

GIBSON DUNN

Federal Infrastructure Permitting

FAST-41 Reforms and What's Next on Capitol Hill

Outline

I. Introductions

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IX. Permit U.S. to Build Coalition

Sample LNG Project Required Authorizations

- **Department of Energy:** Natural Gas Export Authorization
- **Army Corps of Engineers:** Section 10 Rivers and Harbors Act of 1899
- **Army Corps of Engineers:** Section 404 Clean Water Act
- **Department of Agriculture:** National Historic Preservation Act of 1966 Section 106 Review
- **FERC:** Authorization for LNG Terminal Facilities, Onshore or In State Waters
- **Department of Interior, Bureau of Land Management:** Right of Way Authorization
- **FERC:** Environmental Impact Statement
- **Department of Commerce, NOAA, National Marine Fisheries Service:** Marine Mammal Protection Act Incidental Take Authorization
- **U.S. Coast Guard:** Bridge Permit
- **Department of Commerce, NOAA:** Magnuson-Stevens Fishery Conservation and Management Act Section 305 Essential Fish Habitat Consultation
- **Department of Commerce, NOAA/National Marine Fisheries Service:** Endangered Species Act Consultation
- **National Park Service** Permit
- **Fish and Wildlife Service:** Bald and Golden Eagle Protection Permit
- **Department of Energy:** Supplemental Environmental Impact Statement



Portman, McCaskill Introduce Federal Permitting Improvement Act



Senator Rob Portman ✓
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113TH CONGRESS
1ST SESSION

S. 1397

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 purposes.

IN THE SENATE OF THE UNITED STATES

JULY 30, 2013

Mr. PORTMAN (for himself, Mrs. MCCASKILL, Mr. DONNELLY, Mr. ENZI, and Mr. BARRASSO) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

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 purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 **SECTION 1. SHORT TITLE.**
- 4 This Act may be cited as the “Federal Permitting
- 5 Improvement Act of 2013”.

129 STAT. 1312

PUBLIC LAW 114-94—DEC. 4, 2015

**DIVISION D—MISCELLANEOUS
TITLE XLI—FEDERAL PERMITTING
IMPROVEMENT**

**Public Law 114-94
114th Congress**

An Act

Dec. 4, 2015
[H.R. 22]

To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

Fixing America's
Surface
Transportation
Act.
23 USC 101 note.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Fixing America’s Surface Transportation Act” or the “FAST Act”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

SEC. 41001. DEFINITIONS.

42 USC 4370m
note.

In this title:

(1) **AGENCY.**—The term “agency” has the meaning given the term in section 551 of title 5, United States Code.

(2) **AGENCY CERPO.**—The term “agency CERPO” means the chief environmental review and permitting officer of an agency, as designated by the head of the agency under section 41002(b)(2)(A)(iii)(I).

(3) **AUTHORIZATION.**—The term “authorization” means any license, permit, approval, finding, determination, or other administrative decision issued by an agency that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of a covered project administered by a Federal agency or, in the case of a State that chooses to participate in the environmental review and authorization process in accordance with section 41003(c)(3)(A), a State agency.

(4) **COOPERATING AGENCY.**—The term “cooperating agency” means any agency with—

(A) jurisdiction under Federal law; or

(B) special expertise as described in section 1501.6 of title 40, Code of Federal Regulations (as in effect on the date of enactment of this Act).

(5) **COUNCIL.**—The term “Council” means the Federal Infrastructure Permitting Improvement Steering Council established under section 41002(a).

(6) **COVERED PROJECT.**—

(A) **IN GENERAL.**—The term “covered project” means any activity in the United States that requires authorization or environmental review by a Federal agency involving

IIJA & The Federal Permitting Reform & Jobs Act; the Inflation Reduction Act

PUBLIC LAW 117-58—NOV. 15, 2021

135 STAT. 429

Public Law 117-58
117th Congress

An Act

To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

Nov. 15, 2021
[H.R. 3684]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Infrastructure
Investment and
Jobs Act.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Infrastructure Investment and Jobs Act”.

23 USC 101 note.

TITLE VIII—FEDERAL PERMITTING IMPROVEMENT

SEC. 70801. FEDERAL PERMITTING IMPROVEMENT.

