completing all federal permitting for infrastructure projects. Agencies would need to show from the outset how they plan to complete the permitting process within the allotted time frame, and if they cannot, explain to Congress why this is the case. Like the current law, this would force bureaucratic agencies to make clear why they will fail to complete their work and which steps they will take to minimize the time overrun. Unlike the current law, these changes put a specific time window in place for permitting approval that is uniform across project types. In doing so, they would set a government-wide standard for the length of the permitting process, bringing clarity and transparency to permit approvals.

The FPISC could also get some help without any legislation—indeed, without any further involvement from Congress. Under the FAST-41 Act, the Permitting Council is headed by an appointed executive director. This position does not require Senate approval. The director appointed by President Obama left when the Trump administration arrived, but the Trump administration has never nominated anyone for this role, leaving it filled by an acting executive director who is concurrently the Permitting Team Lead at the Office of Management and Budget. Without a full-time leader, the efforts of the council are limited by a lack of staff time and a lack of clear direction. The Trump administration ought to advance one of its core priorities by finding and appointing a suitable director.

Infrastructure permitting ought to be a policy area that is susceptible to bipartisan incremental improvement, even in the current environment. The existing FAST-41 Act helps push the federal government toward faster approval of large-scale projects meant to last, which saves the cost of reactive pothole-filling during interminable permit delays. Ultimately, that should mean lower capital costs for builders, less wasted resources as projects await federal permits, and a shorter time between the identification of a need for an infrastructure asset and when Americans get to use it.

The authors did not receive financial support from any firm or person for this article or from any firm or person with a financial or political interest in this article. They are currently not an officer, director, or board member of any organization with an interest in this article.

Report Produced by **Center on Regulation and Markets**