

## Updates

August 01, 2017

Should Infrastructure Project Developers Invoke Streamlined Environmental Review Under FAST-41?

Title 41 of the Fixing America's Surface Transportation Act (FAST-41) includes measures to streamline environmental reviews for certain infrastructure projects. Congress passed the FAST Act in December 2015, and the Office of Management and Budget and Council on Environmental Quality issued an 86-page joint guidance document to federal agencies on January 13, 2017.

Importantly, the guidance interprets the statute to make the environmental streamlining procedures in FAST-41 voluntary for new covered projects. Under the guidance, the environmental streamlining process is triggered only if a project developer chooses to initiate it. While the law creates new opportunities for infrastructure project developers to use the streamlining process to their advantage, it also adds new procedural requirements to the existing environmental review process. If a project sponsor does not opt in to the FAST-41 streamlining procedures, the normal environmental review process would apply.

Whether to initiate the new streamlining process is an important strategic consideration that should be addressed early in the project development process. This update discusses some of the factors that project sponsors should consider.

### Covered Projects

Only "covered projects" can elect to take advantage of the environmental streamlining provisions in FAST-41. In general, a "covered project" is an infrastructure construction project subject to the National Environmental Policy Act (NEPA) that will cost more than \$200 million and falls into any of the following categories:

- Renewable energy production: biomass, hydropower, wind, hydrokinetic, solar, geothermal and energy storage
- Conventional energy production: land and off-shore oil and gas production, and fossil fuel and nuclear power plants
- Electricity transmission
- Broadband
- Natural gas pipelines
- Liquefied natural gas terminal facilities
- New or expanded manufacturing facilities

Most surface transportation and water resources projects are excluded from FAST-41 because they qualify for streamlining procedures under other laws.

### Key Changes in FAST-41

First, what has not changed: FAST-41 does not amend NEPA or any other federal environmental review law. Therefore, the existing procedural and substantive requirements of all of those laws remain in effect. In this fundamental sense, the process remains as complex and potentially delay-prone after the FAST Act as it was before.

What has changed: The FAST Act establishes an overarching framework that is intended to improve the efficiency of the environmental review process through better coordination, specific deadlines, increased transparency and more effective means for resolving interagency disputes.

Key elements of this framework include:

**Federal Permitting Improvement Steering Council (FPISC).** The FPISC is a [15-member interagency council](#) with responsibility for overseeing all federal agencies' implementation of the FAST-41 process. The FPISC Executive Director is given specific responsibilities under the statute, including a role in resolving interagency disputes. President Trump has not yet appointed an FPISC Executive Director.

**Permitting Dashboard.** The [dashboard](#) is an online database that lists all federal infrastructure projects that are subject to FAST-41 requirements and are currently undergoing an environmental review process. It also includes surface transportation projects that are not subject to FAST-41 but are subject to similar requirements applicable to those projects.

**Performance Schedules.** The FPISC Executive Director is charged with establishing standard schedules for completing the environmental review process for specific types of infrastructure projects. These schedules have been issued and are posted on the FPISC's website. These schedules provide a starting point for measuring how long the process should take—and for determining whether the process has been delayed.

**Facilitating Agencies.** For each type of infrastructure project, the FPISC is required to designate a "facilitating agency." The facilitating agency is responsible for receiving a developer's request to initiate the environmental review process for an infrastructure project, and helping to get the process under way—even if the facilitating agency itself ultimately does not lead the process, or even have a role in approving it.

**CERPOs.** Each federal agency with a role in approving infrastructure projects is required to designate a Chief Environmental Review and Permitting Officer. This new role is intended to improve accountability and performance by giving a specific individual responsibility for overseeing the agency's compliance with FAST-41.

**Initiation Notice.** The project sponsor is responsible for initiating the FAST-41 process by submitting a "notice of initiation" to the FPISC Executive Director. The notice of initiation triggers a series of deadlines under the statute for the facilitating agency and other agencies to get the process under way—or to advise the sponsor that additional information is needed before the process can begin.

