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Laura Gentile
Office of Policy (Mail Code 1104-A)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Comments of the Associated General Contractors of America (AGC) on Applying
FAST-41 Best Practices to Delegated State Permitting Programs
Docket ID No. EPA-HQ-OA-2017-0600

Dear Ms. Gentile:

The Associated General Contractors of America (AGC) appreciates the opportunity to provide the U.S. Environmental Protection Agency (EPA) with input on whether, and the extent to which, the best practices identified by the Federal Permitting Improvement Steering Council (FPISC)¹ – pursuant to “FAST-41” – apply to the environmental review and permitting programs in states that have been delegated the authority to implement and enforce provisions of the federal pollution control laws.² 82 *Fed. Reg.* 50418 (Oct. 31, 2017).

Executive Summary

On Jan. 18, 2017, the FPISC published *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects*, available at <https://www.permits.performance.gov>. AGC strongly recommends that EPA apply the streamlined permitting procedures in FAST-41 and the corresponding best practices identified by the FPISC to all state agencies conducting environmental approvals (for a covered “FAST-41” project,³ or otherwise) pursuant to their delegated authority. Many federal environmental statutes were designed by U.S. Congress to allow states to assume *partial or full* control of the resulting

¹ *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects* (Jan. 18, 2017), available at <https://www.permits.performance.gov>.

² On Dec. 4, 2015, the Fixing America’s Surface Transportation Act (FAST Act) was signed into law. Title 41 of this Act (42 U.S.C. § 4370m et seq.), referred to as FAST-41, created a new governance structure, set of procedures, and funding authorities to improve the Federal environmental review and authorization process for covered infrastructure projects. FAST-41 created the Federal Permitting Improvement Steering Council (FPISC) composed of agency Deputy Secretary-level members and chaired by an Executive Director appointed by the President. FPISC is charged with issuing recommendations on best practices to support the goals of FAST-41 – namely improving the timeliness, predictability, and transparency of the Federal environmental review and authorization process for covered infrastructure projects. *See, e.g.*, 42 U.S.C. 4370m-1(c)(2)(B). This statute applies specifically to authorizations and environmental reviews that are led by and/or issued by a Federal agency.

³ For the full definition of a covered project, see Section 3 of the FAST-41 Implementation Guidance at <https://www.permits.performance.gov/tools>.

programs through the delegation process. A majority of states have been delegated authority to implement and enforce one or more provisions of the federal pollution control laws.⁴ For example, EPA has authorized 46 states⁵ to operate the National Pollutant Discharge Elimination System (NPDES) permit program under Section 402 of the Clean Water Act; that program requires permits for stormwater discharges from construction activities that disturb one or more acres of land, and discharges from smaller sites that are part of a larger common plan of development or sale. These state-run programs are critical to the authorization of a construction project (breaking ground without an NPDES permit can lead to federal civil penalties of up to \$ 52,414 per day, per violation).⁶ State environmental agencies must take advantage of new processes to enhance coordination, transparency, predictability, and oversight of the federally-required reviews and permitting required prior to construction.

With the slow pace of critical construction projects, and President Trump's latest Executive Order⁷ calling for faster approvals of permits for highways, bridges, pipelines and other major building efforts, AGC urges EPA to implement proven best practices that will foster coordination, transparency of approvals, and expedited permitting. Overall, the FAST-41 process is beneficial to project proponents because it helps to make the process more efficient and transparent. Potential benefits include various provisions aimed at: enhancing early stakeholder engagement; the use of geographic information systems and other tools; clear/concise presentation of analyses; online training; and reducing information collection requirements and other administrative burdens.

AGC maintains that better EPA oversight of delegated programs is needed. In the U.S. Secretary of Commerce's recent report [Streamlining Permitting and Regulatory Burdens for American Manufacturers](#) (Oct. 6, 2017), three major themes were identified by domestic manufacturers and industry stakeholders in the report: overlap, duplication and lack of coordination between states and EPA; uncertainty related to the permitting process; and inconsistency in application and enforcement.⁸ The FAST-41 practices would help states make well informed, science-based decisions in a timelier manner.

