Developments in Federal and State Law

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# EXPEDITING ENVIRONMENTAL REVIEW AND PERMITTING OF INFRASTRUCTURE PROJECTS: THE 2015 FAST ACT

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Ensconced in the Fixing America's Surface Transportation Act (FAST Act)—the $305 billion federal transportation bill enacted in December 2015—are new procedures intended to make the review process for large infrastructure projects more efficient.[1] Title XLI of the FAST Act, which is captioned "Federal Permitting Improvement," builds on Obama administration efforts to speed up public infrastructure development and is intended to fundamentally change the way that federal agencies conduct reviews for large infrastructure projects.[2] This article discusses the recent historical backdrop for the FAST Act's permitting provisions, describes the new permitting regime established by the FAST Act, and concludes with some observations about the impact the legislation could have on the development of future infrastructure projects.

## I. Background

The National Environmental Policy Act (NEPA) establishes the now-familiar requirement that agencies take a "hard look" at the environmental impacts associated with major federal actions.[3] To satisfy NEPA's hard-look requirement, agencies must consider and apply diverse statutory and regulatory requirements to proposed projects. Moreover, NEPA is "a procedural statute that mandates a process rather than a particular result."[4] The procedural requirements associated with the review and environmental permitting for federal actions can be cumbersome. In addition, most large projects must receive environmental reviews, permits, or both from more than one level of government. Multiple Tribal, state, and local agencies, as well as non-government stakeholders, play a role in environmental permitting and review.

[1] Pub. L. No. 114-94 (2015), §§ 41001–41014, 129 Stat. 1312 (2015). This article draws from an article published in the *Real Estate Finance Journal*. *See* Edward McTiernan et al., *Expediting Environmental Review and Permitting of Infrastructure Projects: The 2015 FAST Act and NEPA*, REAL EST. FIN. J., Winter/Spring 2016, at 50.

[2] Pub. L. No. 114-94, §§ 41001–41014, 129 Stat. 1312 (2015).

[3] *See* 42 U.S.C. § 4321 *et seq.*

[4] Stewart Park & Reserve Coal., Inc. v. Slater, 352 F.3d 545, 557 (2d Cir. 2003).

The net result is that the environmental review and permitting process driven by NEPA can be extremely time consuming, particularly for large infrastructure projects.

During his first term, President Obama took steps to make this process more efficient as part of his efforts to strengthen the economy and create new jobs. At the end of August 2011, he issued a Presidential Memorandum that called on federal agencies to expedite the review of high-priority infrastructure projects.[5] This memorandum prompted the creation of the Federal Infrastructure Projects Permitting Dashboard, which tracked the permitting of approximately 50 selected major highway and transit projects, including New York's replacement of the Tappan Zee Bridge.[6]

The Presidential Memorandum was followed by the issuance in 2012 of Executive Order 13604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*, which established a Steering Committee comprising deputy secretaries or their equivalents from the 12 federal agencies most likely to be involved in infrastructure projects, chaired by the Office of Management and Budget (OMB), and managed in consultation with the President's Council on Environmental Quality (CEQ).[7] The Steering Committee established by Executive Order 13604 was charged with identifying best practices for infrastructure permitting and review. The Steering Committee issued its report in June 2012[8] and eventually developed the *Implementation Plan for Modernizing Infrastructure Permitting*, which was released in May 2014.[9]

The *Implementation Plan* was wide-ranging. Its recommended course of action included 15 reforms with 96 near-term and long-term milestones, organized within four overarching strategies:

1. Institutionalize Interagency Coordination and Transparency
2. Improve Project Planning, Siting, and Application Quality
3. Improve Permitting, Reviews, and Mitigation
4. Drive Continued Improvement.

The goals of the *Implementation Plan* were to reduce uncertainty for project sponsors, reduce by half the aggregate time it takes to conduct reviews and make permitting decisions, and produce measurably better environmental and community outcomes.

