



Congress Establishes Federal Permitting Reforms for Major Infrastructure Projects

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On December 4, 2015, President Obama signed into law the FAST/DRIVE Act (H.R. 22) transportation bill. It includes, as Subpart D, the Federal Permitting Improvement Act (Act), which aims to improve the permitting process for major infrastructure projects, including energy projects, costing \$200 million or more. The law establishes a federal interagency council chaired by a Presidential appointee to develop permitting performance standards, set deadlines, and enable the public to track the progress of major federal permitting actions. However, the provisions terminate seven years after enactment.

LEGISLATIVE PROVISIONS

The permitting streamlining provisions apply to construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband pipelines, manufacturing and other projects specifically approved for application of the procedures by a new Federal Permitting Improvement Steering Council (Steering Council).

The Steering Council is established to track, coordinate and streamline permitting of covered projects, and to develop performance standards for permitting different categories of projects. Each identified federal agency, including among others, the Federal Energy Regulatory Commission, the Departments of Agriculture, Interior, Energy, and Commerce, and the Environmental Protection Agency, must appoint a high ranking official to the Council and designate a chief environmental review and permitting officer to advise and assist the agency council member, including making recommendations to the council member to improve the agency's permitting processes. The Steering Council's tasks include setting up an online database or "Permitting Dashboard" to track covered projects, which will enable the public to track the status of reviews and authorizations by all cooperating and participating agencies.

The law imposes requirements for covered projects on federal permitting agencies, and allows states with conforming laws to make respective state agencies subject to the same requirements. A covered project is defined as any activity that requires authorization or environmental review by a federal agency involving the infrastructure mentioned above that is: i) subject to the National Environmental Policy Act (NEPA) and likely to require a total investment exceeding \$200 million and does not qualify for abbreviated permitting under any other law, or ii) is subject to NEPA and in the opinion of the Steering Council is likely to benefit from enhanced permitting oversight and coordination.

The Steering Council is directed to establish within six months an inventory of covered projects that are pending environmental review or authorization by a federal agency, categorize the projects based on sector and type, identify the types of environmental reviews and authorizations most commonly required for each category, and add a covered project to the inventory after receiving notice from the project sponsor. Within one year of enactment, the Steering Council is directed to issue recommendations for: i) performance schedules for environmental reviews and authorizations most commonly required for each category of covered project, and ii) best practices for enhancing early stakeholder engagement, ensuring timely decisions, improving interagency coordination, increasing transparency, reducing information collection and other administrative burdens, making technical information available, and developing training materials for agencies.

A project proponent initiates the review process by providing notice of initiation of the project with supporting information to the appropriate lead NEPA agency. The lead NEPA agency then identifies all federal and non-federal agencies likely to have financing, environmental review, authorization, or other responsibilities for the proposed project and invites each such federal agency to become a participating or cooperating agency in the environmental review process. An invited federal agency is so designated unless it states that it does not have jurisdiction or authority or that it does not intend to exercise its

authority or otherwise participate in the environmental review. States may choose to have state agencies with permitting or review authority participate in the Act's environmental review and authorization process.

Within 60 days of the posting of a covered project on the Permitting Dashboard, the lead NEPA agency must establish a Coordinated Project Plan (CPP) including timelines for review and approval by itself and cooperating or participating agencies based on the performance schedule and timetable for that type of project by the Steering Council. The CPP is also posted to the Permitting Dashboard. To the maximum extent possible, agencies are required to carry out their tasks under the CPP concurrently and the federal review is required to be coordinated with applicable state, local, or tribal agency processes. The Executive Director mediates any disputes among agencies and the project proponent over the timetable. Extensions of the final completion date under the timetable must be approved by the Steering Council's Executive Director and cannot in total exceed half the time of the original timetable. Any further extensions must be approved by the Director of the Office of Management and Budget and must be accompanied by a report to Congress explaining the delays.

Agencies are also authorized to set up fee structures for project proponents to help cover the agencies' costs of administering the program. Although cooperating agencies are required to coordinate their environmental reviews and adhere to the schedule, there is no new enforcement mechanism under the Act's provisions. However, an agency that fails to meet the timeline must submit a notice for the Permitting Dashboard, to include an explanation for the failure to meet the timeline and an alternative completion date. Each month thereafter until the agency has taken final action, it must submit for the Permitting Dashboard a status report describing any agency activity related to the project. The Steering Council must also submit an annual report to Congress on its progress in implementing the law.

The Act attempts to curb litigation in two significant ways. First, it requires any challenge to a covered project's NEPA review to be filed within two years of the record of decision or approval or denial of a permit. Second, in considering whether to enjoin construction of a covered project pending a court challenge, the Act permits courts to consider, among other things, the negative effects on jobs that would result from such an injunction.

IMPLICATIONS

The permitting and regulatory reforms of the Act have potential to improve infrastructure permitting timelines. In particular, the reforms primarily emphasize promoting best practices, standardizing expectations of timetables, and providing transparency on agency performance.

However, the legislation does not amend any of the substantive laws that provide the basis for requirements for permits and authorizations, such as the Federal Power Act, NEPA, Natural Gas Act, Endangered Species Act, or Clean Air Act. It also does not establish legal deadlines for action by agencies, but rather creates a process for inter-agency negotiation of such deadlines and improved transparency regarding causes of delay. It remains to be seen whether the lack of enforcement mechanisms in the Act will undercut the incentive for agencies to meet their deadlines in order to avoid the public notice and reporting requirements associated with missed deadlines.

Because the Act requires the covered projects inventory for pending projects to be established within six months and recommendations for performance schedules and best practices to be made within one year of enactment, entities wishing to have input into the Steering Council's implementation activities have a limited time to act. Van Ness Feldman welcomes inquiries in this regard from any potentially affected entities.

For more information

Van Ness Feldman's hydroelectric and public land and natural resources practices provide comprehensive legal, policy, and business advisory services for the full range of issues affecting these matters. Van Ness Feldman's decades of experience cover every aspect of these matters, ranging from transactions and land use planning to licensing, permitting, regulatory compliance and litigation. If you would like additional information, please contact [Joseph Nelson](#) or [Mike Swiger](#) in our Washington, D.C. office at 202-298-1800, or [Matthew Love](#), in our Seattle, WA office at 206-623-9372.

