Legal Backgrounder

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How Fast is the FAST Act?: An Analysis of Reforms Streamlining the NEPA Review Process

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The Fixing America's Surface Transportation Act (FAST Act), signed by President Obama on December 4, 2015, is meant to improve the National Environmental Policy Act (NEPA) review process for major infrastructure, energy, and manufacturing projects.[1] In order to counteract the slow pace and high costs that have plagued NEPA's environmental-impact reviews, the FAST Act prescribes measures to improve agency coordination and reduce litigation delays. As this LEGAL BACKGROUNDER explains, however, there are many obstacles to streamlining that may blunt the effectiveness of these reforms. Project applicants will need to be proactive throughout the permitting process to ensure that federal agencies utilize these tools effectively.

The Problem: NEPA Costs, Delays, and Litigation

The environmental reviews mandated by NEPA have long been a major obstacle to infrastructure development. The Department of Energy reported that the average completion time for an Environmental Impact Statement (EIS) in 2015 was 4.1 years, and the average cost was $4.2 million.[2] A 2014 U.S. Government Accountability Office report found that the average completion time for an EIS in 2012 was 4.6 years from the notice of intent to prepare an EIS through the issuance of the record of decision.[3] These figures likely underestimate both time and costs. Available data from federal agencies generally do not account for costs beyond third-party contractor fees, including a project applicant's data-development costs. The time estimates do not include the work that precedes the decision to prepare an EIS or the cost of defending them in court.

Why Does the NEPA Process Take So Long?

Recognizing that important infrastructure projects were facing undue permitting delays, Congress and the White House have been focused on the need for NEPA streamlining for several years.[4] Several obstacles have undermined these efforts. For example, many agencies are risk-averse, and sometimes choose not to pursue streamlined options out of concern that such "short-cuts" will increase litigation risk.

The complex overlay of laws and regulations that apply to infrastructure projects in addition to NEPA also complicates the permitting process. For example, the number of species listed and the breadth of critical habitat

[1] Public Law No: 114-94, Title XLI.

[2] Department of Energy, *Lessons Learned Quarterly Report*, Mar. 2016, available at http://energy.gov/nepa/downloads/lessons-learned-quarterly-report-march-2016.

[3] Government Accountability Office, *Little Information Exists on NEPA Analyses*, Apr. 2014 at 17.

[4] For example, the Safe Accountable Flexible Efficient Transportation Equity Act of 2005: A Legacy for Users shortened the statute of limitations for NEPA challenges to 180 days for certain transportation projects and delegated some responsibilities to the states. In addition, the CEQ and the Office of Management and Budget (OMB) announced a number of initiatives in 2015 aimed at accelerating the environmental review process for infrastructure projects. OMB M-15-20, Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects (2015).

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identified under the Endangered Species Act (ESA) grows every year. This growth in turn expands the number and type of projects requiring ESA consultations. Those consultations can require agencies to consider a greater range of potential impacts, which can complicate and expand the NEPA process.

Inter-agency review is another potential obstacle to streamlining. Section 309 of the Clean Air Act empowers EPA to review other federal agencies' EISs.[5] EPA's reviews often focus on identifying and recommending appropriate mitigation measures for the proposed project, which can lead to time-consuming negotiations between EPA and the responsible federal agency. If EPA finds the draft EIS "inadequate," the agency will recommend the draft EIS be formally revised and made available for a second period of public comment. EPA also reviews final EISs to ensure that the lead agency has taken EPA's comments into account. If EPA finds that the project's environmental impacts have not been sufficiently addressed, it may refer the matter to the Council for Environmental Quality (CEQ).

Federal agencies' uncertainty over the level of analytical scrutiny they should apply in reviewing projects can also complicate the NEPA process. For instance, agencies often struggle with the level of analysis required when assessing climate-change impacts. Environmental organizations frequently raise this uncertainty when commenting on EISs.[6] CEQ released draft guidelines on climate-change impacts in 2014.[7] While the guidance suggests that agencies focus on the projects with the greatest impacts, it also potentially expands the scope of analysis by counseling agencies to consider alternatives to the proposed action that have less potential impact on the climate.