## II. The FAST Act's Changes to the Environmental Review and Permitting Processes

The Federal Permitting Improvement provisions in Title XLI of the FAST Act borrow many of the key features of the Obama administration initiatives. The FAST Act and the executive initiatives share goals of improved efficiency, increased transparency, and application of best practices. For example, Section 41003(b) of the FAST Act codifies the existence of an online "Permitting Dashboard" that presents project-specific permitting timetables, including projected dates for completion of environmental reviews and issuance of permits.

The Federal Permitting Improvement provisions of the FAST Act do much more than simply incorporate existing executive branch practices into statute. The provisions also create a new category of "covered projects" that are entitled to be reviewed in accordance with timetables and best practices established as required by the FAST Act. Threaded throughout the FAST Act's permitting provisions are requirements intended to increase and improve the coordination of permitting and environmental review processes. In addition, the FAST Act potentially speeds up the implementation of large infrastructure projects by imposing limitations on judicial review of covered projects.

### A. Covered Projects

Title XLI of the FAST Act is not an across-the-board attempt to overhaul NEPA, but it will affect the NEPA reviews for a broad swath of projects. The FAST Act created a new category of "covered projects" that are entitled to be reviewed in accordance with performance schedules and best practices developed by a Federal Permitting Improvement Steering Council (Council) and its Executive Director, two entities created by the FAST Act that are discussed in more detail below.

Covered projects are defined as activities requiring authorization or environmental review by a federal agency and "involving

[5] Presidential Memorandum, Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review (Aug. 31, 2011), https://www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more.

[6] Presidential Memorandum, Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review (Aug. 31, 2011), https://www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more.

[7] Exec. Order No. 13,604, 77 Fed. Reg. 18,887 (Mar. 28, 2012).

[8] STEERING COMMITTEE ON FEDERAL INFRASTRUCTURE PERMITTING AND REVIEW PROCESS IMPROVEMENT, IMPLEMENTING EXECUTIVE ORDER 13604 ON IMPROVING PERFORMANCE OF FEDERAL PERMITTING AND REVIEW OF INFRASTRUCTURE PROJECTS: A FEDERAL PLAN FOR MODERNIZING THE FEDERAL PERMITTING AND REVIEW PROCESS FOR BETTER PROJECTS, IMPROVED ENVIRONMENTAL AND COMMUNITY OUTCOMES, AND QUICKER DECISIONS (June 2012), https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/federal-plan.pdf.

[9] STEERING COMMITTEE ON FEDERAL INFRASTRUCTURE PERMITTING AND REVIEW PROCESS IMPROVEMENT, IMPLEMENTATION PLAN FOR THE PRESIDENTIAL MEMORANDUM ON MODERNIZING INFRASTRUCTURE PERMITTING (May 2014), https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/pm-implementation-plan-2014.pdf.

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 as determined by a majority vote of the Council."[10] In addition, the activity must either (1) be subject to NEPA, likely to require a total investment of more than $200 million, and not qualify for abbreviated authorization or environmental review processes under any other law, or (2) be subject to NEPA and likely, in the opinion of the Council, to benefit from enhanced oversight and coordination.[11] The second category of projects includes projects likely to require authorization from, or environmental review by, more than two federal agencies and projects likely to require preparation of an environmental impact statement (EIS).

Notably, covered projects do not include transportation projects subject to 23 U.S.C. § 139—which substantially narrows the surface transportation projects that would be subject to the Title XLI permitting provisions—or projects subject to Section 2045 of the Water Resources Development Act of 2007 (WRDA).[12] Such projects remain subject to the special review procedures in those statutory sections, though information on such projects may be included on the Permitting Dashboard.[13] Projects subject to 23 U.S.C. § 139 are highway projects, public transportation capital projects, or multimodal projects that require approval by the Department of Transportation. (The FAST Act also modified the review procedures that apply to such projects.) Section 2045 of WRDA applies to studies for development of feasibility reports or reevaluation reports for water resources projects where it is determined that such studies require environmental impact statements.

