

Streamlining the Federal Permitting Process for Major Energy and Infrastructure Project

Article By:

L. Marissa Grace

On January 6, 2015, Representative Rodney Davis (R-Ill.) introduced H.R. 22 – Surface Transportation, Reauthorization, and Reform Act of 2015 (“Act”). H.R. Res. 22, 114th Cong. (2015) (enacted). The purpose of this Act, also known as “Fixing America’s Surface Transportation Act” or “FAST Act,” is to “authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.” *Id.* This Act, which became public law on December 4, 2015, contains a provision entitled “Federal Permitting Improvement,” found in Title XLI under Division D of the Act (“Title”). This Title, which was sponsored by Senator Rob Portman (R-OH), will streamline the Federal permitting process for major energy and infrastructure projects.

This Title establishes the Federal Permitting Improvement Steering Council, which is a multi-agency permitting council who oversees and coordinates the Federal permitting process for covered projects. Under this Title, “covered project” means:

[A]ny activity in the United States that requires authorization or environmental review by a Federal agency involving construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, or any other sector as determined by a majority vote of the Council that:

- is subject to the National Environmental Policy Act (“NEPA”);
- is likely to require a total investment of more than \$200,000; and
- does not qualify for abbreviated authorization or environmental review processes under any applicable law; or
- is subject to NEPA and the size and complexity of which, in the opinion of the Council, make the project likely to benefit from enhanced oversight and coordination, including a project likely to require authorization from an environmental review involving more than two Federal agencies or the preparation of an environmental impact statement under NEPA.

Id. at §41001(6). Covered projects under this Title do not include: (1) highway or transportation projects; or (2) water resources development projects subject to environmental review. *Id.* The passage of this bill will improve the review and authorization of covered projects subject to the Federal permitting process.

I. Federal Permitting Improvement

This Title includes thirteen sections. Five sections comprise the bulk of this Title, which are: (1) Section 41002, which establishes a Federal Permitting Improvement Council; (2) Section 41003, which provides the basis for the improvement of the Federal permitting process; (3) Section 41005, which calls for the coordination of reviews between Federal agencies and State, local, and tribal authorities; (4) Section 41006, which speaks to the review of the best permitting practices as established by the Federal Permitting Improvement Council by State authorities; and (5) Section 41007, which minimizes litigation delays by reducing the statute of limitations for review of covered projects.

A. Federal Permitting Improvement Council

Section 41002 of this Title establishes the “Federal Permitting Improvement Steering Council,” which will be chaired by the Executive Director, who is appointed by the President. *Id.* at §41002. This Council will be comprised of council members of those Federal agencies who have permitting authority over covered projects as defined in this Title. *Id.* Several of these Federal agencies include: (1) the U.S. Department of Energy; (2) the U.S. Department of Interior; (3) the Administrator of the Environmental Protection Agency; (4) the Chairman of the Federal Energy Regulatory Commission; and (5) the Chairman of the Nuclear Regulatory Commission. *Id.*

The section establishes the duties for both the Executive Director and the council members. The Executive Director’s duties include: (1) establishing an inventory of covered projects that are pending environmental review or authorization; (2) categorizing the covered projects within the inventory based on sector and project type and identifying the types of environmental reviews and authorizations most commonly involved in each category; (3) ensuring that a covered project is added to the inventory after receiving a notice of initiation of a covered project; (4) designating a facilitating agency for each category of covered projects and publishing the list of designated facilitating agencies in the inventory; (5) developing performance schedules, including intermediate and final completion dates, for environmental reviews and authorizations; and (6) reviewing and revising the performance schedules every two years. *Id.*

The council members are responsible for issuing recommendations for the best practices relating to the permitting process, which include: (1) stakeholder engagement; (2) ensuring timely decisions regarding environmental reviews and authorizations; (3) improving coordination between Federal and non-Federal entities; (4) increasing transparency; (5) reducing information collection requirements; (6) developing appropriate geographic information systems; (7) creating and distributing training materials; and (8) addressing other aspects of infrastructure permitting as determined by the Council. *Id.* These best practices will be reviewed and revised annually during scheduled Council meetings. *Id.*

