

INFRASTRUCTURE PERMIT STREAMLINING UNDER THE FAST ACT



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Introduction

Last December, Congress passed and President Obama signed the Fixing America's Surface Transportation Act (FAST Act),¹ the first multi-year federal transportation bill enacted in a decade. Almost unnoticed among nearly five hundred pages of transportation law were twenty-one pages of new, highly detailed procedural rules for federal permitting of most major infrastructure and other capital projects, and authorization for a large administrative apparatus within the Executive Office of the President. The new rules and administrative structure should, if funded and implemented, prove to be a welcome boost to ongoing efforts by the current Administration to improve the federal permitting and siting process. This article describes the new law and its implementation challenges, and offers thoughts on the FAST Act's potential value to infrastructure developers.

The authors of this paper have been involved with many federal infrastructure and other permitting processes that were defined by interagency discord, ever-receding schedules, uncontrolled agency costs, and unwelcome surprises. But we also served as regulatory counsel to the first interstate electric transmission project that received expedited review under the earliest manifestation of the Obama Administration's infrastructure permit streamlining initiative. The process applied to that multi-billion dollar transmission project benefited greatly from a well-enforced decision-making schedule at the Interior Department and authoritative oversight of the National Environmental Policy Act (NEPA) process from the Council on Environmental Quality (CEQ). Despite tough siting and permitting issues and determined opposition, the project was approved and built and put into service within a timeframe that was far faster than the schedule experienced by every other major interstate transmission project in the federal approval process at that time.

Our experience leads us to expect that the new law, though no panacea, will encourage further improvements in federal permitting. It should regularize and make more routine the innovative procedural changes that some agency officials and developers have had to invent and defend project-by-project. Our outlook is tempered by the fact that key elements

of the new law specifically require involvement by senior agency appointees at a time when a change of administration is at hand. In addition, Congress will need to fund the new administrative apparatus. Full implementation is going to take some time. That said, we believe that certain opportunities may be available to those who choose to bring solid project proposals into the new system early.

The FAST Act's new rules on federal permitting merit attention for the additional reason that they amount to a sweeping addition to CEQ's NEPA regulations. Those regulations have been unchanged since 1978. Congress has now, in effect, augmented (but not changed) NEPA's bedrock rules to create a new category of NEPA and permitting procedures applicable to certain infrastructure and other capital projects.

The large community of lawyers, regulators, consultants, developers, conservationists, and others who have operated for almost four decades under one set of CEQ rules will need to come to terms with the reality that the rules have been expanded in very significant ways – without any of the public involvement or other procedure that normally accompanies, shapes, and builds a degree of shared understanding around new federal rules. The learning process will encompass big-picture issues involving the many ramifications of a two-tier permitting system and smaller challenges such as those that may arise from the law's use of four different terms – environmental assessment, environmental document, environmental impact statement, and environmental review – to describe analytical materials that support permit decisions.²

CEQ has long confronted questions about its authority to issue regulations.³ The FAST Act sidesteps those questions and may well have erased any residual uncertainty by ratifying and building upon the existing NEPA regulations. Neither interpretation eliminates the many questions that may emerge as NEPA's many stakeholders fully acquaint themselves with the new rules. We hope this article will help focus the discussion.

Executive Summary

Overview of Title XLI. Title XLI of the FAST Act changes the federal permitting process for major infrastructure and other capital projects in three ways: (1) better coordination of and deadline-setting for permitting decisions; (2) enhanced procedural transparency; and (3) tightened deadlines for litigation challenging permitting decisions. Title XLI's procedural reforms apply to projects involving investment greater than \$200 million and extend to most-and potentially all-industry sectors, including renewable or conventional energy production, electricity transmission, aviation, ports and waterways, broadband, pipelines, and manufacturing (though not to transportation projects or Army Corps of Engineers' water resource development projects).

FAST Act Title XLI mandates a new inter-agency administrative apparatus called the Federal Infrastructure Permitting Improvement Steering Council—largely controlled by the Office of Management and Budget (OMB) and CEQ—to set model or presumptive deadlines, push resolution of interagency disputes, and allocate funding and personnel resources to support the overall decision-making process. FAST Act Title XLI also enumerates and strongly encourages use of a suite of NEPA “best management practices” aimed at reducing delay and uncertainty, all the while expressly preserving existing agency authorities. Unlike “regulatory reform” and “NEPA streamlining” legislative proposals introduced in Congress in recent years, the new law does not change federal environmental or other laws on which permit decisions are based. Section 41012 specifically disclaims any legislative intent to amend NEPA.⁴

In the words of the Senate report that accompanied the bill that was, with some changes, incorporated into the FAST Act as Title XLI: “The bill does not alter substantive standards or safeguards, but instead seeks to create a smarter, more transparent, better-managed process for government review and approval of major capital projects.”⁵

A Continuation of Previous Efforts. The new law ratifies and makes non-discretionary reforms already underway within the Executive Branch aimed at promoting more orderly and timely completion of federal permitting decisions on major

infrastructure projects. The text of Title XLI closely resembles guidance issued by OMB and CEQ in September 2015, which itself followed a series of Presidential orders, directives, and plans.⁶ The new law does not simply restate Administration policy; some important differences are apparent on the surface (e.g., Title XLI's reforms apply to independent agencies that were excluded from the Administration's efforts) and others may appear in time. CEQ and OMB would be well advised to offer an explanation soon of how they understand the differences between the duties imposed by Title XLI and the infrastructure permitting improvements already adopted by the current Administration.

