

Streamlining the Federal Environmental Review Process

The Pros and Cons of FAST-41

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Title 41 of the Fixing America's Surface Transportation Act (Act), 42 U.S.C. § 4370m et seq., now commonly known as the FAST-41 program, may prove to be a vital set of tools to facilitate the successful processing and approval of the nation's most important infrastructure projects. Enacted in 2015 and signed into law by President Obama, the Act created a new governance structure, set of procedures, and funding authorities to improve the federal environmental review and authorization process for "covered" infrastructure projects. The Act intentionally casts a broad net over a wide range of potential infrastructure initiatives including aviation, ports, water resources, energy production and transmission, pipelines, and even broadband internet improvements. Ultimately this initial gateway into the policy was written so broadly that any project determined to be "covered" under the Act by the Federal Permitting Improvement Steering Council (Permitting Council)—a collection of federal departments and agencies tasked with improving federal infrastructure permitting—can potentially enter the program. Therefore, the limiting factor for project entrants is more closely tied to the size and complexity of the undertaking.

In order to qualify for entrance to the FAST-41 program, a proposed "covered project" must meet a few specified criteria, including (1) the total capital investment related to the project is likely to exceed \$200 million; (2) the project does not qualify for abbreviated authorization or environmental review under other applicable laws; and (3) the project must be subject to the requirements of the National Environmental Policy Act (NEPA) and, in the opinion of the Permitting Council, the project is likely to benefit from the enhanced oversight and coordination afforded by the program. *See* 42 U.S.C. § 4370m(6)(A).

Suggested criteria for conditions in which the FAST-41 program would provide such a benefit include (1) the project requires authorization and/or environmental review by two or

more federal agencies and/or (2) the project requires the preparation of an Environmental Impact Statement (EIS). Even this secondary set of criteria provides broad discretion to the Permitting Council to ensure that the program has maximum flexibility to assist projects that reasonably reach the scale, complexity, and intent of the program.

In order to become a covered project under FAST-41, project sponsors must submit a FAST-41 Initiation Notice (FIN) with information described under the Act. *Id.* § 4370m-2(a)(1). In accordance with the Paperwork Reduction Act, an online FIN submission tool is under development. In the interim, interested project sponsors for new potential covered projects can submit a variety of information about the project, including information about the project's location and environmental, cultural, and historic resources, to the Permitting Council's Executive Director and the appropriate facilitating agencies.

From a cursory viewpoint, the FAST-41 program seeks to provide covered projects with three primary benefits. The first benefit is to provide a faster, more transparent, and predictable path. Even for the most complex of projects, including those subject to the development of an EIS and the authorization of several different agencies, the program envisions completion of the entire NEPA process (spanning publication of the Notice of Intent (NOI) to the Record of Decision (ROD)) in two years or less. Upon entrance into the program, the requisite federal agency staff, with assistance from the Permitting Council, must develop a Coordinated Project Plan (CPP) including a timeline of significant milestones. *See id.* § 4370m-2(c)(1). Once set, the major timeline milestones can be shifted backward with prior notification to and approval of the Permitting Council. Elements of the CPP are both provided to the project proponent/applicant as well as posted on the publicly accessible "Permitting Dashboard," *see id.* § 4370m-2(b)–(c), which is outlined in greater detail below.

A second primary benefit is to increase accountability and coordination among federal agencies. Where projects require the oversight and approval of multiple federal agencies, the Permitting Council and its Washington, DC–based staff act as supplemental support for project management as well as arbitrators to resolve discrepancies between each agency’s individual permit processes and administrative practices. Essentially, the Permitting Council provides direct logistical and authoritative support for implementation of the “One Federal Decision” mandate, which requires federal agencies to shorten the time for environmental review for major infrastructure projects that are subject to NEPA. *See* Exec. Order No. 13807 (Aug. 15, 2017). Importantly, the Council’s role is not designed to impose top-level political mandates; rather, it is to ensure adequate coordination and attention.