B. Permitting Process Improvement

1. Project Initiation and Designation of Participating Agencies

A notice of initiation of a covered project must be submitted to both the Executive Director and the appropriate facilitating agency. *Id.* at §41003. This notice must include: (1) a statement of the purpose and objectives of the covered project; (2) a description of the covered project illustrating the project area and the locations of any environmental, cultural, and historic resources; (3) the technical and financial ability of the project sponsor to construct the proposed covered project; (4) any Federal financing, environmental reviews, and authorizations anticipated to be required for the covered project; and (5) a showing that the proposed project meets the definition of a covered project as defined in this Title. *Id.*

2. Permitting Dashboard

The Executive Director will establish and maintain a Permit Dashboard (“Dashboard”) that will track the status of Federal environmental reviews and authorizations for any covered project in the inventory. *Id.* The Dashboard will contain the following information: (1) the notice of initiation; (2) application and supporting documents, or an explanation as to how this information may be accessed by the public; (3) a description of any Federal agency action taken or decision made that materially affects the status of a covered project and documents supporting that action; and (4) the status of any ongoing litigation. *Id.* The Executive Director will also publish to the Dashboard: (1) a permitting timetable; (2) status of compliance with the permitting timetable; (3) modifications to the permitting timetable along with an explanation for any modifications; and (5) a memorandum of understanding, if established. *Id.*

3. Coordination and Timetable

This Title also establishes a plan for coordinating public and agency participation in any required Federal environmental review and authorization, known as the Coordinated Project Plan (“Plan”). *Id.* This Plan must include: (1) roles and responsibilities for entities involved in an environmental review or authorization; (2) a schedule of dates by which a permit approval must be made; (3) any avoidance, minimization, and mitigation strategies as required by law; and (4) a schedule for public and tribal outreach and coordination. *Id.*

C. Coordination of Required Reviews Amongst Agencies

This Title allows, at the request of a project sponsor, for a Federal agency to consider, adopt, or incorporate by reference, documentation previously prepared in accordance with applicable state law, which is also required for an environmental review or authorization under Federal law. *Id.* at §41005. The documentation prepared under applicable state law must have allowed for the opportunity for public participation and the consideration of alternatives and environmental consequences that are substantially equivalent to those obligations under NEPA. *Id.* This coordination between state and Federal agencies will reduce delays in the permitting process.

D. Delegated State Permitting Programs

For those Federal permitting programs that delegate or otherwise authorize a State to administer a Federal permit program in lieu of a designated Federal agency, such as the National Pollutant Discharge Elimination System (“NPDES”) permitting program, this Title requires that the Federal agency authorized to carry out that Federal statute: (1) initiate a national process, with public participation, to determine whether the best practices, as established by the Council and in accordance with this Title, are generally applicable to State permitting programs as delegated under the Federal statute; and (2) provide model recommendations, by December 4, 2017, for States to

make modifications to the applicable permit programs so as to reflect the best practices as established in this Title. *Id.* at §41006. Federal agencies may invite input from State, tribal, and local authorities in establishing applicable best practices. *Id.*

E. Minimizing Litigation Delays

Finally, this Title will minimize litigation delays, as the statute of limitations for claims arising under Federal law and relating to covered projects is reduced from six years to two years from the date of final publication in the Federal Register or the approval/denial of a permit. *Id.* at §41007. If the action relates to an environmental review under NEPA, the action must be filed either by a party who submitted a comment during the environmental review, or by a party who lacked a reasonable opportunity to submit a comment. *Id.* This comment must have provided sufficient detail so as to put the lead agency on notice of the issue the party is bringing for judicial review. *Id.* Before a court may issue a temporary restraining order or preliminary injunction, a court must consider the effects on public health, safety, and the environment, the potential for significant job losses, and any other economic harm that may result from the action. *Id.*

II. Conclusion

The passage of this Title is a substantial step towards improving the Federal permitting process. This Title will promote better agency coordination, will set permitting deadlines, and will reduce litigation delays. For those Federal permitting programs that have been delegated to applicable State agencies through a Federal statute, it will be important for State legislators to enact legislation requiring the participation of applicable State agencies in reviewing the best practices established by the Council, and in enacting legislation that requires the adoption of the Council's model recommendations for modifications to a State permitting program so as to reflect the best practices established by the Council. Enacting legislation of this type will further promote the purpose of this Title, which is to streamline the Federal permitting process for covered projects.

© Steptoe & Johnson PLLC. All Rights Reserved.

National Law Review, Volume V, Number 352

Source URL: <https://natlawreview.com/article/streamlining-federal-permitting-process-major-energy-and-infrastructure-project>