

FAST-41 Environmental Review and Permitting Process Changes in the Senate Infrastructure Bill

Title VIII of the Infrastructure Investment and Jobs Act (H.R. 3684), the infrastructure bill recently passed by the U.S. Senate, includes several important amendments to Title 41 of the Fixing America's Surface Transportation (FAST) Act,[1] or FAST-41, which have the potential to significantly reform the federal environmental review and permitting process for covered infrastructure projects. Most notably, the Senate infrastructure bill makes FAST-41 permanent, codifies some aspects of the Trump administration's "[One Federal Decision](#)" policy, allows tribal projects to use FAST-41's streamlined environmental review and permitting procedures, and places an increased emphasis on timing and transparency.

Background on FAST-41

The FAST Act, enacted in December 2015, codified an Obama administration initiative to cut environmental review and permit decision-making timelines for infrastructure projects, while improving outcomes for communities and the environment. It accomplished this by establishing streamlining procedures for covered infrastructure projects and creating a council of agency deputy secretaries to better coordinate and expedite agency reviews.

FAST-41 created the Federal Permitting Improvement Steering Council (Permitting Council), an interagency council of deputy secretaries with responsibility for overseeing federal agencies' implementation of the FAST-41 process, with an executive director appointed by the president. FAST-41 also required each federal agency to designate a chief environmental review and permitting officer who reports directly to a deputy secretary on all matters related to environmental reviews and authorizations, providing accountability for agency performance by giving a specific individual responsibility for overseeing an agency's compliance with FAST-41. Among other responsibilities, the Permitting Council was required to use an online database (the Permitting Dashboard) to track the status of federal environmental reviews and authorizations for covered projects; issue annual recommendations for best practices in several categories related to infrastructure permitting; and publish recommended performance schedules for environmental reviews and authorizations for specific categories of infrastructure projects.

FAST-41 also created special procedures intended to streamline the environmental review and permitting process for "covered projects." Covered projects are infrastructure projects in various specified sectors that are: (1) subject to the National Environmental Policy Act, likely to cost over \$200 million, and not eligible for abbreviated authorization or environmental review; (2) covered by a programmatic plan designed to facilitate development of carbon dioxide pipelines; or (3) subject to NEPA and designated by the Permitting Council as likely to benefit from enhanced oversight and coordination. (Covered projects do not include surface transportation and water resources projects that are subject to separate streamlining provisions under 23 U.S.C. § 139 and 33 U.S.C. § 2348, respectively.) Among other procedural requirements applicable to covered projects, the lead or facilitating agency must create a coordinated project plan, which is a concise plan for coordinating

public and agency participation in, and completion of, any required federal environmental review and authorization for the project, and which must include a permitting timetable with intermediate and final completion dates for action by each participating agency on any federal environmental review or authorization required for the project. FAST-41 also sets a two-year statute of limitations for filing a lawsuit to challenge covered projects. NEPA claims must be filed by a party that submitted a comment during the environmental review and comments must have been "sufficiently detailed comment so as to put the lead agency on notice of the issue on which the party seeks judicial review," unless "the lead agency did not provide a reasonable opportunity for such a comment on that issue."

Other provisions of FAST-41 are discussed below, where relevant. For more detailed summaries of FAST-41, refer to our prior updates linked [here](#).

Permanent Extension of FAST-41

FAST-41 initially had a seven-year "sunset" limitation, meaning it would expire in December 2022. Perhaps the most significant aspect of the Senate infrastructure bill is its removal of the sunset provision, making FAST-41 permanent. This would eliminate the uncertainty regarding the effect of the sunset of FAST-41 on a pending project, which has been a concern for project proponents.

Accelerated Timelines and Process Changes

The Senate infrastructure bill makes some changes to FAST-41's environmental review procedures for covered projects, incorporating some aspects of the One Federal Decision policy that had been rescinded by President Biden's Executive Order 13990.[2]

The FAST-41 environmental review process for covered projects includes many interim deadlines for agency actions—for example, not more than 60 days after the deadline for posting a project on the Permitting Dashboard, the lead agency must develop a Coordinated Project Plan with a permitting timetable. Meeting these deadlines has been challenging for projects involving complex environmental issues or strong disagreements among agencies. However, the Senate bill envisions even more aggressive timelines:

- Under the Senate bill, the Permitting Council must aim to develop recommended performance schedules that do not exceed two years, "to the maximum extent practicable, and consistent with applicable Federal law." The relevant agencies and Permitting Council must provide an explanation if a recommended performance schedule exceeds two years.
- Under the Senate bill, federal agencies must, "to the maximum extent practicable," issue a record of decision within 90 days of issuance of a final environmental impact statement.
- Currently, the lead or facilitating agency has 45 days (after the deadline for posting a project on the Permitting Dashboard) to identify all federal and nonfederal agencies likely to have financing, environmental review, authorization, or other responsibilities with respect to the proposed project, and to identify and invite federal agencies to become participating or cooperating agencies. Under the Senate bill, this timeframe is shortened to 21 days. Additionally, potential participating and cooperating agencies will

be required to respond within 14 days of receiving the invitation.

For covered projects that require an environmental impact statement, the Senate bill requires preparation of a single, joint, interagency environmental impact statement, unless the lead agency provides justification in the coordinated project plan that multiple environmental documents are more efficient.