The third primary benefit is to provide enhanced legal protection. While there are multiple Executive Orders that seek to provide comparable streamlining of the NEPA process or federal permit actions, the FAST-41 program also extends its timeline benefits beyond the ROD. Covered projects also receive the benefit of a statute of limitations shortened from six years to two, and the Act further limits the ability to file lawsuits challenging the underlying permit actions to those parties who actively participated in and commented upon the project’s respective environmental document. 42 U.S.C. § 4370m-6(a). Lastly, the program limits the manner in which project opponents can seek disruptive injunctions. *Id.* § 4370m-6(b).

As noted above, the Act codified into law the use of a Permitting Dashboard to track project timelines and provide other information that is made available to the public. *See id.* § 4370m-2(b)–(c). The Permitting Dashboard is an online tool for federal agencies, project developers, and interested members of the public to keep track of the federal government’s environmental review and authorization processes for complex and large infrastructure projects. The Dashboard tracks several categories: (1) infrastructure projects designated as “covered projects” under the Act; (2) certain other Department of Transportation (DOT) projects (subject to Titles I, IX, and XI of the Act); (3) major infrastructure projects, *see* Exec. Order No. 13807, § 3(e) (Aug. 15, 2017); and (4) legacy projects, which were part of the original MAX.gov Permitting Dashboard.

Currently there are 580 projects listed in the database, almost half of which (275) have been completed or canceled. The vast majority of projects on the Permitting Dashboard and in the database have been aviation and surface transportation projects (504 projects, or 86 percent). The other sectors include renewable energy (wind, solar and hydro), 21 projects; water resources, 19 projects; pipelines, 16 projects; electrical transmission, 10 projects; conventional energy, 6 projects; and ports and waterways, 3 projects.

Apart from the above, the Permitting Dashboard contains a detailed Federal Environmental Review and Authorization Inventory and a Regulatory and Permitting Information Desktop (RAPID) Toolkit. The Inventory highlights the fact that there are 61 different permits and review processes implemented by 15 different federal agencies, and provides toolkits for certain types of projects—bulk transmission of electricity, geothermal

energy, hydropower, and solar. These RAPID Toolkits make regulatory and permitting information rapidly accessible from one location by providing a step-by-step analysis of the approval process, contact information for federal and state regulators, best practice information, reference material, and links to permit applications, manuals, and related information.

The Permitting Dashboard process also includes an Accountability Scorecard, which evaluates agency performance and overall progress in processing environmental reviews and authorization decisions for major infrastructure projects. The performance accountability system requires agencies to report data on different performance indicators. These indicators include whether they are jointly and cooperatively processing environmental reviews. The Scorecard also includes evaluating whether the federal government is making authorization decisions using the “One Federal Decision” framework.

Critically, the Scorecard also shows whether major infrastructure projects have complete permitting timetables, whether they are meeting major milestone target dates, and whether agencies establish and use a process to elevate schedule delay issues to senior agency officials. The time and cost to complete reviews and make decisions are also part of the Scorecard. The Office of Management and Budget is tasked to review agencies’ performance at least once each quarter and will publish a quarterly scorecard of agency performance on meeting these indicators on the Permitting Dashboard.

Coordinating FAST-41 with New Initiatives

As briefly mentioned above, the FAST-41 program now has some level of redundancy with Executive Orders issued by the Trump administration. For instance, in 2017 President Trump signed Executive Order 13766, which laid the foundation for subsequent actions to help “Expedit[e] Environmental Reviews and Approvals for High Priority Infrastructure Projects.” Exec. Order No. 13766 (Jan. 24, 2017). In particular, Executive Order 13766 sets forth a similar goal of completing NEPA review in two years or less irrespective of the scale or complexity of the project. Also in 2017, President Trump signed Executive Order 13807 for “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.” Exec. Order No. 13807 (Aug. 15, 2017). Executive Order 13807, which established what is known as “One Federal Decision” (noted above), requires federal agencies to shorten the time for environmental review for major infrastructure projects that are subject to NEPA. *Id.* The goal of this effort is for agencies to process environmental reviews and authorization decisions as “One Federal Decision” and in no more than two years (from publication of a NOI to prepare an EIS to issuance of the ROD). *Id.* § 2(h). Executive Order 13807 further requires all other federal authorization decisions for the construction of a major infrastructure project to be completed within 90 days from the issuance of the ROD. *Id.* § 5(b)(iii).