The text of the new law, and nearly every point between the lines, manifests an aggregation of power by OMB and, to a lesser degree, CEQ. OMB's strengthened role fits with the agency's responsibility to oversee and coordinate “management” and the “budget” of the federal government. CEQ's new duties are in line with the agency's statutory mission to coordinate NEPA administration and to advise the President on environmental policy. The roles mandated for OMB and CEQ by Congress are essentially identical to the roles those agencies had already assigned to themselves through the current Administration's various infrastructure permitting-related directives and orders.⁷ As written, the new law's most immediate incremental achievement is to reduce remaining doubts within Executive Branch agencies or elsewhere about the durability of the Administration's procedural-reform initiative.

Expectations for Implementation. The new mandatory duties are likely to be gratifying to the OMB and CEQ political appointees and career officials who secured them. But the important question about the new rules is, of course, whether they will effect useful change. Can centralized authority to administer the federal permitting process achieve additional, meaningful improvements in the process absent any concurrent reconciliation of conflicting agency mandates or de-escalation in the policy conflicts among public- and private-sector stakeholders or competition among industry interests?

The policy-making environment in Washington has resisted dispassionate consideration of procedural reform because any

discussion of development-related permitting process affects (and is largely driven by) underlying disagreements among stakeholders over the substance of environmental, energy, and natural resource policy. It is no accident that the topic of “permit streamlining” has commonly been championed by advocates and lawmakers in tandem with proposals for “regulatory reform” aimed at trimming federal environmental, safety, and other rules.

Indeed, the permit-streamlining bills with provisions ultimately included in the FAST Act moved through both Houses of Congress alongside “regulatory reform” bills.⁸ “Regulatory reform” bills were passed by the House at about the same time as the FAST Act,⁹ but they were not approved by the Senate and drew strong opposition from the White House.¹⁰

Permit streamlining made it into law carried quietly on the back of the bipartisan federal transportation bill and with the support of the Administration. Though permit streamlining is now law, the topic—and the administration of the new law—are unlikely soon to become detached from the policy disagreements implicated by large infrastructure developments. It would be prudent to expect the implementation process to encounter skepticism or hostility in some agency and stakeholder circles engendered by the topic’s affiliation with Congressional efforts to change environmental rules.

Expectations for the FAST Act’s permit-streamlining provisions should also be tempered by recognition that they will become fully useful only after the Congress funds and the Administration puts in place a large, complex administrative system. The Administration was already moving in this direction at its own initiative, and it is by no means starting from scratch. However, the timing could not be more challenging, as the current Administration is entering its final year. It is an inauspicious context for those expecting a quick fix.

Whatever else they may do, the new rules seem unlikely to change the enduring reality that, when it comes to large, complex, federally permitted infrastructure projects, the most reliable predicate to a predictable and businesslike process is equally well-framed substance. Even the strongest process is unlikely to save flawed substance. The new rules are not a

new reality; they are a new feature of a reality in which some developers have already learned to succeed. Those developers think ahead of the regulatory process, engage early with local stakeholders, and define their success in an agile way that anticipates and integrates the tangible outcomes reasonably necessary to address stakeholder interests.

There are reasons for hope alongside the various reasons for caution. The FAST Act’s infrastructure permit streamlining provisions, once operational, should work to reduce the number of occasions where developers of well-conceived, high-dollar projects nevertheless face substantial delay in the permitting process because of confusion or risk-aversion within or among agencies, lack of agency decision-making resources, or deliberate foot-dragging. In this regard, the Administration cites a number of instances in which its pre-FAST Act procedural reforms have helped major projects complete the federal permitting process.¹¹ The new law should also complement and benefit from implementation of the Administration’s new natural resource mitigation policies, including the recent Presidential directive and Interior Department initiatives, that encourage private-sector-funded compensatory mitigation measures, advance mitigation, and landscape-level planning.¹²

Other considerations may paint a less encouraging picture: At the time of writing, the current dashboard is tracking 23 projects. Twelve of the projects, more than half the total, are described as “in progress” but had estimated completion dates in 2014 or 2015.¹³ There are likely to be many different reasons for the apparent delays, some having nothing to do with the federal permitting process, *per se*. The raw numbers prevent any one-sided judgment about the value of the current reforms, at least in terms of the timing of decisions.

Our experience suggests that novel or unusually complex projects, or familiar projects in novel or unusually complex contexts, seem like the ideal candidates to benefit most from the new law because those projects tend to require agencies to confront unfamiliar facts, make new choices, resolve untested legal issues, and otherwise take risks. Those are the conditions that delay even the most important and least controversial projects. A system that mandates establishment of schedules, discourages potential delays, and empowers the schedule-

keepers to push the process forward should help offset agencies' inherent aversion to risk. But the new law, even when fully implemented, will not guarantee a fast win; it may just as surely enable a fast "No."

