

COMMENTS OF BUSINESS ROUNDTABLE

Docket EPA-HQ-OA-2017-0600

Introduction/Summary

These comments are submitted on behalf of Business Roundtable, an association of chief executive officers of leading U.S. companies. Business Roundtable member companies produce more than \$7 trillion in annual revenues and employ nearly 16 million employees. Business Roundtable is focused on growing the economy and accelerating the creation of high quality jobs for the American people. Title 41 of the Fixing America's Surface Transportation Act (FAST-41) provides a mechanism for comprehensive reform of the process of permitting major infrastructure that can make significant progress toward achieving those critical objectives.

Business Roundtable urges EPA to condition a state's assumption of delegated responsibilities under EPA-administered permitting statutes on the State's adherence to the same best practices that would be applicable to EPA if it were to perform the permitting responsibilities directly. Applying best practices to delegated authorities would be an important step in effectuating both FAST-41 and Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects."

Discussion

EPA's Request for Public Comment¹ (Request for Comments) fulfills the agency's obligation under Section 41006(a)(1) of FAST-41, 42 U.S.C. § 4370m-5(a)(1), to initiate a national process, with public participation, to determine whether and the extent to which any of the best practices recommended in the annual report of the Federal Permitting Improvement Steering Council² (the Best Practices Report) are generally applicable on a delegation- or authorization-wide basis to permitting under statutes that enable a Federal agency to delegate authority to, or otherwise authorize, a State to issue or administer a permit program in lieu of the Federal agency. Numerous EPA-administered statutes provide for delegations of permitting responsibilities to the States, including the Clean Air Act, the Clean Water Act, and the Resource Recovery and Conservation Act (RCRA). The vast majority of permits under these statutes are issued by States.

The Best Practices Report notes that many of the practices described in the report are widely used by Federal agencies today, and that some of the best practices described in the report are legally required for projects covered under FAST-41 and certain other projects.³ Best practices are offered to enable Federal agencies to "execute their authorizations and environmental reviews in the most efficient and effective manner."⁴ Where States have taken over the

¹ *FAST-41 Best Practices: Delegated State Permitting Programs*, 82 Fed. Reg. 50418 (Oct. 31, 2017).

² Federal Permitting Improvement Steering Council, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects* (Jan. 18, 2017).

³ Best Practices Report, pp. ii, 2.

⁴ Best Practices Report, p. 1.

responsibility for executing Federal authorizations and environmental reviews, the obligation to utilize best practices likewise should transfer to the State along with the permitting authority. Failing to do so could diminish the efficiency and effectiveness of the delegated authorization process.

Federal involvement in the permitting process does not end with the delegation of permitting authority. Rather, as the Request for Comments indicates, EPA has established minimum program requirements for authorized and delegated programs, and also has communicated regularly with delegated and authorized programs regarding program implementation and oversight. In 2016, EPA identified the sharing of best practices with all permitting authorities as one of the tools to be considered in order to establish and maintain a strong collaborative environment between EPA and State permitting programs.⁵

It is time to go further and establish a clear linkage between the exercise by States of delegated Federal authorities and the adoption of best practices. Congress set the stage for this in FAST-41, which identified best practices for permitting programs,⁶ and recognized that modifications to permitting programs for States acting under delegated authority should be considered. Section 41006(a)(2) of FAST-41⁷ requires EPA to “make model recommendations for State modifications of the applicable permit program to reflect the best practices.” Those recommendations are due by December 4, 2017 (the date two years after the enactment of FAST-41).

Business Roundtable recommends that EPA should not only issue model recommendations, but also should explore the extent to which the relevant statutes authorize the agency to *require* States, as a condition of maintaining delegations or authorizations of authority, to incorporate the recommended best practices into their permitting programs. Where consistent with existing law, EPA should require as a condition of a delegation of authority that States apply the best practices identified in FAST-41 and the annual reports of the Federal Permitting Improvement Steering Council in their permitting programs.

We believe that EPA has this authority under its principal permitting statutes. For example, Title V of the Clean Air Act authorizes EPA to promulgate “regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency.”⁸ The law specifies that such elements shall include “[a]dequate, streamlined, and reasonable procedures for expeditiously determining when such applications are complete, for processing such applications, for public notice . . . , and for expeditious review of permit actions, including applications, renewals, or revisions”⁹ The requirements for expedition and streamlining

⁵ See “Promoting Environmental Program Health and Integrity: Principles and Best Practices for Oversight of State Permitting Programs,” August 2016, at p. 3 (https://www.epa.gov/sites/production/files/2016-10/documents/principles_and_best_practices_for_oversight_of_state_permitting_programs.pdf).

⁶ FAST-41, Section 41002(c)(2)(B), 42 U.S.C. § 4370m-1(c)(2)(B).

⁷ 42 U.S.C. § 4370m-5(a)(2).

⁸ 42 U.S.C. § 7661a(b).

⁹ 42 U.S.C. § 7661a(b)(6).

are reflected in other required Title V elements as well.¹⁰ The provisions of the Clean Water Act and RCRA authorizing EPA to delegate permitting programs under those laws contain similarly broad authority.¹¹

Conclusion

Business Roundtable commends EPA for moving the FAST-41 implementation process forward, and encourages the agency to act as expeditiously as possible to provide model recommendations and, where consistent with existing law, require that States acting under delegated authority implement identified best practices to streamline permitting authorities.

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¹⁰ See, e.g., 42 U.S.C. § 7661a(b)(7)(provisions that failure of a permitting authority to act are to be treated as a final permit action in order “[t]o ensure against unreasonable delay by the permitting authority . . .”), § 7661a(b)(8)(reasonable public access procedures “consistent with the need for expeditious action by the permitting authority on permit applications and related matters”), § 7661a(b)(9)(requirement for revisions to permits with a term of 3 or more years to incorporate newly applicable standards/regulations, with such revisions required “as expeditiously as practical and consistent with the procedures established under paragraph (6) . . .”), and § 7661a(b)(10)(requiring permit programs to “allow changes within a permitted facility . . . without requiring a permitting revision . . .”).

¹¹ See the Clean Water Act, 33 U.S.C. § 1314(i)(2) (requiring the Administrator to “promulgate guidelines establishing the minimum procedural and other elements of any State [NPDES] program”) and § 1342(c)(1), (2) (requiring suspension and ultimately withdrawal of approval of any state program that “does not conform to the guidelines issued under section 1314(i)(2) of this title” and requiring that state permit programs at all times be in accordance with the guidelines under section 1314(i)(2)); RCRA, 42 U.S.C. § 6926(a) (requiring EPA to promulgate guidelines to assist States in the development of State hazardous waste programs) and § 6926(b)(1) (prohibiting states from carrying out a permitting program for hazardous waste storage, treatment or disposal facilities that EPA finds is “not equivalent to the Federal program under this subchapter”).