While these Executive Orders have emphasized permit streamlining procedures under NEPA and expanded the role of the Council on Environmental Quality (CEQ)—the main federal agency overseeing NEPA implementation—the Executive Orders have often been labeled as too aggressive in setting page

and time limits. Criticisms of the Executive Orders have been compounded by the Trump administration's announcement on January 10, 2020, to further narrow the scope of NEPA by, for example, narrowing the definition of "effects" to be considered.

Despite criticism of the Executive Orders, the FAST-41 program has gained funding and staffing and continues to garner strong bipartisan support. Indeed, the FAST-41 program received a unanimous, 21-0 vote by the Senate's Environmental and Public Works Committee in July 2019 in support of S. 1992, which is intended to continue funding authority for provisions of the FAST Act, currently set to expire in the fall of 2020. A Bill to Amend the FAST Act to Repeal a Rescission of Funds, S. 1992, 116th Cong. (2019). Other FAST-41 legislation has also been introduced and remains pending in both the Senate and House. *See, e.g.*, Federal Permitting Reform and Jobs Act, S. 1976, H.R. 3671, 116th Congress (2019). With another election cycle looming, the FAST-41 program provides perhaps the safest harbor within which a project proponent can ride out any political storm.

Despite the proven advantages that accompany the FAST-41 program, potential project proponents should be aware that the initiation in this process does come with some moderate administrative burdens, which in turn depend on the nuances of each specific regulatory and development scenario.

A Deeper Understanding of FAST-41 Pros and Cons

As expected with a large and sometimes controversial, but well-intended, effort to streamline other administrative processes, the actual implementation of and participation in the FAST-41 program has its "ups and downs." The primary intended benefits, such as the expedited NEPA timeline and reduction in legal risks, are obvious and at times already available from alternative means such as the Executive Orders without needing to take action to become a FAST-41 covered project. Some of the other positive nuances, however, must be experienced firsthand to appreciate.

One primary issue to consider is that use of the Executive Orders can be a passive action, subject to some level of discretion. A request to agency staffers to comply with the specifications of an Order may or may not succeed. There is little you can do as a project applicant to supply the agencies with additional resources or oversight. The FAST-41 program, on the other hand, has the added benefit of providing local staff with direct support within their own individual department/division, as well from the Permitting Council, CEQ, and federal lead agency representatives. This has proven particularly helpful when dealing with local offices of federal agencies, which are often underfunded, understaffed, and inexperienced with projects of significant size, complexity, or controversy. Instead of those local staffers being left to fend for themselves, the Permitting Council drives home the importance of the project's success from Washington, DC, through each individual department's chain of command. By the time the local staff is back in the loop, their management team has taken notice and brought in the additional resources needed to fulfill their agency's respective contribution to the overall permitting effort.

The program also provides a uniquely beneficial tool for linear projects. While the program can presumably include any project involving two or more federal agencies, the benefits of the program are amplified as the number of federal agencies increases. Given their tendency to span long distances and thus transect more federal jurisdictions, linear projects (pipelines, electrical transmission, water diversion, etc.) have an increased likelihood of creating these scenarios. In these circumstances, it is not just the number of federal agencies involved, but also the context in which they have permit and/or environmental oversight. Long linear projects are more likely to involve a federal agency that is an owner/caretaker of federal lands rather than just a resource agency. An illustrative example is the difference between the U.S. Department of Agriculture overseeing a national forest versus the U.S. Army Corps of Engineers overseeing a Water of the U.S. The latter deals with permitting almost daily and has the requisite staffing and systems in place to handle such requests; the former has a primary role of facilitating recreation, environmental management, or fire protection, with permitting being an ancillary request far outside the local district's core mission, staffing expertise, and/or annual budget.

There may also be trickle-down benefits to state and local permitting. The FAST-41 program obviously cannot force local jurisdictions, with their independent police power, or states, pursuant to state regulations (such as the California Environmental Quality Act (CEQA)), to directly participate in the streamlined federal permitting effort and/or expedited timelines. However, these jurisdictions can choose to voluntarily participate directly in the FAST-41 effort because there will likely be some benefits that positively affect the project as a whole. For example, if the federal team elects to hire a third-party consultant to prepare the EIS and that consultant needs to meet the aggressive federal schedule, this can sometimes foster the faster completion of a related state-level environmental review such as an Environmental Impact Report (EIR) pursuant to CEQA. Similarly, with a federal team motivated to issue an Endangered

Species Act take authorization and associated Biological Opinion (BO), it can clear the path for a state's wildlife agency to issue concurrence with the BO earlier than otherwise possible.