**Process Requirements.** Projects subject to FAST-41 must comply with new procedural requirements, including the requirement to establish a project schedule with specific milestones and limitations on the extent to which the project schedule may be modified.

**Limits on Litigation.** FAST-41 establishes time limits on when lawsuits may be filed challenging federal approvals for infrastructure projects, and it places some limits on the types of claims that can be raised in those lawsuits. It also specifies factors that courts must consider in deciding whether to issue a preliminary injunction halting a project.

#### Potential Benefits of FAST-41

Overall, the FAST-41 process should be beneficial to project sponsors because it helps to make the process more efficient and transparent. Potential benefits include:

- Enabling the project sponsor to kick off the environmental review process by submitting an initiation notice to the facilitating agency, which then triggers other deadlines for federal agencies themselves to determine which agency will lead the NEPA process.

- Requiring the lead agencies to create a schedule for completing environmental reviews based on recommended performance schedules for different types of covered projects and in consultation with other agencies.
- Allowing schedules to be modified only in limited circumstances and limiting the length of time by which those schedules may be extended.
- Requiring that lead agencies report to Congress when projects are substantially delayed beyond their established schedule.
- Requiring project schedules to be posted on the Permitting Dashboard, which creates greater transparency and accountability for each agency involved in the process.
- Establishing a two-year statute of limitations (as compared to six years generally) for challenges to federal agency approvals for infrastructure projects, running from the date of publication of a *Federal Register* notice announcing the approval. The guidance does not state whether the two-year statute of limitations would apply to a covered project if the FAST-41 process is not invoked.
- Requiring courts to give greater consideration to economic impacts (including job losses) when deciding whether to issue a preliminary injunction delaying a project.
- Limiting the scope of lawsuits challenging the federal environmental review process to issues raised in comments submitted during the environmental reviews process.

### Potential Drawbacks of FAST-41

While the FAST-41 process ultimately should prove beneficial, there is inevitably a learning curve when a new process of this scope and complexity is established. Project sponsors may find that FAST-41 adds new procedural requirements without actually reducing the time needed to complete the process. Specific issues to consider include:

- Some of the same provisions that are intended to benefit projects may actually restrict the project sponsor's flexibility. For example, if the permitting timetable needs to be modified, the project sponsor and lead agency must take additional procedural steps, which include consulting with other agencies and preparing a written justification. Moreover, permitting timetables may only be modified for specified reasons, may only be extended for a certain length of time and may not be modified within 30 days of the completion date.
- FAST-41 and the OMB/CEQ guidance created a host of new requirements and new terminology for federal agencies to decipher, and agencies will inevitably face hurdles as they implement these new requirements. While initial guidance was issued at the end of the last administration in January 2017, individual agencies have not yet updated their own procedures to reflect FAST-41 requirements.
- FAST-41 authorizes federal agencies to issue regulations establishing fees that project sponsors are required to pay to reimburse the United States for the reasonable costs of conducting environmental reviews and authorizations for covered projects. The guidance clarifies that fees will not be imposed before such regulations are issued. Nonetheless, project sponsors should note that it is possible fees will be assessed in the future for covered projects when the FAST-41 process is used.

For projects that are not expected to face significant obstacles in the environmental review process, it may be simpler and faster to follow the traditional environmental review process rather than invoking FAST-41.

### Conclusion

The OMB/CEQ guidance gives infrastructure project developers an important choice of whether to opt in to the environmental streamlining procedures in FAST-41. While opting in may speed up the environmental review process, it has not made the process any simpler. The substantial benefits for covered projects are accompanied by procedural obstacles and potential pitfalls. Infrastructure project developers should carefully evaluate early in

the development process whether the circumstances of their project justify opting in to this new process.

## Resources

The FPISC maintains a website of materials regarding the FAST-41 process, including:

- [Permitting Dashboard](#)

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