## B. New Administrative Entities

The Federal Permitting Improvement Steering Council and its Executive Director play key roles in implementing the FAST Act's scheme for more efficient infrastructure permitting. The Council comprises its chair (the Executive Director, who is appointed by the President),[14] the CEQ Chair, the OMB Director, and members appointed by the Secretary of Agriculture, the Secretary of the Army, the Secretary of Commerce, the Secretary of the Interior, the Secretary of Energy, the Secretary of Transportation, the Secretary of Defense, the Administrator of the Environmental Protection Agency, the Chair of the Federal Energy Regulatory Commission, the Chair of the Nuclear Regulatory Commission, the Secretary of Homeland Security, the Secretary of Housing and Urban Development, and the Chair of the Advisory Council on Historic Preservation. The Council members must hold positions of deputy secretary or higher. The Executive Director may invite the heads of other agencies to participate as Council members. The composition of the Council closely resembles that of the Steering Committee established under Executive Order 13604. As of the writing of this article, it does not appear that the Council has been formally convened or that an Executive Member has been appointed.

In the FAST Act's first year, the Executive Director has several obligations. By June 2016, the Executive Director is required to develop, in consultation with the Council, an inventory of currently pending covered projects and to identify appropriate project categories into which such projects fall. These projects must be entered into the Permitting Dashboard required by the statute.[15] Based on these categories, by December 2016 the Executive Director "shall develop recommended performance schedules, including intermediate and final completion dates, for environmental reviews and authorizations most commonly required for each category of covered projects."[16] These schedules "shall reflect employment of the use of the most efficient applicable processes, including the alignment of Federal reviews of projects and reduction of permitting and project delivery time," and are not to exceed the average completion time for comparable projects.[17] The performance schedules must specify that any decision by an agency on an environmental review or authorization must be issued not later than 180 days after the date on which all information needed to complete the review or authorization is in the possession of the agency.[18]

In addition to advising the Executive Director on the inventory of existing covered projects and performance schedules, the Council's obligations during the first year of the FAST Act's implementation include issuing recommendations on an annual basis for best practices that address the following topics:

(i) enhancing early stakeholder engagement, including fully considering and, as appropriate, incorporating recommendations provided in public comments on any proposed covered project;

(ii) ensuring timely decisions regarding environmental reviews and authorizations, including through the development of performance metrics;

(iii) improving coordination between Federal and non-Federal governmental entities, including through the development of common data standards and terminology across agencies;

[10] Pub. L. No. 114-94, § 41001(6)(A).
[11] Pub. L. No. 114-94, § 41001(6)(A)(i)–(ii).
[12] Pub. L. No. 114-94, § 41001(6)(B).
[13] Pub. L. No. 114-94, § 41003(f)(1).
[14] Pub. L. No. 114-94, § 41002(b)(1)(A).
[15] Pub. L. No. 114-94, § 41003(b)(2)(A)(i).
[16] Pub. L. No. 114-94, § 41002(c)(1)(C).
[17] Pub. L. No. 114-94, § 41002(c)(1)(C)(ii)(aa)–(bb).
[18] Pub. L. No. 114-94, § 41002(c)(1)(C)(ii)(cc).

(iv) increasing transparency;

(v) reducing information collection requirements and other administrative burdens on agencies, project sponsors, and other interested parties;

(vi) developing and making available to applicants appropriate geographic information systems and other tools;

(vii) creating and distributing training materials useful to Federal, State, tribal, and local permitting officials; and

(viii) addressing other aspects of infrastructure permitting, as determined by the Council.[19]

The Council must update these recommended best practices on an annual basis.