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For example, participation in the program requires that the Permitting Council post certain basic project information onto the publicly accessible Permitting Dashboard website. This stems from the program's desire to hold permitting agencies accountable for the timely and transparent progression of projects. While virtually all permit application packages are accessible upon the filing of a Freedom of Information Act or applicable state-level Public Records Act request, gathering that documentation takes a concerted effort by the interested party. On the other hand, projects on the FAST-41 dashboard will have basic information such as geographic location, project sponsor/proponent contact information, lead agency contact information, estimated development cost, brief project description, and high-level permit timeline proactively placed on the federal website, potentially subjecting that project to greater public scrutiny.

The FAST-41 process also includes other unique and additive burdens, including the creation of threshold steps or initial hurdles in the environmental review process. As noted above, agency staff are required to develop a CPP, including a timeline for all major project milestones, and actively report progress up their own federal departmental management chain and to the Permitting Council, as well as observe certain protocols regarding notifications to the Permitting Council and/or Congress when project delays exceed certain thresholds. As a result, proponents and agency staff alike should consider the relative cost/benefit of participating in the FAST-41 program versus utilizing the aforementioned Executive Orders to achieve many of the same streamlining benefits with fewer statutory strings attached.

Participation in FAST-41 also highlights the importance of agency relationships. Any seasoned permitting agent or land use attorney understands the value of relationship building and preservation with critical agency contacts. Electing to participate in the FAST-41 process may create additional points of contention with all these important stakeholders. For instance, initiation in the program could involve several different federal agencies, not all of which welcome the added time pressure and leadership oversight that comes with the FAST-41 structure. It is not uncommon to hear federal staffers point out that hours spent reporting progress to high levels of management are hours that otherwise could have been spent actively focusing on the permitting or environmental tasks. This point of friction can be mitigated to some degree by paying close attention to the human element of the process and employing restraint in requesting direct interactions with the Permitting Council.

Finally, participation in the FAST-41 program, or adherence to the similar Executive Orders, can conflict with other regulatory processes or create unintended consequences. For example, these federal streamlining programs set page limits

(150–300 pages) for EIS documents along with the aggressive overall timelines. In some instances, this can create scenarios where local or state agencies feel they cannot rely on the truncated NEPA process to support their respective regulatory schemes. For example, projects in California that may have historically proceeded with a combined EIS and state-level EIR might determine that it is too difficult to create a legally defensible environmental document satisfying dueling federal and state mandates. Therefore, the FAST-41 program may accelerate the federal environmental review process but inadvertently delay the state or local process.

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Representative Projects with Completed Permits

The goals of FAST-41 to streamline and expedite permitting have already benefitted many types of projects across the country. Some representative projects in other sectors that have completed permitting include the examples that follow. Further details can be found on the FAST-41 Permitting Dashboard, cms8.permits.performance.gov/about/fast-41. These are good examples of how the streamlining program helps projects with complicated permitting issues, multi-stakeholders and local communities, and the jurisdiction of multiple permitting agencies. These examples all achieved their permitting in a timely manner, as indicated on the Dashboard.

Hudson River Rebuild by Design Project: Resist, Delay, Store, Discharge (New Jersey)

This coastal resiliency project, proposed by New Jersey state and local groups, is an urban stormwater management strategy to address impacts from coastal storm surge flooding and infall rain flooding along the Hudson River, experienced during Superstorm Sandy. The comprehensive approach to managing flooding and surge is done in a very integrated manner, including the following combination of hard infrastructure, green infrastructure, and soft landscape solutions for coastal defense: *Resist*: barriers in a combination of hard infrastructure (bulkheads, floodwalls, and/or seawalls) and soft landscaping (berms and/or levees that could be used as parks). *Delay*: urban green infrastructure designed to focus on slowing stormwater runoff throughout the region using a combination of public and private amenities. *Store*: green and grey infrastructure improvements, such as bio-retention basins, swales, and green roofs,

intended to slow down and capture storm water. *Discharge:* enhancements to Hoboken's existing stormwater management system to reduce combined sewage overflow and manage flooding.