Overview of NEPA-Streamlining Reforms in the FAST Act

With the FAST Act, Congress and the Obama Administration sought to improve on past attempts to streamline the NEPA process by coordinating and expediting NEPA review across a broader range of agencies and industry sectors. The Act establishes a Federal Permitting Improvement Council (the Council), composed of officials from CEQ, the OMB, and 13 other federal agencies, to coordinate this streamlining effort.

The range of projects covered by the FAST Act includes: "renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, [and] manufacturing."[8] In addition, the Council has the authority to designate projects in other industry sectors by majority vote.

To trigger the FAST Act, a project must be subject to NEPA; be likely to cost more than $200 million; and *either* 1) not qualify for abbreviated environmental-review processes under any applicable law, *or* 2) because of its size and complexity, would likely benefit from enhanced coordination.[9]

Important aspects of Title XLI of the FAST Act include:

- **Coordinated Project Plans**. The plans will identify the lead agency and cooperating agencies and set out a permitting timeline. The lead agency is to develop the permitting timetable in consultation with the cooperating agencies and the applicant.
- **Permitting Dashboard**. An expanded online database will track the status of federal NEPA reviews for each covered project. The lead agency must post information, including the permitting timetable, status of compliance for each participating agency, and any memoranda of understanding between the agencies.

[5] 42 U.S.C. § 7609(a).
[6] *See, e.g., Ctr for Biological Diversity v. Nat'l Highway Traffic Safety Admin.,* 538 F.3d 1172, 1217 (9th Cir. 2008).
[7] CEQ, Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts (2014).
[8] FAST Act, Title XLI, § 41001(6)(A).
[9] FAST Act, Title XLI, § 41001(6).

- **Coordination with States**. States may elect to impose the FAST Act's streamlining procedures on state reviews of a covered project.
- **Applicant Fees**. The FAST Act authorizes member agencies of the Council to issue regulations establishing fees for applicants to reimburse the costs of federal reviews.
- **Judicial-Review Provisions**. The law enacts litigation reforms that reduce the general statute of limitations to two years and directs courts to consider any negative effects on jobs when deciding whether to preliminarily enjoin a project.

Analysis of the FAST Act's NEPA Provisions

Applicants for energy, pipeline, broadband, and other covered projects will welcome the FAST Act's NEPA streamlining provisions, but they will need to take an active role to ensure the effectiveness of these reforms. Applicants must also be aware that the judicial-review provisions offer limited benefits.

Project Applicants Must Be Prepared to Advocate for NEPA Streamlining. Project applicants cannot benefit from the FAST Act's reforms without the committed involvement of permit-issuing federal agencies. Businesses must proactively engage with the lead and cooperating agencies at each step of the process, both to leverage the new streamlining provisions of the FAST Act, and to help fortify the final NEPA document against legal challenges. Some of the steps project proponents should consider include:

- **Filing an initial project notice to demonstrate that the project triggers the FAST Act**. Applicants of potentially covered projects must submit a notice to the Council and the lead permitting agency that summarizes the project and all federal approvals needed, and, most importantly, explains how the project meets the covered-project definition under the Act. After filing the notice, an applicant should be prepared to advocate for why the project triggers FAST Act streamlining.
- **Advocate for the appropriate level of review**. Once a lead agency is designated, applicants should be prepared to advocate for the appropriate level of NEPA review. In some cases, an applicant may be able to argue that a categorical exclusion is applicable, or that one agency can "tier" off another's existing NEPA document. However, less is not always better. For example, if an agency is considering the preparation of an initial Environmental Assessment (EA), and it appears likely that the project could have significant environmental impacts, applicants should encourage the agency to bypass the EA and instead only prepare an EIS.
- **Advocate that the EIS focus on the "preferred alternative."** The FAST Act contains a provision that has received little attention, but that could help reduce the scope of some EISs. The Act provides "the preferred alternative for a project, after being identified, may be developed to a higher level of detail than other alternatives"[10] if doing so will not prevent the lead agency from making an impartial decision or deter the public from commenting on the alternatives. This provision appears aimed at avoiding a situation where an agency feels compelled to fully investigate and discuss in detail numerous alternatives, even though the preferred alternative has been identified. In some cases, applicants should be prepared to advocate that this provision offers a basis for the EIS to focus on the preferred alternative, while providing a less detailed level of analysis for other alternatives.
- **Negotiate project schedules and encourage agencies to meet project deadlines**. Within 60 days after a project is added to the Permitting Dashboard, the lead agency must, in consultation with coordinating and participating agencies, develop a plan for completion of the environmental review and authorization, including deadlines. Changes to the timetable are limited and require justification along with consultation from stakeholders. Thus, applicants will have a role in helping the agency set the plan and schedule for the project, as well as ensuring that schedules are not extended without justification.