The FAST Act's Infrastructure Permit Streamlining Provisions

The FAST Act's infrastructure permit streamlining provisions originally surfaced several years ago in stand-alone legislative proposals in the House and Senate.¹⁴ The text of the Senate legislation, in particular, closely tracked permitting-reform initiatives developed by the Obama Administration. The Senate legislation, with changes that brought it into even closer alignment with the Administration's approach, was grafted onto the FAST Act during the House-Senate conference process on the two chambers' respective versions of the FAST Act. There is very little legislative history.¹⁵ The paucity of legislative history is particularly noteworthy because the new law's provisions are unusually prescriptive and present a detailed articulation of a new administrative process.¹⁶ The statutory language is at a level of eye-blurring detail usually associated with regulatory proposals. The following discussion attempts to capture the overall structure and key operational elements without getting bogged down.

Covered Projects. The FAST Act is a 490-page, 89-title bill primarily concerned with funding transportation programs for the next five years. Several provisions involve "streamlining" of one kind or another for transportation projects. Title XLI, however, is much broader. It applies to the federal permitting process for a defined class of "covered projects," including:

[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. . . .¹⁷

Provided that the project also is:

- Subject to review under NEPA and likely to involve investment of more than \$200 million and not eligible for abbreviated authorization or environmental review under other law; or
- Selected for inclusion by a to-be-formed multi-agency federal permitting improvement council because the project is subject to NEPA and of a size and complexity which, in the opinion of the council, makes the project likely to benefit from enhanced oversight and coordination.

But does not include most federal transportation projects or federal water resource development projects.¹⁸

The phrasing of the "covered project" definition is awkward and may lead to some dispute over the law's scope. Does "construction of infrastructure for" energy production, electricity transmission, and other types of project include the projects themselves (e.g., power plants, transmission towers and conductors), or just the infrastructure for them? The latter interpretation would be quite narrow in application and inconsistent with general practice under NEPA and federal permitting procedures. We speculate that drafters' intent was to be broadly inclusive of all interrelated features of an energy or other "covered project" to the same extent that the features are included in the federal approval process. If so, the law's intended scope and best interpretation would be better captured by the phrase "construction of, and infrastructure for," though that is not the language of the new law. There is also the potential for confusion from the emphasis put on the term "infrastructure," a term generally associated with pipelines, wires, rails, roads, and civil works of various sorts. Title XLI potentially covers every kind of major capital project that requires some form of federal permitting, including things not usually considered "infrastructure," such as mines. It does seem clear that the term "infrastructure" excludes generalized governance activities, such as land-use planning, that may affect infrastructure permitting.

Federal Infrastructure Permitting Improvement Steering Council. The law is to be administered by a multi-agency federal entity called the Federal Infrastructure Permitting

Improvement Steering Council (Council).¹⁹ The Council would include the Chairman of the CEQ, the Director of OMB, and senior sub-cabinet level representatives from:

- the Department of Agriculture,
- the Department of the Army,
- the Department of Commerce,
- the Department of the Interior,
- the Department of Energy,
- the Department of Transportation,
- the Department of Homeland Security,
- the Department of Housing and Urban Development;
- the Environmental Protection Agency,
- the Federal Energy Regulatory Commission,
- the Nuclear Regulatory Commission, and
- the Advisory Council on Historic Preservation.

It merits attention that Congress has directed two independent agencies, the Federal Energy Regulatory Commission and Nuclear Regulatory Commission, to participate in the new Council-led process. The Administration's own infrastructure permitting-reform initiative had refrained from requiring the independent agencies to participate.²⁰ This feature of the new law brings into the scope of the Council's process some of the most controversial and complicated infrastructure projects, including interstate gas pipelines, hydropower facilities, and nuclear plants, assuming that the existing unique siting procedures for those projects are not interpreted to be the type of abbreviated authorization or environmental reviews that would disqualify them from inclusion in the Council process. It would not make much sense to include the two agencies as mandatory members of the Council if their permitting processes are not intended to be covered under the new procedures. It is also noteworthy that the Department of State is not included among the Council members, despite that Department's authority over presidential permits for pipelines crossing the United States' international boundaries, most recently highlighted by the Keystone XL oil pipeline controversy.

The Council is to be staffed by an executive director appointed by the President.²¹ The executive director will serve as the

chair of the Council. The new law does not require Senate confirmation of the executive director, nor does it specify that the executive director must be appointed from one of the Council member offices or agencies. The Director of OMB is required to select an agency (not limited to the Council member entities) to provide administrative support to the executive director.²²

The scale of the administrative apparatus under control of the executive director and Council is suggested by the Congressional Budget Office (CBO) analysis of S. 280, the bill that ultimately became, with some changes, Title XLI:

CBO estimates that when fully implemented the council would spend about \$30 million annually. The council's employees would work from a headquarters office and satellite offices across the country. The council would have about 70 employees. Most of the council's employees would be assigned to work in those agencies with the largest administrative workloads related to the review of infrastructure projects, others would probably be assigned to travel to the sites of such infrastructure projects, and some employees would help the council to identify best administrative review practices and track agencies' schedules and progress.²³

If the CBO estimate is accurate, the council staff would be about three or four times more numerous than the staff of CEQ and about one and one-half times the size of OMB's Office of Information and Regulatory Affairs. One may reasonably doubt whether many in Congress understood that the statute would so expand the staff in the Executive Office of the President; this may become an issue when Congress considers appropriations for the new apparatus.