Housing and Urban Development (HUD) was the lead agency for this project through its Community Planning and Development/Community Development Block Grant Disaster Recovery Fund program. HUD worked closely with the New Jersey Department of Environmental Protection and Department of Community Affairs and three local communities as well as U.S. Fish and Wildlife Service (FWS) and Department of Commerce (N.O.A.A.). The participants considered social, economic, engineering, and environmental factors using a collaborative process, including a thorough and extensive outreach, public involvement, and agency coordination. The funded first phase included the design and environmental impact analysis of the overall comprehensive master plan of the entire project. According to the Dashboard, the first-phase permitting has been completed as scheduled.

Chokecherry and Sierra Madre Wind Energy (Wyoming)

The Power Company of Wyoming LLC proposed to develop and operate the Chokecherry and Sierra Madre Wind Energy Project in Carbon County, Wyoming. The first phase includes building 500 wind turbines. Once the buildout is completed, the project will have the capacity to generate up to 1,500 megawatts of clean, renewable power—enough to run nearly 500,000 homes and representing the largest proposed onshore wind energy facility in North America when fully operational. The total project will be capable of generating up to 3,000 megawatts of clean, renewable power, enough to power nearly one million homes. Some of the major obstacles to the development of wind power in Wyoming include concerns over the impact of wind turbines on airborne wildlife (in particular, eagles), opposition due to aesthetics, and resistance from the state's fossil fuel industry, which is the backbone of the state's economy.

Because the project involved a large proportion of federal lands, the Department of Interior was the lead agency for the permitting process, with the primary responsibility under its Bureau of Land Management (BLM). The project proponent consulted closely with the BLM and the FWS to design an Avian Protection Plan and an Eagle Conservation Plan. Early coordination resulted in numerous wildlife monitoring practices that will improve the siting of wind turbines. Additionally, the project proponent's proposed actions were significantly modified by agreement to account for issues raised by the public. In particular, this process included resolving potential conflicts with other resource uses in the area. The permitting was completed within the overall project development time frame with minimum delays.

All Aboard Florida—Miami to Orlando Passenger Rail Service (Florida)

All Aboard Florida – Operations LLC (AAF) proposed to construct a privately owned intercity passenger railroad system to connect Orlando and Miami, Florida. The initial Phase I consists of a new passenger rail service along the 66.5 miles of the Florida East Coast Railway Corridor connecting West Palm Beach, Fort Lauderdale, and Miami. AAF also proposed to extend that service to Orlando with Phase II. The total project will consist of a 235-mile intercity passenger rail service with an anticipated three-hour travel time between Miami and Orlando.

The Department of Transportation, through the Federal Railroad Administration (FRA), was the lead agency for the NEPA review process. FRA issued a Finding of No Significant Impact (FONSI) for the initial Phase I of the Project on January 30, 2013, and published a notice to prepare an EIS on April 15, 2013. The EIS was initiated for Phase II of the Project but analyzed the cumulative effects of both phases of the Project because train operations will cover the full corridor between Miami and Orlando. In coordination with FRA, the FWS reviewed the request for AAF to obtain a permit authorizing the filling of wetlands in association with Phase II and issued a revised Biological Opinion to include additional species and clarification of project details. According to the Dashboard, the Record of Decision for the combined Final EIS was completed December 15, 2017, per the original target date.

In summary, FAST-41 provides a vital set of tools to help coordinate the environmental processing and approval of most major infrastructure projects. The program is certainly not perfect, and coverage of a project under FAST-41 can have certain disadvantages. However, FAST-41 can also lead to a variety of benefits, including a more predictable permitting path, increased accountability and coordination among federal agencies, and certain legal protections. In the end, any potential FAST-41 project applicant should spend the time and resources to weigh the pros and cons of obtaining FAST-41 coverage. That coverage may help achieve the often-elusive goal of corralling disparate agencies and timelines for important infrastructure projects, all without compromising the depth and integrity of the NEPA process. ☞

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