

**Business Roundtable Comments on Notice of Proposed Rulemaking on
“Fees for Governance, Oversight, and Processing of Environmental Reviews and
Authorizations by the Federal Permitting Improvement Steering Council”**

FPISC Case 2018–001¹

November 5, 2018

Introduction

Business Roundtable CEOs have long advocated changes to the federal permitting process to “simplify, streamline and accelerate America’s permitting process with the goal of encouraging large-scale capital investments in the U.S. economy while maintaining the nation’s commitments to health, safety and soundness.”² Business Roundtable also strongly supported efforts for legislative reform of the federal permitting process for major infrastructure projects, which culminated in the passage of Title XLI of the Fixing America’s Surface Transportation Act,³ generally referred to as FAST-41.⁴ Because of its longstanding interest in reforming the permitting process for major infrastructure projects, Business Roundtable in April 2017⁵ called for aggressive implementation of FAST-41. Among other things, Business Roundtable identified the need to ensure that the Federal Permitting Improvement Steering Council (FPISC or Permitting Council) is adequately funded to carry out its important responsibilities under FAST-41. Business Roundtable has recognized that “[f]unding is necessary for the Executive Director and staff, maintenance of the permitting dashboard ... and additional funding for steering council activities.”⁶ The Roundtable has also supported user fees in other contexts where agencies provide valuable services.

The FPISC Notice of Proposed Rulemaking (NPRM) would establish user fees, in the form of a project initiation fee, to reimburse FPISC’s reasonable costs incurred in implementing certain requirements of FAST-41, plus the costs of operating the FPISC Office of the Executive Director (OED). In particular, the NPRM states that the fees would be used to reimburse the

¹ 83 Fed. Reg. 44846 (Sept. 4, 2018).

² See Business Roundtable, *Permitting Jobs and Business Investment: Streamlining the Federal Permitting Process* (April 2012) at 3. This report may be accessed at: https://www.businessroundtable.org/sites/default/files/2012_04_23_BRT_Permitting_Jobs_and_Business_Investment.pdf.

³ Pub. L. No. 114-94 (Dec. 5, 2015).

⁴ 42 U.S.C. § 4370m *et. seq.* Pursuant to section 41009 of FAST-41 (42 U.S.C. § 4370m-8(a)), Permitting Council agencies are authorized, in consultation with the FPISC Executive Director, to establish a fee structure to recover, from project sponsors, reasonable costs incurred in conducting environmental reviews and authorizations for infrastructure projects covered by FAST-41.

⁵ See BRT Letter, *Expedite Infrastructure Permitting Through Existing Law*, available at: <https://www.businessroundtable.org/resources/brt-letter-expedite-infrastructure-permitting-through-existing-law>.

⁶ *Id.*

FPISC-OED for costs incurred in 1) developing performance schedules for environmental reviews and authorizations required for common categories of “covered projects,”⁷ and reviewing and approving modifications to permitting schedules for covered projects; 2) recommending guidance for agencies to carry out their responsibilities under FAST-41; 3) issuing yearly recommendations for best practices; 4) outreach to state, tribal and local governments engaged in the permitting process; and 5) mediating disputes between project sponsors and relevant agencies. The proposed project initiation fee would be due in two installments: a nonrefundable \$5,000 fee at the time a project sponsor submits a FAST-41 initiation notice of a proposed covered project, and \$195,000 within 10 days of a determination that the project is a covered project for purposes of FAST-41.

Business Roundtable supports the establishment of a user fee to help to ensure adequate staffing and oversight of the federal permitting process through the FPISC. However, in comments below, the Roundtable makes three recommendations:

- First, the one-time start-up costs for the FPISC should be excluded in determining the proposed fee. The FPISC incurred a number of one-time start-up costs associated with implementing FAST-41, including drafting permitting best practices and developing agency guidance. While these activities were and are valuable, their benefits do not accrue only to proposed covered projects but instead flow to all projects requiring federal permits. Thus, Business Roundtable believes that these one-time start-up costs should not be taken into consideration when determining the appropriate amount of the user fee. Instead the amount of the user fee should reflect only on-going operational costs directly associated with covered projects. Such an approach would more closely comport with the concept of a user-fee for services provided.
- Second, the second installment of the user fee should be structured in such a way that it would be payable only in further installments depending on federal entities adhering to the published performance schedule for the covered project. This structure will provide further needed discipline to the permitting process.
- Third, any changes to the methodology used to calculate fees, and any adjustments to fees beyond ministerial increases for inflation, should be made after public notice and opportunity for comment.

⁷ Under FAST-41, “covered projects” generally are infrastructure construction projects that are subject to the National Environmental Policy Act (NEPA) and either (i) cost more than \$200 million; (ii) require the preparation of an Environmental Impact Statement; or (iii) require approvals from more than two federal agencies. See 42 U.S.C. § 4370m(6). Sponsors of such projects may file a FAST-41 Initiation Notice (<https://www.permits.performance.gov/tools/interim-fast-41-initiation-notice-instructions>) with FPISC and the lead agency for the project. The FPISC Executive Director then must add the project to the Federal Infrastructure Permitting Dashboard (<https://www.permits.performance.gov>), unless the Executive Director or a lead agency determines that the project is not a covered project. Under FAST-41, the Dashboard is maintained by the Executive Director of the FPISC and the General Services Administration, and disclosure on the Dashboard is the principal accountability mechanism under FAST-41. The Dashboard will contain links to applications and supporting documents, descriptions of the Federal actions affecting the project and the timetable established for the project.

