PAUL HASTINGS

STAY CURRENT

January 2016

Follow @Paul_Hastings

That Was FAST! Congress Adopts NEPA Reforms for Renewable Energy Projects In Surface Transportation Bill

By Jill Yung

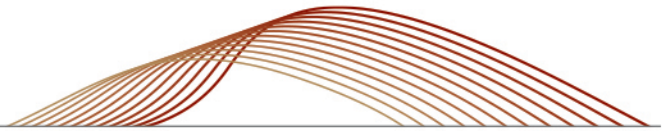
On December 4, 2015, President Obama signed into law the Surface Transportation Reauthorization and Reform Act of 2015 (Public Law No. 114-94). At first glance, this would appear to have been a non-event, as the law ostensibly addressed only the "authoriz[ation of] funds for Federal-aid highways, highway safety programs, and transit programs . . . ."[1] But the bill, more commonly known as the "Fixing America's Surface Transportation Act," or the "FAST Act," also had "other purposes." Specifically, in the "Federal Permitting Improvement" provisions buried in Title XLI of Division D, the newly enacted law changes how federal agencies must conduct environmental reviews under the National Environmental Policy Act ("NEPA") for, among other things, large renewable energy projects.

Many of the changes are not groundbreaking, as their origins are traceable to a cache of evolving orders, memoranda, and guidance documents published by the Obama Administration over the past several years. The firm deadlines for decision making introduced in the FAST Act nevertheless introduce significant new conditions that could give renewable energy projects faster approvals. In addition, the significance of having memorialized the Administration's regulatory agenda in statute should not be underestimated. If nothing else, the Federal Permitting Improvement provisions take some of the guesswork out of 2017 (and the conditions under a new Administration) for developers of renewable energy projects with federal ties.

Key Elements of Title XLI of the FAST Act

Although the Federal Permitting Improvement provisions made a surprising, eleventh hour appearance in the FAST Act, the stage for their adoption was set by S. 280, the Federal Permitting Improvement Act of 2015. Title XLI of the FAST Act, like the Federal Permitting Improvement Act, proposed to make the process for federal approval of major infrastructure projects more efficient by, inter alia, creating "a council composed of the relevant permitting agencies to establish best practices and model timelines for [coordinated] review," enhancing the transparency of the permit approval process, and "reduc[ing] uncertainty owing to reduced litigation risk" for "economically significant capital projects" (*i.e.*, projects with a total investment of more than $200 million).[2]

Application of Title XLI. The permitting reforms proposed by the Federal Permitting Improvement provisions apply only to "covered projects," which include activities "involving construction of

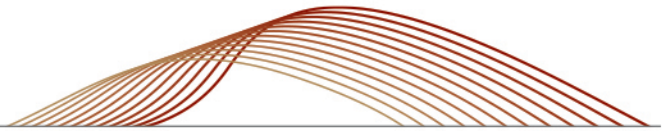


infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, [or] manufacturing," provided that such activities are (1) subject to NEPA, (2) likely to require a total investment (public or private) of more than $200,000,000, and (3) ineligible "for abbreviated authorization or environmental review processes under any applicable law; or . . . subject to NEPA and the size and complexity [of the activity] . . . make the project likely to benefit from enhanced oversight and coordination" (*i.e.*, projects involving authorizations from three or more federal agencies or that will require "the preparation of an environmental impact statement under NEPA").[3] Of particular interest for this alert, the provisions will apply to most utility-scale solar projects being permitted by federal agencies.

Coordination Requirements and Deadlines to Ensure Timely Permitting. The permitting process for covered projects is overseen by the "Federal Permitting Improvement Steering Council," which is composed of representatives of the various federal permitting agencies, the Chairman of the Council on Environmental Quality ("CEQ"), and the Director of the Office of Management and Budget ("OMB"), and chaired by an Executive Director appointed by the President.[4] On or before December 4, 2016, the Council must develop recommended best practices for enhancing early stakeholder engagement, ensuring timely environmental review of projects, improving coordination and data sharing with state and local governments, and reducing administrative burdens, including information collection requirements.[5] Also in 2016, the Executive Director, in consultation with the Council, is tasked with developing Performance Schedules for covered projects to establish interim milestones and a deadline for environmental review that does not exceed the recent average review time for similarly situated projects.[6] On top of this, Performance Schedules must "specify that any decision by an agency on an environmental review or authorization must be issued not later than 180 days after the date on which all information needed to complete the review or authorization (including any hearing that an agency holds on the matter) is in the possession of the agency."[7] The Executive Director is additionally responsible for shepherding projects through a scheduled permitting process that will be managed using "an online database to be known as the 'Permitting Dashboard,'" which is discussed in more detail below.[8]

