

# FAST Act Infrastructure Permitting Reforms

Summary below is based on American Council of Engineering Companies (ACEC) Last Word Newsletter 12/15

**The Fixing America's Surface Transportation (FAST) Act signed into law contains the most sweeping changes ever to the federal environmental review process.**

Reforms (in Title XLI, Section 41003, which is based on the previously proposed Federal Permitting Improvement Act sponsored by Senators Portman/McCaskill) include:

- Establishing an **interagency council**, The Federal Permitting Improvement Council, tasked with inventorying projects, recommending performance schedules, and reviewing and issuing best practices annually
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- Establishing a **permitting timetable**, including intermediate and final completion dates for covered projects
- Designation of a **Lead Agency** to coordinate responsibilities among multiple agencies involved in project reviews
- Providing for **concurrent reviews** by agencies, rather than sequential reviews
- **Allowing some state-level environmental reviews to be used**, thereby avoiding duplication of work by federal reviewers
- Requiring that agencies involve themselves in the process **early and comment early**
- Establishing a reasonable process for **determining the scope** of project alternatives
- Creating a **searchable, online “dashboard”** to track the status of projects during the environmental review and permitting process
- **Reducing the statute of limitations to challenge a project review from six years to two years**
- Requiring courts, when addressing requests for injunctions to stop covered projects, to **consider the potential negative impacts on job creation.**

Projects covered by the new law (Section 41003) include all economically significant infrastructure projects that have a total investment of **\$200 million or more**, that would benefit from increased coordination or that require two or more federal reviews or the preparation of an Environmental Impact Statement under NEPA.

# Will FAST Act Make Permitting Faster?

## Streamlining Offered for Infrastructure Projects

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### HIGHLIGHTS:

- The new Fixing America's Surface Transportation Act (FAST Act) for federal highway funding provides National Environmental Policy Act (NEPA) permitting streamlining for infrastructure projects.
- The FAST Act establishes an **interagency council, requires permitting timetables and creates a public on-line "dashboard" to track projects**. It also authorizes federal agencies in some instances to use environmental review **documents prepared under state law** to comply with NEPA.
- The new legislation also includes litigation reforms that **reduce the NEPA statute of limitations from six years to two years generally** – and 150 days for transportation projects – and requires courts to consider the effects on jobs.

The new federal highway funding legislation, the [Fixing America's Surface Transportation Act](#) (FAST Act), signed into law by President Obama on Dec. 4, 2015, provides long-term funding certainty for surface transportation projects and also contains a broader set of permit streamlining reforms. The changes will impact infrastructure projects serving multiple sectors, including renewable and conventional energy production, electricity transmission, pipelines, manufacturing, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines and manufacturing. Other sectors may be added in the future.

### What Are the Purpose and Key Reforms of the New NEPA Streamlining Legislation?

The new permit streamlining provisions contained in Title XLI of the FAST Act are based on the previously proposed Federal Permitting Improvement Act sponsored by Sen. Rob Portman (R-Ohio) and Sen. Claire McCaskill (D-Mo.). The legislation responds to and builds on the permit streamlining project launched by the Obama Administration in 2012 under [Executive Order 13,604](#). According to the bill sponsors, the [new streamlining legislation](#) "seeks to create a smarter, more transparent, better-managed process for government review and approval of major capital projects."

### Establishing an Interagency Council

Section 41002 of the FAST Act establishes a **Federal Permitting Improvement Council** (Council), composed of an Executive Director appointed by the President, the Chairman of the Environmental Protection

Agency (EPA), the Director of the Office of Management and Budget (OMB), and Council Members designated by each of the remaining 13 major federal agencies. The Council is tasked with:

- developing a **categorized inventory of covered projects** that are pending environmental review
- developing **recommended performance schedules** for environmental review, including requiring a mandatory completion date of not more than 180 days after the approving agency receives all necessary information
- reviewing and issuing **best practices annually** and creating training materials for permitting officials

### **Creating Additional Streamlining Provisions**

Section 41003 of the FAST Act contains various provisions aimed at streamlining the environmental review process, with improved agency coordination through creation of a Coordinated Project Plan and a new Permitting Dashboard to serve as a centralized information page for pending projects, as well as opportunities to better coordinate with state environmental documentation.