The executive director is authorized to invite other federal agencies to participate as members of the Council.²⁴ Each Council representative must be at the deputy secretary level or its equivalent. Each agency on the Council is also required to establish a new staff position within the agency for a "chief environmental review and permitting officer" or CERPO.²⁵

Inventory and Categorization of Covered Projects. The law authorizes a complex process to identify “covered projects” that merit particular attention and priority. The process is to be led by the executive director, working with the Council. The executive director has 180 days to assemble an inventory of all “covered projects” currently undergoing environmental review or permitting, and to organize the inventory by type of project.²⁶ The inventory will serve, in effect, as a list of covered projects that are eligible for administration under the “streamlining” provisions of the law.

How many projects could come within the scope of the new law? The CBO reported that “OMB indicates that the council would coordinate the federal review of 200 to 300 projects each year.”²⁷ The inventory and most of the information developed through administration of the new law to covered projects is to be published on a “permitting dashboard,” presumably the same tracking and disclosure tool already established by the Administration.²⁸

Each category of covered project is to be assigned to a single “facilitating agency,” which seems to mean that the agency would thereafter carry the burden of facilitating application of the law to the particular category of covered project and associated industry sector(s), but does not mean that the agency would be the presumptive lead agency for the purposes of NEPA review or permitting.²⁹

The executive director will also assemble a recommended performance schedule for completing the federal permitting and environmental reviews for each category of covered project. These schedules will serve as benchmarks for development of project-specific permitting timetables.³⁰

Participation in the New Process. The text of the law is not entirely clear whether participation in the new process is voluntary or mandatory for developers of covered projects. Section 41003(a)(1)(A) states that “[a] project sponsor of a covered project shall submit to the Executive Director and the facilitating agency notice of the initiation of a proposed covered project.” One could read this to require all covered projects be submitted to the Council process. Or it can be read simply to identify the first step one must take in bringing a

covered project into the Council process, namely, submitting notice to the executive director and the facilitating agency. The ambiguity was evident in the Senate Committee report on S. 280. The Committee observed that the CBO had, in scoring the bill, erroneously interpreted the law as mandating participation:

The Committee notes that while the Congressional Budget Office states that S. 280 “would impose private-sector mandates . . . on sponsors of large construction projects that require authorization or environmental review by a federal agency,” the bill would not require the project sponsor to notify federal government agencies beyond current requirements. Additionally, project sponsors would only be subject to newly authorized “fees to cover some of the costs of administering federal permits and project reviews” on a voluntary basis for sponsors seeking consideration under the expedited review process described in the bill.³¹

Given the Committee report language, we believe that the best interpretation of the law is that participation is voluntary—eligible covered projects must be nominated by project sponsors to be included in the streamlining process. If this interpretation is correct, it means that developers would have the option not to participate in the new process. The law does not address the potential that a developer and an agency, or a developer and the Council, may disagree whether a project should follow the new or pre-existing permitting process. Similarly, the law requires the executive director to assemble information on all covered projects now going through the permitting process and to include them in the permitting dashboard, but does not appear to require the developer of any such project to allow it to go through the new process. OMB and CEQ may wish to clarify soon their interpretations of the law with respect to these points.

Permitting Schedules. Projects brought into the Council process will be subject to a coordinated and time-limited environmental review and permitting schedule.³² Title XLI does not set specific permitting schedules. However, the final completion date in the recommended performance schedule for each category cannot exceed the average time

to complete an environmental review or authorization for projects within that category. The benchmark time periods for decisions on environmental reviews and approvals are to be calculated based on analysis of the time required to complete environmental reviews and approvals for projects within the relevant category of covered projects during the preceding two calendar years.³³ Agencies must issue decisions on environmental review or authorizations not later than 180 days after the date on which all necessary information is in the agency's possession.³⁴

The FAST Act requires that state and federal permitting reviews run concurrently for a covered project as long as doing so does not impair a federal agency's ability to review the project. The new law also allows federal agencies to adopt state environmental reviews that meet NEPA requirements,³⁵ and allows a State to choose to require that its own permitting agencies participate in the Council process when applied to a NEPA review of a covered project in that state.³⁶

The processing timetable for an individual covered project will be established through interagency coordination and consultation with stakeholders and the project proponent. Interagency disagreements over the timetable are subject to dispute resolution by the Council's executive director, with involvement by the OMB Director, when necessary.³⁷

The FAST Act does not enumerate the permits and approvals required to be included in the schedule, but the intended scope appears to be all-inclusive. The inventory of permits included in the Administration's existing permitting dashboard lists dozens of widely applied and relatively obscure permits, consultations, notices of decision, notices to proceed, right-of-way authorizations, evaluations, and environmental and community resource reviews by federal and state agencies.³⁸ The dashboard's list does not include the FERC- and NRC-issued certificates and permits required for nuclear plants, hydropower facilities, and interstate gas pipelines. On this point, too, OMB and CEQ may wish to offer timely guidance.