[10] FAST Act, Title XLI, § 41005(c)(4).

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- **Encourage agencies to coordinate reviews**. The designation of one facilitating agency, and the express direction to incorporate state environmental documents in the federal permitting process, could reduce project permitting inefficiencies. Applicants should urge federal agencies to coordinate with reviews under state NEPA counterparts where possible. Applicants should also seek combined, concurrent review processes with other federal statutory requirements, including those under the ESA and the National Historic Preservation Act.

The Judicial Review Changes are Limited. Applicants should also be aware that the FAST Act's judicial-review provisions are only a small step in the right direction. The statute of limitations reduction from six to two years is meant to provide greater certainty for applicants. In reality, however, most NEPA challenges are already brought well within two years, because project challengers generally want to file suit before the targeted project is constructed in order to avoid mootness arguments.

The law also provides that in any action seeking a temporary restraining order or preliminary injunction of a covered project, the court shall "consider the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction" and shall not presume that such harms are reparable.[11] This provision seems unlikely to have a significant impact, as most courts already consider an injunction's negative impact when balancing the harms and equities.[12] Moreover, injunctions are difficult to obtain in NEPA cases, as the burden for obtaining such extraordinary relief is high.[13]

Another FAST Act provision dictates that NEPA challenges can only be brought by those who commented on an EIS and did so with sufficient detail to put the lead agency on notice of the claims. This is also little more than a reiteration of existing law, as courts, for the most part, have limited NEPA challenges to comments raised within the public review period on the EIS.[14]

Finally, while the FAST Act imposes some deadlines on agencies, the deadlines do not appear to be judicially enforceable. The Act provides avenues for agencies to extend deadlines, including possibly when an agency determines more information is needed. If disputes arise about timelines, the Act designates OMB as the arbiter, rather than the courts.

Thus, while the judicial-review provisions are positive advances, these changes likely will not have a significant impact on the use of NEPA litigation as a weapon for delay.

Conclusion

Project proponents must be prepared to advocate for streamlining throughout the NEPA review process, including both before and after an application is filed, as the lead agency may not necessarily be focused on the most efficient route to permitting. As soon as the project proponent is aware that an agency authorization is needed, the project proponent should meet with the agency to explain details of the project, coordinate outreach with federal, state, tribal, and local agencies, and delineate the NEPA process. The project proponent should meet with agency officials regularly throughout the NEPA process to discuss the project schedule, other procedural items, and potential scope revisions, and assist the agency in responding to public and interagency comments.

Title XLI of the FAST Act offers some valuable new tools, such as development of performance schedules and agency coordination through the Federal Permitting Improvement Council, but it will take active involvement by the project applicant to make sure these tools are effectively utilized for particular projects.

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[11] FAST Act, Title XLI, § 41007(b).

[12] *See, e.g., Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1086-87 (10th Cir. 2004) (suspension of construction costing $144,000 per day constituted significant financial harms weighing against granting the preliminary injunction).

[13] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

[14] *See, e.g., Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553–554 (1978).

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