

Client Alert

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The FAST Lane: How the FAST Act Provisions Could Expedite Your Federal Permitting

In December 2015, Congress enacted and the President signed into law the Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94. The FAST Act seeks to streamline federal environmental review and permitting, and reduce bureaucratic redundancies for large infrastructure projects for certain sectors, including energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, and manufacturing.

Title XLI of the FAST Act creates new requirements for federal agencies to set performance schedules, seeks to increase transparency and efficiency for projects subject to review by multiple agencies through the creation of a new interagency council, and limits the time frame for challenges to agency action under the National Environmental Policy Act (NEPA). For companies that anticipate seeking federal authorization for large infrastructure projects, it may be beneficial to engage now with federal agencies to determine how to utilize the FAST Act provisions to expedite federal permitting for upcoming projects.

What Projects Qualify?

The FAST Act's new permitting requirements apply to any activity that requires authorization or environmental review by a federal agency and involves construction of infrastructure for "renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing," or any other sector determined by the interagency council to qualify.¹ To qualify as a "covered project" the activity must be subject to NEPA and involve a likely total investment of more than \$200 million. Other activities may also qualify if, due to the size and complexity of the project, it would likely benefit from enhanced oversight and coordination.²

Interagency Council to Develop Performance Schedules and Public Permitting Dashboard

The statute establishes a new government council to focus on improving the Federal permitting process. The "Federal Permitting Improvement Council" (the Council) will be composed of members at the deputy secretary level or higher from the relevant federal agencies, including the Environmental Protection Agency, the Departments of Army, Energy, and Interior, and the Federal Energy Regulatory Commission. The Council, along with an executive director appointed by the President, are required to do the following:

- **Inventory Development.** By June 1, 2016, the executive director, in consultation with the Council, must create an inventory of covered projects that are currently pending environmental review or authorization.

¹ Pub. L. No. 114-94, Section 41001(6).

² Two categories of projects are excluded because they receive streamlining assistance in other statutes: (1) public transportation projects requiring approval of the Department of Transportation, which are subject to project streamlining in other sections of the FAST Act; and, (2) water resources projects that are subject to project streamlining in section 2045 of the Water Resources Development Act of 2007.

- **Performance Schedules.** Using the inventory of covered projects, by December 4, 2016, the executive director in consultation with the Council must develop recommended performance schedules including intermediate and final completion dates for each category of covered projects. The final completion date for any category must not exceed the overall average time³ for projects in that category to complete an environmental review or authorization. A final decision by an agency within any category must be issued 180 days after the application is received.⁴ These performance schedules are intended to incorporate the most efficient processes to reduce permitting approval times.
- **Best Practices.** Also, by December 4, 2016, the Council shall develop and issue recommendations on the best practices for reducing information collection requirements, increasing transparency, enhancing early stakeholder engagement, and ensuring timely decisions.
- **Permitting Dashboard.** Under the new requirements, the Council's executive director must also establish and maintain a public, online database to track the review status of a covered project. To increase transparency and hold agencies accountable to the performance schedules, the executive director will post the permitting timetable for individual projects (described in more detail below) and the status of compliance for each agency.

Project Sponsors Must Submit Notice to Trigger FAST Act Requirements

In order to begin the permitting process, project sponsors must submit "notice" to the executive director and the facilitating agency outlining the proposed covered project. The notice must include a statement of purpose and the objectives of the project, a concise description of the project, a statement regarding the technical and financial ability of the sponsor to construct the project, a statement of any environmental reviews, authorizations, or Federal financing required to complete the project, and an assessment as to why the project meets the qualification criteria described above. Upon receipt of notice, many of the FAST Act's requirements for the executive director and participating agencies are triggered. For example, the executive director must create an entry in the dashboard for a covered project 14 days after receiving notice.

