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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.

[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,

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[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.*