Council members are to be advised by "agency CERPOs," which are "chief environmental review and permitting officers" designated by each agency. The agency CERPOs are to serve a number of functions, including providing technical support, implementing guidance and best practices within agencies, assisting with resolution of potential disputes, and developing training programs for agency staff.[20]

## C. Procedures and Timetables for New Projects

The FAST Act specifies in detail the steps that must be taken when a new covered project is initiated, and the timeframe in which federal actions must occur. Sponsors of new projects must submit notices of their initiation of a proposed covered project to the Council's Executive Director and to the "facilitating agency" designated by the Executive Director for a particular category of covered projects.[21] The Notice of Initiation form will be available by June 1, 2016.[22]

No more than 14 days after the Executive Director receives the notice, the Executive Director must create a specific entry on the Dashboard for the covered project unless the Executive Director determines that the project is not a covered project.[23] No more than 45 days after the entry must be made on the Dashboard, the facilitating agency or the NEPA lead agency (which assumes the responsibilities of the facilitating agency once it is established as lead agency) must identify all federal and non-federal agencies and governmental entities likely to have financing, environmental review, authorization, or other responsibilities with respect to the proposed project.[24] The facilitating or lead agency must invite all identified federal agencies to become participating or cooperating agencies in the environmental review and authorization management process.[25]

No more than 60 days after the specific entry is required to be made on the Dashboard, the lead agency must establish "a concise plan"—known as the "coordinated project plan"—"for coordinating public and agency participation in, and completion of, any required Federal environmental review and authorization for the project." This plan must include a permitting timetable with intermediate and final completion dates for action by each participating agency.[26] For the most part, these dates must be based on the performance schedules devised by the Executive Director in consultation with the Council, though the facilitating or lead agency may take into account project-specific factors.[27] The coordinated project plan may be incorporated into a memorandum of understanding.[28]

The FAST Act imposes a number of procedural requirements related to the establishment and implementation of permitting timetables. It requires that the facilitating or lead agency develop the permitting timetable in consultation with each coordinating and participating agency, the project sponsor, and states in which the project is located. Once established, the permitting timetable may not be modified without compliance with procedures set forth in the statute.[29] The statute sets limitations on the length of modifications and requires the OMB Director to submit a report to Congress when permitting the Executive Director to authorize a modification beyond the limitation set in the statute; in addition, the facilitating or lead agency thereafter must make annual supplemental reports to the Executive Director, OMB, and Congress regarding progress on the review.[30] Failures to conform with a completion date also require explanations on the Dashboard.[31]

The FAST Act prescribes comment periods of between 45 and 60 days on draft EISs unless the lead agency, project sponsor, and cooperating agencies agree to a longer period or the lead agency in consultation with cooperating agencies extends the deadline "for good cause."[32] Other review and comment periods are

[19] Pub. L. No. 114-94, § 41002(c)(2)(B).
[20] Pub. L. No. 114-94, § 41002(c)(3).
[21] Pub. L. No. 114-94, § 41003(a)(1).
[22] PERMITTING DASHBOARD: FEDERAL INFRASTRUCTURE INVESTMENTS, https://www.permits.performance.gov/ (last visited Apr. 20, 2016).
[23] Pub. L. No. 114-94, § 41003(b)(2)(A)(ii).
[24] Pub. L. No. 114-94, § 41003(a)(2)(A).
[25] Pub. L. No. 114-94, § 41003(a)(2).
[26] Pub. L. No. 114-94, § 41003(c)(1), (2).
[27] Pub. L. No. 114-94, § 41003(c)(2)(B).
[28] Pub. L. No. 114-94, § 41003(c)(1)(C).
[29] Pub. L. No. 114-94, § 41003(c)(2)(D).
[30] Pub. L. No. 114-94, § 41003(c)(2)(D)(iii)(II).
[31] Pub. L. No. 114-94, § 41003(c)(2)(F)(ii).
[32] Pub. L. No. 114-94, § 41003(d).

limited to 45 days except where the lead agency, project sponsor, and cooperating agencies agree to a longer period or the lead agency extends the deadline for good cause.[33]

It may be noteworthy that the FAST Act stops short of allowing "default approvals" when agencies miss final deadlines. Nevertheless, if a project sponsor is forced to seek judicial intervention on an overdue environmental review or permit, the agency will carry a heavy burden. This seems like fertile ground for future litigation.