The agency with principal responsibility for conducting the environmental review of a project under NEPA ("lead agency") has an additional, distinct set of responsibilities designed to keep project permitting on track. Within 60 days of the Executive Director's action to enter a project in the Dashboard, the lead agency must create a Coordinated Project Plan with a permitting timetable that provides the timeline for all project reviews and approvals, including, "to the maximum extent practicable, State permits, reviews and approvals."[9] The lead agency has some limited authority to deviate from applicable Performance Schedules,[10] but the project sponsor in turn has a right to dispute the proposed permitting timetable.[11]

Beyond schedule requirements and requirements to develop best practices for permitting, the FAST Act also includes a significant substantive change to the content of a NEPA document. Specifically, the Act empowers lead agencies to, at the request of a project sponsor, "adopt or incorporate by reference, the analysis and documentation that has been prepared for a covered project under State laws and procedures as the documentation, or part of the documentation, required to complete an environmental review for the covered project, if the analysis and documentation were" prepared under circumstances comparable to select NEPA requirements.[12] This authority could eliminate the need for burdensome joint document development that currently goes on in jurisdictions where state



environmental reviews are more demanding, but federal agencies have, until now, lacked authority to rely on environmental review documents prepared under state law.[13]

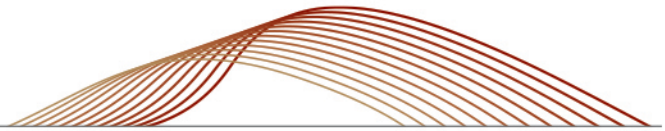
Enhanced Transparency in the Permitting Process. To make the permitting process less opaque, the Act primarily relies on the Permitting Dashboard, which is a vestige of the aforementioned executive orders and memoranda that preceded the FAST Act. Established to support the objectives in the President's August 31, 2011 Memorandum on Speeding Infrastructure Development Through More Efficient and Effective Permitting and Environmental Review,[14] and expanded in response to Executive Order 13604,[15] federal agencies use the Dashboard to track project metrics, streamline the permitting process, and facilitate inter-agency cooperation.[16] The FAST Act further advances the evolution of the Dashboard by mandating its existence and establishing strict deadlines for documenting important permitting and environmental review milestones.[17] These changes are intended to further the primary objective of the Dashboard to increase the transparency of permitting and environmental review processes for the public.

Expedited Judicial Review. One of the overarching goals of Title XLI of the FAST Act, if not the primary goal, is to limit the uncertainty surrounding major federal projects that "makes new construction and investments less attractive and hinders job creation."[18] To support this objective, the FAST Act identified several changes in laws regarding judicial review under NEPA that were needed to provide developers with more predictable outcomes. First, the Act reduces the applicable statute of limitations for NEPA claims, borrowed from the Administrative Procedure Act, from six years to two years.[19] Second, the Act limits the pool of potential litigants to parties that submitted comments on the environmental review documents during the environmental review period.[20] Litigants are furthermore limited to claims arising from issues raised in "sufficiently detailed" comments to the agency (or claims that "the lead agency did not provide a reasonable opportunity for such a comment").[21] Finally, in instances where litigants seek injunctive relief (*i.e.*, an order prohibiting construction), the Act provides that a court shall "(1) consider the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction; and (2) not presume that the harms described in paragraph (1) are reparable."[22]