The permitting dashboard will track the movement of projects through the permitting process.³⁹ Any agency unable to meet the decision-making deadlines included in the processing timetable is required to provide the executive director an

explanation of the reasons for not making the deadline and post it on the dashboard. The agency will have to provide subsequent explanations for each month that the agency's decision-making is delayed past the timetable dates. There is no penalty or regulatory consequence for missed deadlines.

The new law authorizes the states to form interstate compacts to create regional infrastructure development authorities. The FAST Act language is nearly identical to a provision of the Energy Policy Act of 2005 that amended the Federal Power Act to allow formation of interstate compacts on electric transmission infrastructure. The new compact authority applies to all categories of covered projects. Notably, the new law omits and presumably overrides the earlier statute's provision that any transmission-related compacts require subsequent approval by Congress.⁴⁰

The law does not authorize new appropriations, but it does authorize agencies to reprogram appropriated funds and to collect fees from project proponents to reimburse the agencies for a limited portion of their costs in processing "covered projects" through the expedited procedures established under the law (including the costs of NEPA reviews), and the costs of operating the Council and executive director's office.⁴¹

Limitations on Judicial Review. The permitting process for covered projects would be subject to new limitations on judicial review. The new law includes two litigation reforms. First, it reduces the current general statute of limitations from six years to two.⁴² Second, it directs courts deciding whether to issue a temporary restraining order or preliminary injunction of a covered project to "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 to not presume that such harms are repairable.⁴³ These changes in law seem unlikely to change the timing or outcome of most challenges to federal permitting decisions, since most litigation occurs shortly after decisions are made, and the factors that courts are now required to consider fall within the range of factors courts do typically weigh when considering injunctive relief.

The new authorities created by Title XLI "sunset" after seven years (December 2022).⁴⁴ By that point, roughly one and one-

half presidential terms and three congressional elections into the future, the strengths and shortcomings of the new law should be readily evident.

OMB Involvement. The law places a significant degree of responsibility for implementation in the hands of the Office of Management and Budget.⁴⁵ Specifically, OMB is directed to:

- Provide guidance to the heads of agencies regarding the designation of one or more agency members to serve as an agency CERPO.⁴⁶
- Be a member of the Federal Infrastructure Permitting Improvement Steering Council.⁴⁷
- Designate a federal agency to provide administrative support for the executive director.⁴⁸
- Facilitate, in consultation with the Chairman of CEQ, the resolution of disputes regarding permitting timetables for covered projects that remain unresolved more than 30 days after being submitted to the executive director for mediation.⁴⁹
- Consider, after consultation with the project sponsor, whether to permit the executive director to authorize additional extensions of a permitting timetable that are more than 50% of the original time set for permitting of the project.⁵⁰
- After allowing the executive director to extend the permitting timetable as described above, submit a report to Congress explaining why such an extension is required.⁵¹
- Provide guidance to the heads of agencies listed in section 41002(b)(2)(B) regarding 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.⁵²
- Determine the total estimated costs per fiscal year for the resources allocated for the conduct of environmental reviews and authorizations covered by Title XLI for purposes of establishing a reasonable fee structure.⁵³
- Consider approving requests from the executive director to transfer funds collected by the Council from project

developers to other agencies to facilitate timely and efficient environmental reviews and authorizations for proposed covered projects.⁵⁴

Implementation of the New Law

Any projections about how soon and how well this new administrative machinery will work must take into account the many pieces that first must be put together by an Administration in its final year—when many key officials are fatigued, focused on other priorities, distracted by a presidential election, and in running conflict with Congress on subjects that bear directly on most or all of the resources, locations, policies, and interests affected by the new permitting scheme.

Before the FAST Act's streamlined permitting process can become a reality:

- The President must appoint an executive director of the Council. *Query: Who would take the job at this point in the Administration?*
- Each of the heads of the 13 agencies specified in the law must appoint a member to the Council. The individual appointed must be at the deputy-secretary (or equivalent) level or higher. *Query: How likely is this to happen, given that each such senior official is likely to be a political appointee whose job ends in January 2017?*
- Each of the heads of the 13 agencies must appoint an agency CERPO. *Query: How likely is this to happen when the leadership of each department is focused on concluding and solidifying policy initiatives commenced earlier in the Administration?*
- Once appointed, the executive director has 180 days to consult with the Council and establish an inventory of "covered projects" by category. *Query: How likely is this to happen in July 2016, in the midst of the parties' presidential nominating conventions, especially given the need to have an executive director and Council in place first?*
- In consultation with the Council, the executive director must

designate a facilitating agency for each category of covered activities and publish the list of those facilitating agencies on the permitting dashboard. *Query: Absent a Council or an executive director, can any agency function as a “facilitating” agency?*

- Within one year of enactment of the FAST Act, the executive director, in consultation with the Council, must develop performance schedules for environmental reviews and authorizations most commonly required for each category of covered projects. *Query: How likely is this to occur in the month following the upcoming Presidential election?*
- Also within one year of enactment of the FAST Act, and at least once a year thereafter, the Council must issue recommendations on the best practices for:
 - ♦ enhancing stakeholder engagement,
 - ♦ ensuring timely decisions, including through development of performance metrics,
 - ♦ improving agency coordination at all levels of government,
 - ♦ increasing transparency,
 - ♦ reducing information collection requirements,
 - ♦ developing and disseminating GIS and other tools,
 - ♦ and creating and distributing training materials.

