

United States Senate  
WASHINGTON, DC 20510

December 12, 2022

The Honorable Debra A. Haaland  
Secretary of the Interior  
United States Department of the Interior  
1849 C Street Northwest  
Washington, District of Columbia 20240

Dear Secretary Haaland:

As sponsors and proponents of the FAST-41 permitting improvements,<sup>1</sup> we write to express serious concern about recent draft guidance proposed by the Bureau of Ocean Energy Management on October 24, 2022.<sup>2</sup> This guidance puts onerous requirements on the sponsors of infrastructure projects before allowing them to take advantage of permitting benefits (such as a structured process for enhanced coordination with agencies) that are available to them under the law. As such, this proposed guidance is flatly inconsistent with the law. It also imposes additional cost and delay on energy projects that our country simply cannot afford. We urge you to withdraw this proposed guidance and to take no additional action to make it final.

Affordable and abundant energy is critical to our national defense, to our economic future, and to the daily life of every American. One of the biggest barriers to building energy infrastructure is the red tape and bureaucracy that allows the permitting process for new energy projects to drag on for years.

The permitting improvements reflected in the FAST-41 legislation were the result of a bipartisan effort to improve and clarify/demystify the federal permitting process while retaining all environmental protections. To accomplish this, the legislation

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<sup>1</sup> FAST-41 refers to the permitting improvements described in Title 41 of the *Fixing America's Surface Transportation* ("FAST") Act (Pub. L. No. 114-94), as amended.

<sup>2</sup> United States Department of the Interior, Bureau of Ocean Energy Management, *Draft Guidance: Information Needed for Issuance of a Notice of Intent Under the National Environmental Policy Act for a Construction and Operations Plan*, Attachment A (Oct. 24, 2022), <https://www.regulations.gov/document/BOEM-2022-0056-0001>.

made several significant benefits available to our nation’s most important infrastructure projects—defined as “covered projects” in the statute. Under FAST-41, covered projects are posted to a “permitting dashboard” and the agencies involved are required to coordinate with the project sponsor and each other to timely develop and maintain a coordinated project plan and publicly posted “permitting timetable.” If the agencies miss deadlines, they are required to explain why. The legislation also created a Federal Permitting Improvement Steering Council (“the Council”), composed of representatives from 15 government agencies (including the Department of the Interior) and the Council Executive Director. This Council standardizes interagency consultation and coordination practices, resolves interagency conflicts, and reduces inefficiencies for covered projects. We enacted this legislation to ensure that complex “covered projects”—including renewable and conventional energy projects—could easily obtain the early and ongoing coordination and transparency benefits that FAST-41 and the Council provides.

The recent draft guidance proposed by the Bureau of Ocean Energy Management flouts the law and undermines the very benefits that FAST-41 offers. Under the law, a project qualifies as a “covered project” and is entitled to FAST-41 coverage if certain defined criteria are met.<sup>3</sup> Additionally, the “final and conclusive” authority to determine whether these criteria are met is vested in the Executive Director of the Council,<sup>4</sup> and the specific information that must be submitted by a project sponsor in support of this determination is defined by statute.<sup>5</sup>

In spite of these clear statutory requirements, the proposed guidance by the Bureau of Ocean Energy Management purports to require the completion of a “checklist” where all responsibility for coordinating with regulatory agencies falls solely on project sponsors before the Bureau will “consider” a project a FAST-41 “covered project.” This checklist includes, for example, consultations with numerous different federal agencies and at least nine different studies, assessments, or reports. The guidance also requires project sponsors to identify and provide all federal, state, and local authorizations, approvals, consultations, or permits necessary to conduct the proposed activities and states that the applicant should meet with all agencies that must either permit or be consulted regarding the proposed action at least once. These very activities are captured by the FAST-41 process for covered projects and assigned to the facilitating or lead agency, and not

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<sup>3</sup> 42 U.S.C. § 4370m(6).

<sup>4</sup> 42 U.S.C. § 4370m-2(b)(2)(C).

<sup>5</sup> 42 U.S.C. § 4370m-2(a)(1)(C).

the project sponsor. Within 60 days of FAST-41 coverage, the facilitating or lead agency is required to communicate with each coordinating and participating agency to develop the Coordinated Project Plan. This includes: a list of, and roles and responsibilities for, all entities with environmental review or authorization responsibility for the project; a permitting timetable; a discussion of potential avoidance, minimization, and mitigation strategies; and plans and a schedule for public and tribal outreach and coordination. The plan provides a formal coordination process to ensure all agencies' critical needs to timely complete FAST-41 requirements are addressed and documented in a singular place that can be relied upon for schedule and resource planning for all agencies involved in the environmental review and authorization process. The extra-statutory requirements imposed by this new guidance are an improper attempt to limit access to the FAST-41 process and its considerable efficiencies.

The recent draft guidance also appears to be an attempt to usurp the statutory authority of the Executive Director to make a final determination concerning whether a project qualifies as a "covered project." In a recent written decision, the Executive Director of the Council applied the text of FAST-41 to conclude that an offshore wind energy project qualified as a "covered project" notwithstanding the Bureau of Ocean Energy Management attempts to prevent coverage by imposing extra-statutory requirements.<sup>6</sup> This determination was both correct as a matter of law and within the authority of the Executive Director to decide. Nevertheless, we are concerned the Bureau of Ocean Energy Management is attempting, under the guise of new guidance, to circumvent this decision and undermine the authority of the Executive Director. This is improper and inconsistent with the statutory scheme.

In addition to being unlawful, this guidance is also poor policy. Although many of the required items on the "checklist" would benefit from the interagency coordination and scheduling provisions provided by FAST-41, the guidance requires project sponsors to complete them *before* the Bureau will consider a project for coverage and coordination under the statute that would require the agency to perform these functions. The FAST-41 process enhances transparency for all involved entities through the development and maintenance of a Coordinated Project Plan and permitting timetable for covered projects identifying all relevant completion dates for agency action on any environmental review or authorization

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<sup>6</sup> See Federal Permitting Improvement Steering Council, Executive Director Final Determination of Covered Project Status, *In re Atlantic Shores North*, Case No. 2022-002 (Sept. 2, 2022).

required for a covered project. The filings identified in this guidance can and should be identified, coordinated, and tracked according to the transparency and accountability mechanisms provided by FAST-41.

With families experiencing record energy costs, the United States government should make every effort to encourage and facilitate new energy infrastructure. The draft guidance promulgated by the Bureau of Ocean Energy Management seems to take the opposite approach. It limits access to existing permitting transparency and efficiency measures while imposing even more red tape, cost, and delay on energy permitting. This is deeply concerning.

In light of these serious legal and policy concerns, we urge you to withdraw this proposed guidance and to take no additional action to make it final.

Sincerely,



Rob Portman  
United States Senator



Angus King  
United States Senator



Bill Hagerty  
United States Senator



Kyrsten Sinema  
United States Senator



Dan Sullivan  
United States Senator



Joe Manchin III  
United States Senator



Mitt Romney  
United States Senator



Steve Daines  
United States Senator