Significance of the FAST Act for Permitting Utility-Scale Renewables Projects

The creation of a Federal Permitting Improvement Steering Council may have a significant impact on the permitting of certain renewable energy projects. Where the Bureau of Land Management ("BLM") or a tribe that must consult with the Bureau of Indian Affairs is the lead agency, experience has shown that coordination challenges are less likely. The Department of Energy, Army Corps of Engineers ("Corps"), and the Environmental Protection Agency have served as cooperating agencies on a handful of past projects on federal and tribal lands, and their involvement in projects has not generally presented significant coordination issues. However, where the Corps is the lead agency for purposes of conducting environmental review under NEPA and consulting with the Fish & Wildlife Service ("FWS"), the lack of coordination or agency commitment to renewable energy has caused substantial delay. The Steering Council could remedy this.

On federal and tribal lands, the real coordination issues for solar projects have been intra-agency matters, primarily within the Department of the Interior, with most relevant projects requiring authorizations from BLM and FWS, among others. To address these challenges, the codification of concrete deadlines for the environmental review of utility-scale renewable projects, and the requirement to adhere to a Coordinated Project Plan, should have a meaningful impact. If nothing else, the established deadlines will give legitimacy to developers' efforts to continue the pace of



environmental review and development that became the norm under the "Fast Track" permitting process in 2010 and beyond.[23]

The provisions modifying key aspects of judicial review under NEPA provide welcome clarification and certainty with regard to exhaustion and the statute of limitations. For example, although courts, prior to the FAST Act, could rely on laches to dismiss the claims of litigants who sat on their rights to challenge major, ongoing federal construction projects for two years or more, this reasonable limitation is now mandated by law.[24] Similarly, although it is widely accepted that litigants must exhaust their administrative remedies with administrative agencies before resorting to judicial relief, provided that some meaningful administrative process was offered,[25] the FAST Act codifies this law for all jurisdictions. The requirement that comments be "sufficiently detailed" could furthermore raise the burden for plaintiffs who might otherwise unfairly inflate their grievances in litigation. Finally, although some courts have already demonstrated that they are receptive to arguments that the harm to the public interest associated with enjoining plant construction (i.e., lost jobs and lost opportunities to produce clean energy) must be considered when evaluating a motion for preliminary injunction, the law now requires it.[26] These changes could go a long way toward their stated purpose of reducing the uncertainty associated with litigation and improving developers' positions when seeking project financing.

To the extent that permitting agencies are not already implementing the project tracking and agency coordination recommended by the Administration and mandated by the FAST Act, it remains to be seen whether the high-handed timelines now prescribed by law can be met by agencies that face constant staffing, budget, and other resource constraints. Furthermore, although the law significantly modifies judicial review of NEPA claims involving the approval of covered projects, the FAST Act does not alter agency obligations to "take a hard look" at the environmental consequences of a proposed action. The pressures to complete a full NEPA-compliant project review on a compressed timeline may lead to cutting corners and more legally vulnerable reviews.

Notwithstanding these looming questions about implementation, however, the FAST Act is an important step in broadening a national commitment to renewable energy projects for the future. It also increases the likelihood that the Obama Administration's permitting reforms embodied in executive orders and memoranda will endure, regardless of the outcome of the 2016 presidential election. Even if it only results in aspirational targets for permitting efficiencies, the permitting process for renewable energy projects will undoubtedly benefit simply from efforts to hit those targets.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings San Francisco lawyers:

Gordon E. Hart
1.415.856.7017
gordonhart@paulhastings.com

Peter H. Weiner
1.415.856.7010
peterweiner@paulhastings.com

Jill E.C. Yung
1.415.856.7230
jillyung@paulhastings.com

[1] Surface Transportation Reauthorization and Reform Act of 2015, H.R. 22, 114th Congress (2015) (enacted, Public Law No. 114-94) ("H.R. 22").

[2] S. Rep. No. 114-113 (2015) (S. 280), https://www.congress.gov/congressional-report/114th-congress/senate-report/113/1?q=%7B%22search%22%3A%5B%22%5C%22s280%5C%22%22%5D%7D.

[3] H.R. 22, § 41001(6).