Query: Even if an executive director and Council were in place today, would it be reasonable to expect production of these kinds of materials by the end of the year?

- The Director of OMB must designate a federal agency to provide administrative support to the executive director. *Query: Which agency’s FY 2016 or 2017 budget includes adequate funding and associated staff resources to perform this function? Will Congress fund the new law?*

The Administration’s implementation challenge is substantial and the schedule mandated by Congress is unrealistic. The implementation challenge falls somewhere between assembling a complicated bicycle late on Christmas Eve and directing a group of elves—many of whom will lose their jobs on December 23rd—to build a factory on December 24th that will assemble a bicycle that must be rideable on Christmas Day. Realistically, the implementation process will not happen in the way prescribed by Congress.

As discussed above, the new law incorporates measures that the Obama Administration already has adopted, such as the permitting dashboard. It seems likely that OMB and CEQ will not go through the arbitrary exercise of stopping or abandoning the Administration’s on-going permit streamlining efforts only to erect essentially the same features in the name of FAST Act compliance. FAST Act Title XLI implementation will almost certainly build on procedural improvements already in place.

Even with a foundation for the new procedures in place, it is not at all clear how much progress can be made over the next year or two when so much depends on engagement by senior appointed officials. There are limits to what even the most able career staff can and will do, notwithstanding the changes already underway. Delays are likely to encourage some interests to renew the push for “regulatory reform” bills or additional “permit streamlining” legislation, especially in connection with matters that lend themselves to portrayal as time-sensitive, such as drought, storms, immigration, and similar issues.

Developers and other parties hoping to take advantage of the new authorities and procedures are best advised to familiarize themselves with the many nuances of the complicated process embodied in Title XLI, including particularly the authorities granted to OMB and CEQ. NEPA practitioners will need to come to grips with the creation of a new, two-tier NEPA process with very distinct differences between the tiers. It will also be important to track the actions that the Council member departments and other agencies take to meet their duties to collaborate and cooperate.

As lawyers, we have upheld the cautious traditions of the profession by emphasizing in this article the uncertainties and risks connected to the new law. Seen from that perspective alone, there will be no safer way to assess the import of the new law than to follow the progress of the first few covered projects through the streamlining process—once the law is implemented.

But as counsellors who have been trusted to advise successful infrastructure developers for many years, we would be ignoring our experience if we did not highlight a somewhat counterintuitive opportunity inherent in the unusual arrival

of the complex new law in our midst. Simply, senior officials in the Executive Office of the President—the career and political employees who worked with allies from both political parties in Congress to secure for Title XLI a privileged path to enactment—have a lot to lose if the law fails. Developers who bring well-conceived projects forward soon are likely to receive a very warm welcome from the officials and entities behind Title XLI. The right developers with the right projects who move promptly may find themselves receiving concierge-level service from officials determined to demonstrate the law’s value.

In sum, we are cautiously hopeful that the FAST Act will enable faster, smarter, and more predictable permitting decisions on the country’s most important development projects, but we all are going to have to wait to find out. The most cautious developers will want to sit back and see what happens. Others, however, may wish to move fast to seize an unusual opportunity created by government officials with something important to prove.

