

Environment & Energy

Infrastructure Bill Aims to Ease Federal Environmental Permitting

By Tom Jackson and Megan Berge

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The infrastructure legislation approved by the Senate has provisions aimed at improving the federal environmental permitting process to ease the way for major projects. Baker Botts LLP attorneys look at the details and what to watch for in the future House bill.

In a bipartisan vote, the Senate on Aug. 10 passed the Infrastructure Investment and Jobs Act, a wide-ranging effort to address many aspects of the nation's infrastructure needs. Significant attention has been paid to the provisions that address climate change, but less noted have been provisions addressing federal environmental permitting processes.

These provisions have the apparent goal of making permit processing more efficient and facilitating construction of infrastructure projects, including renewable energy projects.

They build on prior efforts to address longstanding frustrations with the time and expense associated with obtaining approvals needed under various federal environmental and wildlife statutes to construct and operate infrastructure and associated facilities.

Efforts to Streamline the Process

A particular source of frustration has been the implementation of the requirements regarding analysis of the environmental impacts of federal actions under the National Environmental Policy Act (NEPA). Environmental impact statements can run to thousands of pages and can take years to complete, resulting in substantial delays in projects requiring federal approvals.

In recent years, Congress and the White House have undertaken efforts to make NEPA processing and the overall federal environmental permitting process more efficient. For example, in 2015 Congress passed the Fixing America's Surface Transportation Act, or FAST Act, which included the Federal Permitting Improvement Act (known as FAST-41).

The FAST Act contained a variety of provisions related to federal permitting processes for both transportation projects and other types of major infrastructure projects, such as energy infrastructure projects. These included the creation of the Federal Permitting Improvement Steering Council to promote best practices for improving the timeliness, predictability, and transparency of federal permitting and the formalization of a permitting “dashboard” website for tracking permitting progress for individual projects.

The Trump administration attempted to institute further permitting reforms through Executive Order 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.” Among its provisions were the “one federal decision” policy, which directed agencies to coordinate and issue one record of decision (ROD) for major infrastructure projects.

The EO also established a goal of completing the environmental review process for major infrastructure projects within two years. This EO was rescinded in the early days of the Biden administration.

Further Improvements

The infrastructure bill seeks to make further improvements to the federal permitting process by amending the permitting provisions of the FAST Act. Some provisions would codify certain aspects of EO 13807, including the one federal decision policy and the goal of completing the NEPA process within two years.

Among these provisions of the bill are the following:

1. Requires agencies to prepare a single, joint interagency EIS for a covered project unless a lead agency provides justification that multiple documents are more efficient.
2. Requires federal agencies to issue an ROD for a covered project within 90 days of the issuance of the final EIS. Shortens, from 45 days to 21 days, the time for the lead agency to invite other agencies to be a participating or cooperating agency.
3. Requires the Federal Permitting Improvement Steering Council (Council) to develop recommended performance schedules of not more than two years.
4. Requires agencies to submit reports to Congress and the Office of Management and Budget assessing their performance in implementing best practices.

In addition, the bill includes a number of provisions related to NEPA processing that would apply only transportation projects, including several provisions with respect to categorical exclusions.

These provisions of the infrastructure bill would have the potential to provide some degree of improvement in the federal permitting process, including the preparation of analyses required under NEPA. For example, while the two-year permit processing goal does not represent an enforceable deadline, the existence of the goal and the creation of mechanisms within each agency to assess achievement of the goal may encourage agencies in particular cases to make an effort to meet the goal.

The requirement that agencies issue their final decisions regarding a project within 90 days of the publication of the final EIS could help prevent delays at the back end of the process.

The provisions of the infrastructure bill would not represent a panacea for the myriad factors that contribute to lengthy permitting processes for infrastructure projects, but the bill would continue the slow process of federal permitting reform.

The bill now moves to the House for consideration, where it will be watched closely by companies looking to update, expand, or transition infrastructure assets.

Among those watching most closely will be companies seeking to undertake renewable energy projects that represent a key element in addressing climate change, many of which will face the very type of federal permitting hurdles the Infrastructure Investment and Jobs Act would address.

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