Statement of Interest

Business Roundtable is an association of chief executive officers of America's leading companies working through sound public policy to promote a thriving U.S. economy and expanded opportunity for all Americans. The CEO members who compose Business Roundtable lead companies with nearly 15 million employees and more than \$7 trillion in annual revenues. As major employers in every state, Business Roundtable CEOs take seriously the responsibility of creating high-quality jobs. They are committed to joining communities, employees and policymakers in building a better future for the nation and its people. Each year, Business Roundtable member companies provide health care and retirement benefits to tens of millions of Americans and their families; generate more than \$488 billion in revenues for small- and medium-sized businesses, invest \$147 billion annually in research and development, and contribute more than \$8 billion to charitable causes.

Comments

Business Roundtable has long advocated improvements to the federal permitting process for large infrastructure projects, and strongly supported the FAST Act generally and the specific provisions intended to expedite the permitting of major projects contained in FAST-41. The Roundtable has also encouraged Congress to provide adequate funding for the FPISC as well as the Office of Management and Budget to ensure adequate staffing to enable them to carry out their important responsibilities to improve the federal permitting process for significant infrastructure projects. Business Roundtable has recognized and supported user fees as an appropriate means to fund the provision of valuable services by federal permitting entities.

Adequate resources for FPISC and for Permitting Council agencies are essential to realize the promise of FAST-41, as well as to enable these agencies to carry out their responsibilities assigned under Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure*, and Executive Order 13766, *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects*. Business Roundtable supports the establishment of user fees to ensure improvements in federal permitting. However, the amount of the fee should reflect actual on-going costs associated with the FPISC and not initial start-up costs that are not directly attributable to covered projects. As noted above, the FPISC had an initial number of resource-intensive tasks associated with implementing FAST-41 that should not recur. The costs associated with these initial activities, while undoubtedly of value, should not be taken into consideration when determining the appropriate amount of the user fee. Instead, the amount of the user fee should reflect only on-going operational costs directly associated with covered projects. While the difference is not likely to be great, this approach would more closely align with the fundamental notion that a user fee should be tethered to the actual costs of the services provided. It would also avoid the challenge of determining the number of projects over which

the initial start-up costs should be amortized – a judgment that could lead to the early projects bearing a greater share of such costs than later projects.

Annual adjustments in the initiation fee are appropriate: Business Roundtable supports the NPRM’s proposal to permit the Permitting Council to adjust the fee annually based on program implementation experience, demonstrated changes in program costs, and changes in the volume of new FAST-41 initiation notices submitted. The methodology in making such an adjustment, which as proposed in the NPRM would be based on a calculation of average hourly rates for government staff and contractor support costs, should be set forth in the final regulations.

Public Notice and Comment: Consistent with OMB Circular A-25, any change in the fee methodology should require notice and comment rulemaking.⁸ Beyond ministerial adjustments for inflation, any adjustments to the fee itself also should require either notice and comment rulemaking or a direct final rule with a comment opportunity provided, and not simply publication of a notice or a final rule with immediate effectiveness.

The initiation fee should be payable in installments: As the NPRM notes, FPISC’s role includes “institutionalizing . . . accountability . . . among Federal agencies related to the Federal environmental review and authorization process.” The NPRM explains accountability as “ensur[ing] that Federal agencies follow FAST-41 processes and adhere to established timeframes.”⁹ To promote that accountability, Business Roundtable recommends that the payment of the fee be linked to the completion of key milestones in the permitting process. Beyond the non-refundable up-front portion of the fee, the balance of the proposed user fee should be payable in at least two installments as federal permitting agencies meet the deadlines in their published performance schedules for the specific covered project, with the last installment due only when the agencies meet their final decision deadline, whether the final decision is to grant or deny the requested permit. If federal permitting agencies exceed the final deadline for making decisions, the remaining amount due should be progressively reduced until permitting agencies finally accomplish their responsibilities.¹⁰ Business Roundtable recommends that the timing and amount of installment payments be negotiated between FPISC and project sponsors once the project is determined to be a covered project and becomes part of the initial project permitting timetable.

⁸ See Circular A-25, § 7.a (“The general policy is that user charges will be instituted through the promulgation of regulations.”).

⁹ See 83 Fed. Reg. 44850.

¹⁰ Section 41009(f) of FAST-41 authorizes FPISC-member agencies to transfer unobligated appropriated funds to other affected agencies for the purpose of implementing FAST-41. See 42 U.S.C. § 4370m-8(f)(1). The member agencies could agree that each would make FPISC whole for any user fees lost as a result of that agency’s failure to adhere to an applicable deadline.

Conclusion

Business Roundtable supports providing adequate resources for the valuable role that FPISC plays in promoting organization and discipline in the federal permitting process. Business Roundtable recommends that the amount of the user fee reflect only on-going operational costs of the FPISC and not include initial, non-recurring start-up costs associated with implementing FAST-41. Business Roundtable also believes that any future proposed changes in methodology or amount, beyond inflation adjustments, should provide an opportunity for comment. Finally, the final installment of the user fee should be linked to permitting agencies meeting their published schedules. This will provide additional discipline to the permitting process.

For further information about these comments, please contact:

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