Disputes over the permitting timetable are to be resolved within a timeframe established by the statute. The first step of the dispute resolution process is mediation by the Executive Director. If mediation is unsuccessful, the OMB Director, in consultation with the CEQ Chairperson, facilitates a resolution of the dispute. The OMB Director's resolution is final and conclusive and not subject to judicial review.[34]

## D. Coordination and Cooperation

Federal agencies are directed to cooperate with the lead agency in the processing of applications for covered projects, including by working early in the review process to identify and resolve issues that could delay completion of the review.[35] The statute also provides for coordination with state approvals,[36] and for use of environmental review information developed at the state level so as to avoid unnecessary duplication.[37]

## E. Alternatives Analyses

The FAST Act sets forth guidelines for the development of alternatives analyses for covered projects. Early engagement—no later than the commencement of scoping—with cooperating agencies and the public is required,[38] and the range of reasonable alternatives to be considered must be determined no later than the completion of scoping.[39]

The lead agency must determine in collaboration with each cooperating agency the methodologies that will be used, and the level of detail that will be required, for the analysis of each alternative.[40] In addition, the statute permits the preferred alternative to be developed to a higher level of detail than other alternatives to facilitate development of mitigation measures and concurrent compliance with other laws if the lead agency determines that this focus on the preferred alternative will not prevent it from making an impartial decision and will not prevent the public from commenting on alternatives. Cooperating agencies with jurisdiction must also concur in order for the lead agency to proceed with this streamlined alternatives analysis.[41]

## F. Judicial Review

The FAST Act establishes an expedited timeframe for judicial review and provides for special criteria for preliminary injunctions.[42] Legal challenges to authorizations for covered projects must be filed no more than two years after the publication of final notice in the Federal Register.[43] (The applicable statute of limitations for a NEPA action is usually six years unless a specialized statute of limitations has been established.)

The FAST Act also restricts the parties who may challenge the NEPA review for a covered project to parties that submitted comments during the environmental review. In addition, the comments must have been "sufficiently detailed . . . so as to put the lead agency on notice of the issue on which the party seeks judicial review" or the lead agency must not have provided a reasonable opportunity to comment on the challenged issue.[44]

In NEPA litigation, the preliminary injunction stage of NEPA litigation is frequently key. In the Second Circuit, courts apply a test for granting preliminary injunctive relief that requires a plaintiff to show irreparable harm and either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the plaintiff. The Second Circuit has said that the second, more lenient standard does not apply when the plaintiff seeks to enjoin governmental action taken in the public interest.[45] The FAST Act adds another potential hurdle to injunctive relief by requiring courts to "consider the potential effects on public health, safety, and the environment, and the potential for significant negative

[33] Pub. L. No. 114-94, § 41003(d).
[34] Pub. L. No. 114-94, § 41003(c)(2)(C).
[35] Pub. L. No. 114-94, § 41005(e).
[36] Pub. L. No. 114-94, § 41003(c)(3).
[37] Pub. L. No. 114-94, § 41005(b)(1).
[38] Pub. L. No. 114-94, § 41005(c)(1)(A).
[39] Pub. L. No. 114-94, § 41005(c)(1)(B).
[40] Pub. L. No. 114-94, § 41005(c)(3).
[41] Pub. L. No. 114-94, § 41005(c)(4).
[42] Pub. L. No. 114-94, § 41007.
[43] Pub. L. No. 114-94, § 41007(a)(1)(A).
[44] Pub. L. No. 114-94, § 41007(a)(1)(B).
[45] Otoe-Missouria Tribe of Indians v. N.Y. State Dept. of Fin. Servs., 769 F.3d 105 (2d Cir. 2014) (citing Plaza Health Labs, Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989)).

effects on jobs resulting from an order or injunction" and not to presume that such harms are reparable.[46]

## III. Observations

The FAST Act's permitting provisions have the potential to significantly streamline the review of many major projects. Past attempts at modernizing infrastructure permitting have tended to focus on either project authorization or environmental review. By altering the way in which these two interrelated agency functions are managed and tracked it may be possible to materially improve and accelerate the overall process.

