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## S.1976 – “Federal Permitting Reform and Jobs Act”

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Passed in 2015, the “Fixing America’s Surface Transportation (FAST) Act” continued the troubling trend of rolling back environmental review and public input for federal projects under the National Environmental Policy Act (NEPA). Premised on the demonstrably false claim that NEPA and the environmental permitting process is the primary cause of project delay, the FAST Act not only further weakens review of major highway infrastructure projects it also creates an entirely separate regime of limitations on public input and environmental review for *any* chosen infrastructure project costing more than \$200 million dollars.

### **Senator Portman’s bill S. 1976 would make permanent these attacks on judicial review and NEPA rollbacks for massive infrastructure projects. We urge you to oppose these efforts.**

The NEPA attacks in the FAST Act went well beyond surface transportation. Buried at the end of this 500-page bill, in Title XLI of Division D, is the “Federal Permitting Improvement Act” (FAST-41), which fundamentally undermines NEPA for any infrastructure project over \$200 million dollars, except transportation and Army Corp of Engineers projects. Completely unrelated to transportation, the provisions of Title XLI was never subject to a hearing in the House. FAST-41 bypassed the careful scrutiny and consideration of the normal legislative process and its provisions now allow critical infrastructure projects of enormous cost, size, and complexity to bypass the core guarantees of meaningful public input and government accountability under NEPA.

The idea that environmental review, public input, and government accountability under NEPA has been thoroughly reviewed and comprehensively debunked in numerous studies conducted by the Government Accountability Office (GAO), Congressional Research Service (CRS), and the U.S. Department of the Treasury. The CRS has repeatedly concluded that NEPA is not a primary or major cause of delay in project development, instead identifying causes entirely outside the NEPA process.<sup>1</sup> A Treasury Department report released in 2016 similarly noted that “a lack of funds is by far the most common challenge to completing” major infrastructure projects.”<sup>2</sup>

FAST-41 is completely unrelated to transportation projects and applies to an astonishingly broad category of “infrastructure” projects of incredible size, cost, and complexity. In effect, FAST-41 limited robust environmental review on the country’s largest infrastructure projects where full consideration of the socio-economic, environmental, and community impacts are most warranted.

**Recognizing that the limitations on environmental review and public input could have severe consequences on the ability of stakeholders impacted by infrastructure to meaningfully participate in decisions affecting the health, economy, and safety of their communities, Congress wisely included a 7-year sunset clause in FAST-41 to ensure the full impacts of the legislation were carefully reviewed prior to making it permanent. Senator Portman’s bill eliminates the sunset and permanently reauthorizes a decision-making process diminishing public input, government accountability, and environmental review.**

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<sup>1</sup> “Questions regarding the report Two Years Not Ten Years: Redesigning Infrastructure Approvals.” *Congressional Research Service*, June 7, 2017. Available at: <https://fas.org/sgp/crs/misc/twonot.pdf>

<sup>2</sup> “40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance.” *AECOM, Compass Transportation Inc., Raymond Ellis Consulting, and Rubin Mallows Worldwide Inc.* Fall 2016.

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## NEPA LIMITATIONS IN FAST-41

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### Division D – Title LXI – The Federal Permitting Improvement Act (FAST-41)

- Applies Limited NEPA Analysis to Broad Range of Projects – Covered projects under the bill include not just renewable and conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, and other projects over \$200 million dollars, but also any project the Council determines would benefit from abbreviated review.
- Limits Public Participation – Public comments on draft and supplemental documents are subject to arbitrary time limits.
- Allows Adoption of State Environmental Review Documents Without Safeguards Set Forth in NEPA
- Prejudices Alternatives Analysis – Allows the preferred alternative to be developed to a higher level of detail.
- Limits on Judicial Review – Limits the statute of limitations to 2 years, places limits on what parties may file a claim, and makes it more difficult for plaintiffs to obtain a preliminary injunction.

The substance of the toxic provisions found in FAST-41 aside, there is very little available data to measure outcomes associated with covered projects. Furthermore, There are still a number of provisions that the Department of Transportation (DOT) has yet to implement; for example, the FAST Act established the Federal Permitting Improvement Steering Council (FPISC) to coordinate permits across federal agencies for large projects, but President Trump only very recently appointed a permanent Chair. The FAST Act also allowed the FPISC to establish a “fee structure for project proponents to reimburse the United States for reasonable costs incurred in conducting environmental reviews and authorizations” for certain projects, but FPISC only initiated the rulemaking process for this initiation fee in September 2018.<sup>3</sup>

You cannot effectively manage what has not been adequately measured. Additional data is needed before considering any extension of provisions found in Title 41 of the FAST Act beyond the 2022 sunset.

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## EXPANDED NEPA LIMITATIONS IN S.1976

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### Section 2 –The Federal Permitting Reform and Jobs Act

- Waives Rulemaking Requirements Under the Administrative Procedures Act – Under current law, the FPISC must undertake a formal rulemaking and public comment process justifying any addition of covered projects sectors (e.g., mining). S.1976 eliminates this APA obligation, instead only requiring a simple majority vote of the FPISC.
- Expands Application of the Abbreviated Environmental and Public Review Under NEPA to Highways and Army Corps of Engineer Projects
- Further Limits Judicial Review of Government Noncompliance – Eliminates any claim for judicial review for certain determinations by the Executive Director of the FPISC and further shortens the statute of limitations for claims against covered projects.
- Permanently Limits Public Input and Environmental Review for the Most Complex, Critical, and Expensive Projects – S.1976 eliminates the sunset provision found in FAST-41 making rollbacks to NEPA, public input, and judicial review permanent.

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<sup>3</sup> 42 U.S. Code § 4370m-8