

Expediting Environmental Review and Permitting of Infrastructure Projects: The 2015 FAST Act and NEPA

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This article examines Title XLI of the Fixing America’s Surface Transportation Act, which is captioned: Federal Permitting Improvement, and is intended to fundamentally change the way that federal agencies evaluate environmental impacts from, and issue permits for, construction of large infrastructure projects.

Late last year, President Obama signed the Fixing America’s Surface Transportation (“FAST”) act into law.¹ First and foremost, FAST is a highway and transit bill which provides up to \$305 billion in transportation spending through 2020. FAST supports traditional highway spending but also provides funding for a wide range of transportation alternatives ranging from bike lanes to walking trails to self-driving cars.

However, FAST is much more than just a public works spending bill. For example, FAST includes requirements governing the transportation of flammable liquids by rails as well as reauthorization for the controversial Export/

Import Bank. The new law also builds upon the Obama Administration’s efforts to speed up public infrastructure development through more efficient and effective permitting and environmental review. This article examines Title XLI of FAST, which is captioned: Federal Permitting Improvement, and is intended to fundamentally change the way that federal agencies evaluate environmental impacts from, and issue permits for, construction of large infrastructure projects.

Background

The National Environmental Policy Act (“NEPA”)² establishes the now familiar requirement that agencies take a “hard look” at the

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environmental impacts associated with major federal actions. 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."³ 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 or permits or both from more than one level of government. Multiple Tribal, state, and local agencies, as well as affected non-government stakeholders, play a role in environmental permitting and review. The net result is that the environmental review and permitting process driven by NEPA can be extremely time consuming, particularly for large infrastructure projects.

As part of his efforts to strengthen the economy and create new jobs, on August 31, 2011, the president issued a Presidential Memorandum calling on federal agencies to expedite the review of high-priority infrastructure projects. This memorandum prompted several actions, including the creation of the Federal Infrastructure Projects Permitting Dashboard which tracked the permitting of approximately 50 selected major highway and transit projects.⁴ The Dashboard was designed to provide greater transparency into agency decision-making by publicly announcing and tracking important NEPA milestones.⁵

On March 22, 2012, the president took further action to improve environmental permitting efficiency and transparency by signing Executive Order 13604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*.⁶ EO 13604 established a Steering Committee comprised of 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, and managed in consultation with the President's Council on Environmental Quality. The Steering Committee was charged with identifying best practices for infrastructure permitting and review. The Steering Committee issued its report in June 2012 and eventually developed an Implementation Plan for Modernizing Infrastructure Permitting.⁷

The Obama Administration's efforts applied to both the authorization of projects (i.e., issuance of required permits, licenses, or certificates) and the environmental review process. Because of the scope of EO 13604, the Steering Committee examined all aspects of how large projects secure federal environmental approvals. Indeed, the Steering Committee's May 2014 Implementation Plan includes recommendations ranging from how to improve the quality of applications, to techniques for making the threshold determinations about the significant adverse impacts and, of course, suggestions for preparing environmental impact statements ("EISs").

The Federal Permitting Improvement provisions in Title XLI of FAST borrow many of the key features of the president's initiative to expedite federal decision-making through improved efficiency; increased transparency and application of best practices. For example, § 41002 of FAST establishes a Federal Permitting Improvement Steering Council ("Council")—the composition of which closely tracks the steering committee created by EO 13604. The Council will be run by an Executive Director who is appointed by the president. Moreover, § 41003(b) of FAST requires that federal agencies maintain an online Permitting Dashboard

which presents project-specific permitting timetables, including projected dates for completion of environmental reviews and issuance of permits.⁸

Importantly, FAST applies to both the way in which federal agencies issue authorizations and how they conduct environmental impact reviews. However, Title XLI of FAST does much more than simply incorporate existing executive branch practices into statute. FAST's Federal Permitting Improvement provisions also create a new category of Covered Projects which, if subject to NEPA, are entitled to be reviewed in accordance with timetables and best practices established by the Council. In addition, FAST imposes limitations on judicial review of Covered Projects.

Projects Covered By Title XLI of FAST

Title XLI of FAST is not an across-the-board attempt to overhaul NEPA (at least not yet), but it applies to a broad swath of projects, and not only those involving surface transportation. FAST applies to activities "involving 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" if certain qualifications are met.⁹ To qualify as a Covered Project, the initial anticipated total investment must be likely to exceed \$200,000,000. (The statute does not limit this to federal investment; a private project that requires federal approvals would seem to be covered.) Moreover, the project must trigger NEPA and be of a "size and complexity" such that "in the opinion of the Council. . . the project

[is] likely to benefit from enhanced oversight and coordination...."¹⁰

Performance Schedules

The Council plays a key role in refining FAST's scheme for modernizing infrastructure permitting. The Council is required to survey the key federal development agencies, develop an inventory of Covered Projects, and identify appropriate project categories. Based upon these categories, by December 2016 the Council "shall develop recommended performance schedules, including intermediate and final completion dates, for environmental reviews and authorizations most commonly required for each category...."¹¹ 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." These schedules are not to exceed the average completion time for comparable projects. The statute creates a process for computing and then continuously updating these average completion times. However, we note that a survey prepared by Piet and Carole deWitt and published by the National Association of Environmental Professionals of all federal EISs completed in 2014 found that the mean time between the Notice of Intent to prepare an EIS and the Notice of Availability of the final EIS was 4.7 years, though there was wide variation among agencies.