- A **Coordinated Project Plan** must be developed for each project. It identifies **the lead agency** and cooperating agencies and contains an **agreed-upon permitting timeline**, which may only be extended or otherwise modified under particular circumstances, with the Executive Director's approval and with time limits for any extensions granted. However, there are limits to any reliance on the set timeline. For example, a granted extension may not be challenged in court. Further, in the event that the lead agency fails to meet the timeline, it must merely submit an explanation to the Executive Director, supplemented by monthly progress updates until the process is completed.
- **Every project must be entered into the Permitting Dashboard**, an online database maintained by the Executive Director to track the status of federal environmental reviews. Each covered project shall have its own specific and searchable entry on the Dashboard, created no later than 14 days after the Executive Director receives notification of project application. Various supporting information must be posted by the lead agency, no later than five business days after the agency receives the information, including the permitting timetable, status of compliance for each participating agency, an explanation of any timetable modifications, and any memorandum of understanding between the lead agency and cooperating state, local or tribal agencies.
- **Projects are also encouraged to coordinate with state authorizations.** States may elect to impose the FAST Act's streamlining procedures on all state agencies that have jurisdiction over a covered project or will make determinations that apply to it. Alternatively, if certain requirements are met, the lead federal agency is directed to adopt, incorporate by reference and use state environmental documents as all or part of the documentation needed to complete federal environmental review for the project, with appropriate supplementation if necessary. The Council on Environmental Quality is expected to issue further guidance on this important provision.

## **Instituting New Litigation Reforms**

The FAST Act streamlining provisions in Section 41003 include two litigation reforms:

- **reducing the current NEPA statute of limitations from six years to two years**
- allowing courts to **consider the negative effects on jobs** when deciding whether to overturn a project approval

## **What Projects Qualify for Streamlining?**

Projects covered by the new law include all economically significant infrastructure projects that have a total investment of **\$200 million or more**, that would benefit from increased coordination or that require two or more federal reviews or the preparation of an Environmental Impact Statement under NEPA.

However, any highway project, public transportation capital project or multimodal project that requires the approval of the Department of Transportation (DOT) is excluded from Title XLI. Those projects are subject to Section 139 of Title 23, United States Code. Section 139 was also amended by the FAST Act to contain similar project streamlining requirements and agency coordination provisions. **These projects benefit from an even shorter statute of limitations. Section 139 imposes a 150-day statute of limitations** for judicial review of a final permit, license or approval issued by DOT for a highway or public transportation capital project.

Additionally, the Section 139 amendments include a **pilot program to eliminate federal and state duplicative environmental reviews by approving up to five states to conduct environmental reviews for DOT highway, railroad, public transportation or multimodal projects under state laws instead of under NEPA**. Final actions taken by state agencies under the pilot program are subject to the same two-year statute of limitations applicable to covered projects under Title XLI. The statute of limitations for other projects subject to Section 139, however, has not been altered.

## **What is the Bottom Line?**

The FAST Act is intended to improve the permitting process for major infrastructure projects in three ways: 1) better coordination and deadline-setting for permitting decisions; 2) enhanced transparency; and 3) reduced litigation delays. None of this comes without cost, however. To help fund the implementation of these reforms, the FAST Act also creates an Environmental Review and Permitting Fund and authorizes all member agencies of the Council to establish fee structures for project proponents to reimburse the costs of federal reviews.

While the new timelines still offer many "outs" that can slow a process down, the improved transparency and efforts to achieve consistency across all federal agencies in the NEPA permitting approach is a welcome change overall. Additionally, the DOT pilot project allowing states to provide one-stop environmental review under state law is a change that could promise real streamlining in the future.