New Requirements for Federal Agencies to Coordinate With Other Agencies, Set Deadlines for Review, and Provide Explanation for Missed Deadlines

The FAST Act seeks to improve the environmental review and permitting process by requiring agencies to establish and publicize deadlines for review and more efficiently coordinate environmental analysis between both federal and non-federal entities.

- **Coordinated Project Plan.** The lead agency must create a "Coordinated Project Plan" within 60 days after the executive director adds a project to the dashboard. The plan must identify all federal and non-federal entities with responsibilities in reviewing the project, discuss possible mitigation strategies, and reveal plans for public outreach and tribal coordination. The plan also establishes – in consultation with cooperating agencies, the project sponsor, and, if relevant, state governments – a "permitting timetable" setting forth a comprehensive schedule of intermediate and final completion dates by which all environmental reviews and authorizations must be made. In setting these deadlines, the agency must rely upon the performance schedules developed by the Council and executive director. The agency may modify the timetable due to a number of factors including the size and complexity of the project or the scarce resources available to the agency, but, as noted above, all final decisions must be made within 180 days of the agency receiving all necessary information.

³ The average time will be calculated by looking at data from the preceding two years assessing the period between the date of application filing and the final authorization.

⁴ Pub. L. No. 114-94, Section 41002(c)(1)(C)(ii)(II)(cc).

- **Explanations for Failure to Meet Deadlines.** If an agency fails to conform with the completion date established in the permitting timetable, or is at significant risk of failing to comply with such a deadline, the agency must submit to the executive director for publication on the dashboard an explanation describing the specific reasons why the agency was unable to perform. Following the initial explanation, the agency is required to submit monthly status reports until the agency has taken final action on the delayed authorization or environmental review. It is unclear whether this requirement will be a sufficient burden to deter agencies from missing deadlines.
- **Concurrent NEPA Reviews.** The FAST Act also provides for concurrent NEPA reviews among participating agencies. No later than 45 days after the executive director adds a project to the dashboard, the agency must identify all federal and non-federal agencies likely to have financing, environmental review, authorization, or other responsibilities associated with the proposed project and invite them to participate in a coordinated and concurrent review of the project. During this review, and upon request of the project sponsor, the agency may adopt or incorporate by reference the environmental analysis and documentation prepared under state law.

Limitations on NEPA Challenges

To prevent legal action from delaying important infrastructure projects, Congress took some small steps to restrict opponents of a project from challenging federal approval. First, with regard to any claims arising under federal law seeking judicial review of any authorization issued by a federal agency – including a claim arising under NEPA – the statute of limitations is now two years (reduced from NEPA’s default statute of limitations of six years). Although most NEPA challenges occur shortly after an agency’s authorization, this requirement may serve to limit some third party challenges.

Moreover, the FAST Act requires that parties seeking judicial review of an agency decision under NEPA must have submitted comments during the agency’s review period and must have given sufficiently detailed comment to put the agency on notice of the issue upon which they seek judicial review. Lastly, in deciding whether or not to issue injunctive relief, courts, in addition to considering other applicable equitable factors, are now required to consider the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs.

Implications for Large Infrastructure Project Proponents

In sum, the FAST Act may help to streamline environmental review and permitting and reduce bureaucratic redundancies for large infrastructure projects. The effectiveness of the new interagency process, however, will depend on how the legislation is implemented. It will take some time for the Administration to get the permitting review system in place (e.g., the interagency council has one year from enactment to establish recommended performance schedules), and the process is likely to evolve as projects test the effectiveness of the system. Moreover, it is unclear whether the permitting scheme will provide sufficient incentive for agencies to meet deadlines or whether extensions could become commonplace (thereby undermining the utility of set performance schedules).

For companies that anticipate seeking federal authorization for large infrastructure projects, it may be beneficial to engage now with federal agencies to determine how the FAST Act provisions may affect permitting for upcoming projects. Hunton & Williams’ natural resources lawyers are available to assist you in navigating federal permitting processes in light of the FAST Act’s new requirements.

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