Lastly, the Senate bill makes the process of amending a permitting timetable more onerous. A permitting timetable may be modified only after the lead or facilitating agency consults with the executive director of the Permitting Council, which must occur at least 15 days before the lead or facilitating agency and affected cooperating agencies engage in consultation with the participating agencies and the project sponsor on a different completion date.

As a result of these process and timeline changes, early consultation for covered projects will be essential to keep agencies on schedule. Moreover, the bill's two-year goal for recommended performance schedules runs counter to the reality that about 75% of all infrastructure projects take longer because they must be coordinated with other federal, state, tribal, and local requirements, funding, and political decisions.[3]

Greater Role for Native American Tribes, Alaska Native Corporations, and Native Hawaiians

The Senate infrastructure bill makes several changes to FAST-41 to allow for a greater role for Native American tribes:

- The Senate bill expands the definition of covered projects to include infrastructure projects that are (1) subject to NEPA; (2) sponsored by an Indian Tribe, an Alaska Native Corporation, a Native Hawaiian organization, the Department of Hawaiian Home Lands, or the Office of Hawaiian Affairs; and (3) located on land owned or under the jurisdiction of the sponsor.
- Under FAST-41, upon the request of the project sponsor, the lead agency must, as appropriate, adopt or incorporate by reference documentation prepared for a covered project under state laws to fulfill all or part of the federal environmental review for the project if the state documentation and procedures meet certain requirements. The Senate bill would expand this provision to also apply to documentation prepared for a covered project under the laws and procedures of an Indian Tribe.
- The bill specifies that any information relating to Native American natural, cultural, and historical resources in a project sponsor's FAST-41 initiation notice will be kept confidential and exempt from the disclosure requirements under the Freedom of Information Act, removing a potential barrier to participation for many tribes that may have privacy concerns.
- The bill specifies that the Permitting Council's recommended best practices for infrastructure permitting may address engagement with Native American stakeholders "to ensure that project sponsors and agencies identify potential natural, archeological, and cultural resources and locations of historic and religious significance in the area of a covered project."

Emphasis on Transparency and Accountability

Under FAST-41, the environmental review process became more transparent not only to project sponsors but also to the public. The Permitting Dashboard includes extensive information about every FAST-41 covered project, including the permitting timetable, significant project documents, and detailed information about individual agency action.

The Senate infrastructure bill expands the project information available on the Permitting Dashboard. Agencies will be required to provide hyperlinks to websites with information on the status of mitigation measures that were agreed to as part of the environmental review and permitting process, including whether and when the mitigation measures have been fully implemented. Agencies must also publish information about project-related public meetings, public hearings, and public comment periods, in English and in the predominant language of the communities most affected by the project.

In addition, under the Senate infrastructure bill, the executive director of the Permitting Council may direct a lead agency to include a project on the Permitting Dashboard even if it is not a covered project if the executive director determines that a Permitting Dashboard entry is in the interest of transparency. For such projects, the lead agency will be required to publish on the Permitting Dashboard a permitting timetable; updated information on agencies' compliance with the permitting timetable; explanations for modifications to the permitting timetable; and information about project-related public meetings, public hearings, and public comment periods.

Expanded Funding

The Senate bill gives the executive director of the Permitting Council authority to issue regulations establishing a fee structure for sponsors of covered projects to reimburse the United States for reasonable costs incurred in conducting environmental reviews and authorizations for covered projects. Currently, this authority lies with the heads of the Permitting Council member agencies. The Permitting Council issued a proposed rule in 2018 to establish a \$200,000 fee for project sponsors of covered projects, but this proposed rule was withdrawn in May 2021 before it was finalized and took effect.

In addition, FAST-41 established a fund that was available to the executive director of the Permitting Council for the purposes of administering, implementing, and enforcing the act. Under the Senate infrastructure bill, this power has been expanded to include the staffing of the Office of the Executive Director and support of the role of the Permitting Council, including supporting interagency detailee and rotation opportunities, advanced training, enhanced support for agency project managers, and sharing information and lessons learned. The executive director may transfer these funds to other agencies, including state, tribal, and local governments, to facilitate timely and efficient environmental reviews and authorizations.

The Road Ahead

While the Senate infrastructure bill passed with bipartisan support and has President Biden's backing, the likelihood of these changes to FAST-41 being enacted remains uncertain. Notably, the infrastructure bill that the House of Representatives passed earlier this summer (the INVEST in America Act) did not include any changes

to FAST-41 and would have allowed FAST-41 to sunset in December 2022. If a conference committee is created to reconcile the House and Senate versions of the infrastructure bill, it is possible that the FAST-41 provisions in the Senate bill could be changed before final enactment.

Endnotes

[1] Fixing America's Surface Transportation Act, Pub. Law No. 114-94, 129 Stat. 1312 (2015), Title XLI, Federal Permitting Improvement, §§ 41001–41014, codified at 42 U.S.C. §§ 4370m–4370m-12.

[2] Section 7(b) of Executive Order 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021), rescinded the previous Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, with direction to the Office of Management and Budget and the Council on Environmental Quality to consider whether to recommend that a replacement order be issued.

[3] Council on Environmental Quality, *Environmental Impact Statement Timelines (2010-2018)*, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

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