However, the mandatory performance schedules at the core of this new approach are likely to increase friction between agencies that sponsor projects and agencies whose mission includes protecting and managing natural resources—such as the Department of the Interior or the Environmental Protection Agency. Any attempts by federal agencies to bind their state counterparts to strict deadlines are also likely to cause problems. Given limited staff and resources, federal and state resource agencies can be expected to develop strategies to shift costs and responsibilities to project sponsors. In addition, given the focus on schedules and accountability, all agencies may be less inclined to work with applicants on project modifications or mitigation proposals even if changes or compensation might be essential to satisfying substantive permit requirements. Faced with aggressive project schedules and public shaming, some agencies may simply deny applications.

In addition, key agency staff are likely to be increasingly shifted to covered projects. Indeed, one of the potential consequences of the FAST Act is that permitting for smaller projects may get slower.

Despite (or perhaps because of) these changes, major infrastructure developers should not underestimate the ingenuity of project opponents. Some of the most successful NEPA and permitting litigation involves agencies that felt time pressures during permitting or project review and decided to ignore or deemphasize issues or otherwise failed to fully address omissions identified in public comments. The FAST Act provides no shelter for incomplete applications, poor-quality environmental review documents, lack of public participation, or incomplete documentation to support agency decisions. Title XLI of the FAST Act provides certain new tools and a focus on schedules and accountability. But the FAST Act does not relieve agencies of their obligation to take a hard look at the environmental impacts of major federal actions.

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# LEGAL DEVELOPMENTS

# AIR QUALITY

## Court of Appeals Upheld Smoking Restrictions in State Parks

The New York Court of Appeals upheld a smoking ban imposed by the Office of Parks, Recreation and Historic Preservation (OPRHP) in state parks in New York City and in designated areas of other park sites under OPRHP jurisdiction. The court concluded that OPRHP acted within its delegated authority when it imposed the smoking restrictions. The court considered the ban based on the four factors established in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), and its progeny for determining whether agency rulemaking exceeds powers granted by the legislature. The court said that the organization challenging the ban had made arguments regarding the first *Boreali* factor for the first time on appeal and therefore did not reach the merits of the arguments—which concerned whether the agency did more than balance costs and benefits according to preexisting guidelines and instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems. The court indicated, however, that earlier decisions concerning restrictions on sugary drinks and smoking that held that agencies' actions were beyond their authority were distinguishable. In its consideration of the second *Boreali* factor—the "*tabula rasa* consideration"—the court concluded that OPRHP had not "written ... on a blank canvas" but had filled in details of an existing legislative policy to protect the public from secondhand smoke. With respect to the third *Boreali* factor—"consensus consideration"—the court agreed with OPRHP that any legislative inaction could be due to the legislature's conclusion that OPRHP already had statutory authority to ban smoking. The court also noted that a pending bill that the ban's challenger said was intended to fill a "vacuum" in the regulation of outdoor smoking was instead a reaction to the Supreme Court ruling in this case that overturned the ban and was therefore "no more than a prophylactic measure" by anti-smoking advocates. The court also rejected the challenger's argument that the fourth *Boreali* factor concerning "agency knowledge" weighed in its favor. The court said that the ban was driven by concerns within the realm of OPRHP's expertise. *NYC C.L.A.S.H., Inc. v. New York State Office of Parks, Recreation and Historic Preservation*, 2016 N.Y. LEXIS 703 (N.Y. Mar. 31, 2016). [*Editor's Note:* This

[46] Pub. L. No. 114-94, § 41007(b).