[4] *Id.*, § 41002; *see also* Executive Order 13604, 77 Fed. Reg. 18,887 (Mar. 28, 2012) (establishing a similar "Steering Committee" of similar composition to make recommendations regarding infrastructure permitting best practices).

[5] H.R. 22, § 41002(c)(2)(B).

[6] *Id.*, § 41002(c)(1)(C).

[7] *Id.*

[8] *Id.*, § 41003.

[9] *Id.*, § 41003(c).

[10] *Id.*, § 41003(c)(2)(B) (establishing relevant factors to take into account when deviating from the prescribed schedule).

[11] *Id.*, § 41003(c)(2)(C).

[12] *Id.*, § 41005(b)(1).

[13] While some states' "little NEPA" statutes, like the California Environmental Quality Act ("CEQA"), allow use of a NEPA document to satisfy state law requirements, *see* Cal. Code Regs. Tit. 14, § 15221, "[u]nder NEPA, a Federal agency must participate in the preparation of an environmental review (the analysis and documentation) in order for it to satisfy NEPA." CEQ & California Governor's Office of Planning and Research ("OPR"), *NEPA and CEQA: Integrating Federal and State Environmental Reviews* 15 (February 2014), https://www.whitehouse.gov/sites/default/files/page/files/nepa_ceqa_handbook_feb2014.pdf (citing 42 U.S.C. § 4332(2)(D)(ii)).

[14] http://www.gpo.gov/fdsys/pkg/DCPD-201100601/content-detail.html (instructing federal agencies to, among other things, expedite permitting and environmental reviews for high-priority infrastructure projects with significant potential for job creation).

[15] 77 Fed. Reg. at 18,888-89 (instructing several federal agencies to develop and implement plans to improve the regulatory review process and track on a public website infrastructure projects of national or regional significance); *see also* Department of the Interior Agency Plan Implementing Executive Order 13604 on Improving Performance of Federal Permitting and Review of Infrastructure Projects (July 31, 2012), http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=359605.

[16] *See* Federal Infrastructure Projects, http://www.permits.performance.gov.

[17] H.R. 22, § 41003(b)(2).

[18] S. Rep. No. 114-113, *supra* note 2.

[19] H.R. 22, § 41007(a)(1)(A).

[20] *Id.*, § 41007(a)(1)(B)(i).

[21] *Id.*, § 41007(a)(1)(B)(ii).

[22] *Id.*, § 41007(b).

[23] The FAST Act additionally empowers OMB to "after public notice and opportunity for comment, issue regulations establishing a fee structure for project proponents to reimburse the United States for reasonable costs incurred in conducting environmental reviews and authorizations for covered projects." *Id.*, § 41009. To the extent that agencies do not already have clear authority to require project sponsors to fund activities related to environmental review under NEPA, such regulations could significantly improve permitting timelines and coordination in instances where the agency bandwidth is constrained by financial circumstances.

[24] *See Apache Survival Coal. v. United States*, 21 F.3d 895, 910 (9th Cir.1994) (citing cases involving delays of a few months to a few years and considering not just the time that elapsed after the final agency decision, but also, in some instances, the period during which the decision was being made with public participation).

[25] *Wildwest Inst. v. Rainville*, No. 07-466, 2008 WL 5220938 at *5 (D. Idaho Dec. 11, 2008) (reasoning that "it makes no sense to allow a party who failed to file public comments . . . to file a judicial complaint . . . ."); *"Ilio" Ulaokalani Coal. v. Rumsfeld*, 369 F. Supp. 2d 1246, 1253 (D. Haw. 2005) (holding that plaintiffs "forfeited any objection to the PEIS" when they failed to raise their concerns in the public comment process), *rev'd in part on other grounds*, 464 F.3d 1083 (9th Cir. 2006).

[26] *W. Watersheds Project v. Salazar*, No. 2:11-cv-00492-DMG-E, slip op. at 33-34, 37 (C.D. Cal. Aug. 10, 2011) (considering that the "project is expected to contribute to state and federal goals for the increased use of renewable energy and the reduction of greenhouse gas emissions" and the "substantial socioeconomic impact upon hundreds of workers and state revenues" when balancing the equities to determine whether a preliminary injunction was warranted).