Endnotes

- * Tom Jensen is a partner in Holland & Hart's Washington, DC office; Sandi Snodgrass is a partner in the firm's Denver office; Matt Castelli is an associate, also in Denver.
- 1 Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015) [hereinafter Fast Act].
- 2 FAST Act, *supra* note 1, at § 41001(8), (9), (10), (11).
- 3 CEQ's rulemaking powers rest on a series of presidential executive orders; NEPA itself is silent on the point. DANIEL R. MANDELKER, NEPA LAW AND LITIGATION 24 (2013). Those orders allow the "Council" to issue regulations, implying that the Senate-confirmed official who chairs CEQ and serves as the single "Council" member has the requisite rule-making authority. CEQ has not had a Senate-confirmed chair since the resignation of Nancy Sutley in early 2014.
- 4 FAST Act, *supra* note 1, at § 41012.
- 5 COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS, REPORT TO ACCOMPANY S. 280: TO IMPROVE THE EFFICIENCY, MANAGEMENT, AND INTERAGENCY COORDINATION OF THE FEDERAL PERMITTING PROCESS THROUGH REFORMS OVERSEEN BY THE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET, AND FOR OTHER REASONS, S. REP. NO. 114-112, at 3 (2015).
- 6 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB M-15-20, GUIDANCE ESTABLISHING METRICS FOR THE PERMITTING AND ENVIRONMENTAL REVIEW OF INFRASTRUCTURE PROJECTS (2015) *available at* <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2015/m-15-20.pdf>. A White House news release issued on the same day as the guidance offers additional background. News Release, The White House, Accelerating America's Infrastructure Projects (September 22, 2015) *available at* <https://www.whitehouse.gov/blog/2015/09/21/accelerating-america%E2%80%99s-infrastructure-projects>. The 2015 initiative was a major step in implementing a wide-ranging plan to accelerate and expand permitting reform released by the White House in 2014. STEERING COMMITTEE ON FEDERAL INFRASTRUCTURE PERMITTING AND REVIEW PROCESS IMPROVEMENT, IMPLEMENTATION PLAN FOR THE PRESIDENTIAL MEMORANDUM ON MODERNIZING INFRASTRUCTURE PERMITTING (MAY 2014) *available at* <https://www.permits.performance.gov/tools/implementation-plan-pdf>. That plan, in turn, followed a Presidential Memorandum from May 17, 2013, Memorandum on Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures, PUB. PAPERS 346 (May 17, 2013) *available at* <http://www.whitehouse.gov/the-press-office/2013/05/17/presidential-memorandum-modernizing-federal-infrastructure-review-and-pe>, which followed a Presidential Executive Order on March 22, 2012, Exec. Order No. 13604, 77 Fed. Reg. 18,887 (Mar. 22, 2012) *available at* <http://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr>, which built on a Presidential Memorandum from August 31, 2011, Memorandum on Speeding Infrastructure Development Through More Efficient and Effective Permitting and Environmental Review, PUB. PAPERS 601 (AUG. 31, 2011) *available at* <http://www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more>.
- 7 *See supra* note 3.
- 8 The one Senate hearing held on the bill that ultimately became, with some changes, Title XLI of the FAST Act, also considered a "regulatory reform" bill and largely focused on its terms. Most of the discussion by Senators and the few witnesses blurred distinctions between the two pieces of legislation and treated them as adjacent sides of the same coin. *A More Efficient and Effective Government: Improving the Regulatory Framework: Hearing Before the Subcomm. on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce of the S. Comm. on Homeland Security and Governmental Affairs*, 113th Cong. (2014). Testimony by Ambassador C. Boyden Gray focused almost entirely on S. 1029, the Regulatory Accountability Act, a business-sector-championed bill to restrain or eliminate agency rules with adverse economic consequences. The House of Representatives' closest counterpart to the Senate's Federal Permitting Improvement Act was the "Responsibly and Professionally Invigorating Development Act of 2015," generally referred to as the "RAPID Act." The RAPID Act was introduced as H.R. 2641 in 2013, and again as H.R. 348 in 2015. The bill, approved by the House in September 2015 on a mostly

partisan vote, would have established a special NEPA process for infrastructure projects, with tight mandatory deadlines, other procedural constraints, and an apparent presumption of project approval. It does not appear that any provisions of the RAPID Act that were not also found in the Senate bill made their way into the final FAST Act language.

- 9 Searching for and Cutting Regulations That Are Unnecessarily Burdensome Act, H.R. 1155, 114th Cong. (2015); Sunshine for Regulatory Decrees and Settlements Act, H.R. 712, 114th Cong. (2015); All Economic Regulations Are Transparent Act, H.R. 1759, 114th Cong. (2015); Providing Accountability Through Transparency Act of 2015, H.R. 690, 114th Cong. (2015).
- 10 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY ON H.R. 1155, SEARCHING FOR AND CUTTING REGULATIONS THAT ARE UNNECESSARILY BURDENSOME ACT OF 2015 (2016) *available at* www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr115r_20160105.pdf.
- 11 News Release, The White House, Accelerating America's Infrastructure Projects (September 22, 2015) *available at* <https://www.whitehouse.gov/blog/2015/09/21/accelerating-america%E2%80%99s-infrastructure-projects> ("Federal agencies have expedited the review and permitting of over 50 major infrastructure projects, including bridges, transit, railways, waterways, roads, and renewable energy projects, and over 30 of those projects have completed the permitting process.").
- 12 For a discussion of the Administration's mitigation policies, see T. Jensen, B. Schreiber & S. Snodgrass, *The Presidential Memorandum and Interior Department Policy on Mitigation: Their Content and Implications* (November 9, 2015), <https://www.hollandhart.com/obama-new-mitigation-policies> (last visited Feb. 19, 2016).
- 13 *Projects*, PERMITTING DASHBOARD: FEDERAL INFRASTRUCTURE PROJECTS, <https://www.permits.performance.gov/projects> (last visited Feb. 19, 2016).
- 14 Senator Rob Portman (R. OH) introduced S. 1397, the Federal Permitting Improvement Act of 2013, in July 2013. The bill was referred to the Committee on Homeland Security and Governmental Affairs and received a hearing in March 2014, but no additional action was taken before the session of Congress adjourned. Senator Portman reintroduced the bill in January 2015 as S. 280. The bill was again referred to the Committee on Homeland Security and Governmental Affairs. No hearing was held on S. 280; it was taken up and amended in a Committee business meeting in May 2015 and approved by a 12-1 vote. See *S.1397 - Federal Permitting Improvement Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/1397> (last visited Feb. 18, 2016); *S.280 - Federal Permitting Improvement Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/280> (last visited Feb. 18, 2016).
- 15 The entire explanation for the new rules offered by the Conference Report on the final FAST Act text states just this:
Title XLI of the conference report seeks to make more efficient the process for federal approval for major infrastructure projects. It creates a council composed of the relevant permitting agencies to establish best practices and model timelines for review, designate individuals within agencies with primary responsibility for coordinating reviews and agency decisions, and shorten the time in which challenges can be made to final decisions.
CONFERENCE REPORT TO ACCOMPANY H.R. 22 (FAST Act), H.R. REPT. No. 114-357, at 541 (2015).
- 16 The near absence of legislative debate combined with very detailed legislative language affecting most of the federal executive branch is unusual and implies a strong alignment of interest and effort between Congress and the White House. Those seeking more detailed explanation of the statutory language are best advised to consult the various orders, directives, and reports issued by the Obama Administration in connection with its infrastructure permitting initiatives, as cited in note 3, above. Congress never endorsed those documents outright, but the near-identity between much of Title XLI and the Administration proposals suggests that they will be useful in understanding how the Administration, and its successors, will interpret the law.
- 17 FAST Act, *supra* note 1, at § 41001(6)(A).
- 18 *Id.* § 41001(6)(B).
- 19 *Id.* § 41002(a).