About AGC

AGC represents more than 26,000-member firms—the largest commercial construction trade association—through a network of over 90 chapters in 50 states, the District of Columbia and Puerto Rico. Our commercial construction firms are engaged in building, heavy, civil, industrial, utility and other construction

⁴ Delegated authority must be authorized under the individual statute, and states must apply for and receive approval from EPA to administer and enforce federal environmental programs.

⁵ See EPA's Web page for [Authorization Status for EPA's Construction and Industrial Stormwater Programs](https://www.epa.gov/npdes/npdes-state-program-information) - <https://www.epa.gov/npdes/npdes-state-program-information>.

⁶ <https://www.federalregister.gov/documents/2017/01/12/2017-00160/civil-monetary-penalty-inflation-adjustment-rule>.

⁷ Executive Order (EO) 13807, [Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects](#).

⁸ https://www.commerce.gov/sites/commerce.gov/files/streamlining_permitting_and_reducing_regulatory_burdens_for_domestic_manufacturing.pdf

for both public and private property owners and developers. Collectively, AGC member firms build much if not most of the nation's public and private infrastructure.⁹

Environmental Permitting in Construction

EPA, states and localities heavily regulate construction site stormwater runoff, dredge and fill activities in U.S. waters and wetlands, oil and chemical storage and spills, air emissions, lead and asbestos handling/abatement, and solid/hazardous waste storage and disposal. Construction practices may also be subject to rules on hazardous substances (Superfund liability), historic properties, coastal zones, vegetation and habitat protection, indoor air quality, energy and equipment use, as well as requirements resulting from the National Environmental Policy Act (NEPA) processes. In addition to these (and other) strict and abundant requirements, public and private project owners often ask contractors to employ "green" construction practices such as materials recycling and reuse, and voluntary diesel retrofit of their off-road construction equipment. See AGC's Flowchart of Environmental Approvals and Permits Applicable to Construction on AGC's Website at www.agc.org/environment.

AGC members know first-hand how to build infrastructure in a safe, effective and efficient manner. Similarly, they know the many challenges to doing just that. The environmental review and permitting process is one such challenge, repeatedly echoed by AGC members across the country. It is a process that is circuitous, costly and time-intensive for many infrastructure projects; especially for larger infrastructure projects that typically do not qualify for efficient general permitting procedures and must obtain individual permits on a project-by-project basis.

Delays in environmental review and permitting decisions, as well as lengthy procurement processes, often derail the efficient delivery of needed infrastructure projects by many years. Such delays deny the public the substantial benefits that come from a construction project: improving our economy, our competitiveness, and our quality of life.¹⁰

The scope of EPA's regulatory program is expansive, looking at the volume and cost of environmental regulations, compared to those of other federal agencies. A recent report by the U.S. Chamber of Commerce, *Taming the Administrative State*, notes that in 2015, the United States (US) *Code of Federal Regulations* (CFR) contained over 175,000 pages of environmental regulations that accounted for 25 percent of the CFR, far more than any other area of government.¹¹

⁹ While AGC members rarely build single family homes, they are regularly engaged in the construction of all other improvements to real property, whether public or private. These improvements include the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

¹⁰ AGC members strongly maintain that improving environmental approval processes alone, while maintaining the integrity of those processes to mitigate environmental impacts, could allow the public to receive and benefit from infrastructure projects in a timelier fashion. In addition, such improvements could generate project cost savings.

¹¹ <https://www.uschamber.com/report/taming-the-administrative-state-identifying-regulations-impact-jobs-and-the-economy>. Between 2008 and 2016, EPA issued 13 of the 28 rules that had an annual price tag of \$1 billion or more. Those rules alone impose yearly costs of over \$60 billion, dwarfing such rules by other executive branch regulatory

EPA's Delegation of Environmental Programs to States

The term "delegated authority" commonly refers to EPA's authority to approve or authorize states' programs; states generally assume the lead in issuing permits, conducting inspections, monitoring environmental performance, and enforcing requirements.¹² Under most federal environmental laws, EPA may delegate state governments to issue permits or other authorizations under these laws.¹³ To date, a majority of states have been delegated authority to implement and enforce one or more provisions of the federal pollution control laws.¹⁴

When the EPA approves a program for the state, the state has primary responsibility and authority for that particular program (e.g., enforce the requirements).¹⁵ Notably, EPA retains parallel authority to enforce federal requirements even when EPA delegates program authority to a state or tribal government. This means either EPA or a delegated or authorized state or tribe may bring an enforcement action against a facility/site operator. EPA generally will take enforcement action if/when the state fails to act or requests EPA's help, for example.