Section 41002(c)(C)(ii)(cc) requires that "[e]ach performance schedule shall 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 (including any hearing that an agency

holds on the matter) is in the possession of the applicant.” Furthermore, “[e]ach Federal agency shall conform to the completion dates set forth in the permitting timetable established. . .” by the Council.¹²

It may be noteworthy that FAST 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.

Best Practices for Review of Covered Projects

The Council is also charged with developing and updating best practices for environmental reviews and processing of permit applications. Among the eight factors to be considered when developing these recommendations are “ensuring timely decisions. . . through development of performance metrics” and “reducing information collection requirements and other administrative burdens on agencies, project sponsors, and other interested parties.” In addition, agency progress on applications and environmental reviews will be publically tracked on the Dashboard. These criteria and tracking requirements strongly suggest that when the best practices are announced in 2016, the focus will be on accountability, transparency, and the use of information technology—not business as usual for most federal agencies.

Permitting Timetable

Section 41003 provides that each Covered Project will have a lead agency, which will establish a plan for coordinating public and agency participation in any required federal environmental review, and set a permitting timetable, which

may only be modified under limited circumstances. There are also constraints on how long the review date may be extended. Other federal agencies are directed to cooperate with the lead agency in the processing of the application. Any disputes among agencies are to be resolved through a process established by the statute. The statute also provides for coordination with state approvals, and for use of environmental review information developed at the state level so as to avoid unnecessary duplication.

Limitations on Judicial Review

Section 41007 of this new statute imposes limitations on judicial review of the NEPA process for Covered Projects. Actions challenging a federal authorization must be filed within two years of the final agency decision or approval. (For most actions, the statute of limitations applied under NEPA has been six years.) In addition, claims seeking to challenge any authorization issued to a Covered Project are barred unless the action is filed by a party “that submitted comments during the environmental review” and the comments were “sufficiently detailed so as to put the. . . agency on notice of the issue. . .” giving rise to the challenge. Although these changes are not radical, they are likely to discourage some project opponents. Title XLI of FAST does contain a novel new provision intended to reduce the prospect that project opponents can secure preliminary injunctions. Pursuant to FAST, when considering a request for a preliminary injunction, “the court shall (1) consider the potential effect on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction; and (2) not presume that the harms described in paragraph (1) are reparable.”¹³ This change is

potentially significant because, even if a NEPA or permitting violation has occurred, physical construction of the project may preclude meaningful relief.¹⁴

Observations

This new statute has the potential to significantly streamline permitting and environmental 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—like the Department of Transportation or the Department of Defense—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 consequences of FAST 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. FAST provides no shelter for incomplete applications, poor quality EISs, lack of public participation, or incomplete documentation to support agency decisions. Title XLI of FAST provides certain new tools and a focus on schedules and accountability. But FAST does not relieve agencies of their obligation to take a hard look at the environmental impacts of major federal actions.

NOTES:

¹FAST Act, available at http://transportation.house.gov/uploadedfiles/fastact_xml.pdf.

²42 USC § 4321 *et seq.*

³*Stewart Park and Reserve Coalition, Inc. (SPARC) v. Slater*, 352 F.3d 545, 557 (2d Cir. 2003).

⁴<https://www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more>.

⁵New York's replacement of the Tappan Zee Bridge was one of the early projects to be publically tracked using the Dashboard.

⁶Executive Order No. 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects, available at <https://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr>.

⁷<https://www.permits.performance.gov/tools/implementation-plan>.

⁸FAST also advances federal NEPA practice concerning several concepts that are likely to be familiar to

practitioners who work with New York's State Environmental Quality Review Act, N.Y. Env'tl. Conserv. L. §§ 8-0101 to 8-0117, including a formalized process for resolving disputes about which agency shall serve as 'lead' and coordinated multi-agency review of applications and EISs.

⁹FAST § 41001(6) (It is noteworthy that "manufacturing" is listed among the types of projects that are automatically Covered Projects. Manufacturing facilities are not typically viewed as comparable to public infrastructure. Moreover, given the ease with which the Council can expand the list, it is not clear why other traditionally private ventures—such as residential or commercial develop-

ment—could not be defined as Covered Projects.).

¹⁰*Id.*

¹¹FAST § 41002(c)(C).

¹²FAST § 41003(c)(F).

¹³FAST § 41007(b).

¹⁴See *e.g.*, *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 526 N.Y.S.2d 56, 63, 520 N.E.2d 1345 (1988) ("as a general rule, an injunction will not issue to prohibit a fait accompli. . . even though the development violated environmental protection statutes").