- 20 See, for example, the guidance documents issued last September by OMB and CEQ that, when listing the agencies required to participate in the permit streamlining initiative, explain that the Nuclear Regulatory Commission and Federal Energy Regulatory Commission are not included “to respect their independent regulatory and safety mandates.” OFFICE OF MGMT. & BUDGET, *supra* note 3, at 4 n.2, available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2015/m-15-20.pdf>.
- 21 FAST Act, *supra* note 1, at § 41002(b)(1).
- 22 *Id.* § 41002(d).
- 23 COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS, *supra* note 2, at 10.
- 24 FAST Act, *supra* note 1, at § 41002(b)(2), (b)(3).
- 25 *Id.* § 41002(b)(2)(iii).
- 26 *Id.* § 41002(c).
- 27 COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS, *supra* note 2, at 10.
- 28 FAST Act, *supra* note 1, at §§ 41002(c)(1)(B)(ii); 41003(a)(2), (b). The Administration’s permitting dashboard is online at: <https://www.permits.performance.gov/>
- 29 *Id.* § 41002(c)(1)(B).
- 30 *Id.* § 41002(c)(1)(C).
- 31 FAST Act, *supra* note 1, at § 41003(a); COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS, *supra* note 2, at 8.
- 32 FAST Act, *supra* note 1, at § 41003(c).
- 33 *Id.* § 41002(c)(1)(C)(ii)(II)(aa), (bb). The language suggests that the categorical baseline time periods will need to be recalculated each year.
- 34 *Id.* § 41002(c)(1)(C)(ii)(II)(cc).
- 35 *Id.* § 41005(b)(1)(A)(i)
- 36 *Id.* § 41003(c)(3).
- 37 *Id.* § 41003(c)(2)(C).
- 38 *Permit and Review Inventory*, PERMITTING DASHBOARD: FEDERAL INFRASTRUCTURE PROJECTS <https://www.permits.performance.gov/tools/permit-inventory> (last visited Feb. 19, 2016).
- 39 *Id.* § 41003(b).
- 40 Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221, 119 Stat. 594 (codified as 16 U.S.C. § 824p) (“The consent of Congress is given for three or more contiguous States to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to (A) facilitate siting of future electric energy transmission facilities within those states; and (B) carry out the electric energy transmission responsibilities of those States.”).
- 41 FAST Act, *supra* note 1, at § 41009.
- 42 *Id.* § 41007.
- 43 *Id.*
- 44 *Id.* § 41013.
- 45 An inside-the-Beltway aside: Connoisseurs of federal bureaucracy and the way power moves in Washington, DC will find it unsurprising that the original Senate legislation that was later incorporated into the FAST Act was sponsored by Senator Rob Portman (R. OH), who served as OMB director in the administration of President George W. Bush, and previously as Associate White House Counsel under President George H. W. Bush. The one Senate hearing held on the legislation featured testimony by

C. Boyden Gray, former White House Counsel to the first President Bush, who opened his testimony on the bill by stating that Senator Portman was “the best hiring decision I ever made.” *A More Efficient and Effective Government*, *supra*, note 5, at 23. Senator Portman, in turn, acknowledged that Ambassador Gray “hired me as Associate Counsel to the President and put me in his office in the White House where he immediately had me look at regulatory reform, believe it or not.” *Id.* at 11. Ambassador Gray is credited with authoring the 1981 executive order that directed OMB, theretofore concerned only with the federal budget, to review and approve all federal regulations. Peter Behr, *OMB Now a Regulator in Historic Power Shift*, WASH. POST, May 4, 1981, *available at* <https://www.washingtonpost.com/archive/politics/1981/05/04/omb-now-a-regulator-in-historic-power-shift/f06f63b9-d518-4449-b572-d8984ad16796/>.

46 FAST Act, *supra* note 1, at § 41002(a)(2)(iii).

47 *Id.* § 41002(b)(3).

48 *Id.* § 41002(d).

49 *Id.* § 41003(c)(2)(C).

50 *Id.* § 41003(c)(2)(D)(iii)(II).

51 *Id.*

52 *Id.* § 41009(a).

53 *Id.* § 41009(c).

54 *Id.* § 41009(d)(3).

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