EPA has a responsibility to oversee the conduct of delegated inter-governmental programs; the importance of this function enhanced with the increase in the number of delegated programs.¹⁶ EPA has taken a number of steps related to best practices for delegated and authorized state permitting programs.¹⁷ EPA should continually seek to develop more comprehensive, consistent and constructive approaches to oversight of state programs.

agencies. EPA also leads all agencies when it comes to issuing high-impact rules having an annual cost of \$1 billion or more.

¹² Federal statutes often use "primary enforcement responsibility," "primacy," "approved," or "authorized" states' responsibility.

¹³ For example, programs applicable to construction, include the Prevention of Significant Deterioration (PSD) program in air, the Underground Injection Control (UIC) programs in water, and the Resource Conservation and Recovery Act (RCRA) program in hazardous waste. For a state to be authorized, or "delegated," to implement a federal environmental program, it must demonstrate the capability to administer aspects of the program's requirements, including the capacity to enforce those requirements. Delegated authority must be authorized under the individual statute, and states must apply for and receive approval from EPA in order to administer (and enforce) federal environmental programs.

¹⁴ The Environmental Council of the States (ECOS) tracks delegated authority by state and statute, see <https://www.ecos.org/documents/state-delegations/>.

¹⁵ Many state governments have additional environmental laws.

¹⁶ See *EPA Policy on Oversight of Delegated Programs* (April 4, 1984).

¹⁷ See EPA's August 2016 *Promoting Environmental Program Health and Integrity: Principles and Best Practices for Oversight of State Permitting Programs*, available online at https://www.epa.gov/sites/production/files/2016-10/documents/principles_and_best_practices_for_oversight_of_state_permitting_programs.pdf (a common set of principles and best practices for promoting the efficiency and effectiveness of delegated, authorized, and approved state permitting programs).

Streamlining Efforts

AGC has long been committed to simplifying the sequential and layered approach of the existing environmental permitting process. AGC's Flowchart of Environmental Approvals and Permits Applicable to Construction on AGC's Website at www.agc.org/environment attempts to illustrate the complexity of this process. The chart identifies areas of duplication in the process, as well as each of the potential procedural and legal chokepoints that can grind the process to a halt or even restart it entirely.¹⁸

AGC believes we can make the federal environmental review process faster, better, and cheaper without sacrificing environmental protections and allow the public to receive and benefit from cleaner water, safer roads and bridges, and a more reliable energy system in a timelier fashion.

AGC maintains its strong support for the federal permit streamlining provisions in FAST-41 and for the speedy and effective implementation of those provisions. FAST-41 is increasingly important as the new administration has committed to getting more infrastructure built. Indeed, AGC has encouraged lawmakers to expand the scope of FAST-41 to cover additional projects likely to benefit from enhanced oversight and coordination.

AGC supports practices aimed at better management, coordination, timing and transparency of the environmental review process. Thank you for considering these comments and recommendations. If you have any questions, please contact me at pilconisl@agc.org or (703) 837-5332.

Sincerely,



Leah F. Pilconis
Senior Counsel, Environmental Law & Policy
AGC of America

¹⁸ In its [May 2017 testimony before Congress](#), AGC presented reforms included in its comprehensive paper: "Reforms for Improving Federal Environmental Review and Permitting," April 30, 2017 Discussion Draft. AGC also [testified](#) before Congress in March 2017 on how to reduce environmental permitting paperwork. AGC has met and shared its reforms with the [U.S. Environmental Protection Agency](#) (EPA) and the [Army Corps](#), among others. In addition, the association [submitted](#) detailed proposals at the request of the U.S. Department of Commerce, which was covered in the [Washington Post](#). And, the House Natural Resources Committee sought and [received](#) AGC's advice on reforming the Endangered Species Act.