(a) DEFINITIONS.—Section 41001 of the FAST Act (42 U.S.C. 4370m) is amended—

(1) in paragraph (3), by inserting “and any interagency consultation” after “issued by an agency”;

(2) in paragraph (4), by striking “means” and all that follows through the period at the end of subparagraph (B) and inserting “has the meaning given the term in section 1508.1 of title 40, Code of Federal Regulations (or successor regulations).”;

(3) in paragraph (5), by striking “Federal Infrastructure Permitting Improvement Steering Council” and inserting “Federal Permitting Improvement Steering Council”;

(4) in paragraph (6)(A)—

(A) in clause (ii), by striking “or” at the end;

(B) by redesignating clause (iii) as clause (iv); and

(C) by inserting after clause (ii) the following:

“(iii) is—

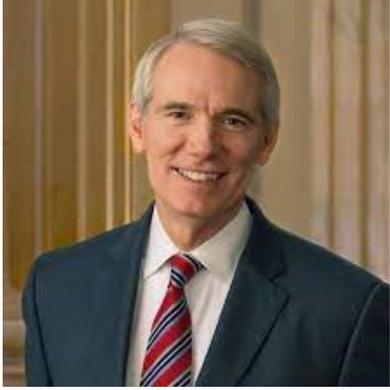
“(I) subject to NEPA;

“(II) sponsored by an Indian Tribe (as defined in section 4 of the Indian Self-Determination and

SEC. 70007. FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL ENVIRONMENTAL REVIEW IMPROVEMENT FUND MANDATORY FUNDING.

In addition to amounts otherwise available, there is appropriated to the Federal Permitting Improvement Steering Council Environmental Review Improvement Fund, out of any money in the Treasury not otherwise appropriated, \$350,000,000 for fiscal year 2023, to remain available through September 30, 2031.

Federal Permitting Reform and Jobs Act Co-Sponsors



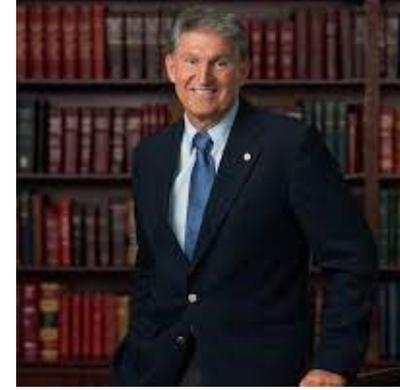
Sen. Rob Portman (R-OH)



Sen. Kyrsten Sinema (I-AZ)



Sen. Dan Sullivan (R-AK)



Sen. Joe Manchin (D-WV)



Sen. Steve Daines (R-MT)



Sen. Angus King (I-ME)



Sen. Mitt Romney (R-UT)



Sen. Mark Kelly (D-AZ)

FAST-41

U.S. Code Title 41, Sec. 4370m et seq.

▣ SUBCHAPTER IV—FEDERAL PERMITTING IMPROVEMENT (sections 4370m to 4370m-12)

SUBCHAPTER IV—Front Matter

Sec. 4370m. Definitions

Sec. 4370m-1. Federal Permitting Improvement Steering Council

Sec. 4370m-2. Permitting process improvement

Sec. 4370m-3. Interstate compacts

Sec. 4370m-4. Coordination of required reviews

Sec. 4370m-5. Delegated State permitting programs

Sec. 4370m-6. Litigation, judicial review, and savings provision

Sec. 4370m-7. Reports

Sec. 4370m-8. Funding for governance, oversight, and processing of environmental reviews and permits

Sec. 4370m-9. Application

Sec. 4370m-10. GAO report

Sec. 4370m-11. Savings provision

Sec. 4370m-12. Repealed. Pub. L. 117-58, div. G, title VIII, §70801(h), Nov. 15, 2021, 135 Stat. 1294

Federal Permitting Improvement Steering Council (“Permitting Council”) Members

- Presidentially-Appointed Executive Director
- Department of Agriculture
- Army Corps of Engineers
- Department of Commerce
- Department of the Interior
- Department of Energy
- Department of Transportation
- Department of Defense
- Environmental Protection Agency
- Federal Energy Regulatory Commission
- Nuclear Regulatory Commission
- Department of Homeland Security
- Department of Housing and Urban Development
- Advisory Council on Historic Preservation
- Council on Environmental Quality
- Office of Management and Budget



US Army Corps of Engineers®



Covered Projects Requirements

Must come from a covered sector (42 U.S.C. 4370m(6)(A)):

- Renewable or conventional energy production
- Electricity transmission
- Surface Transportation
- Aviation
- Ports and Waterways
- Water Resource Projects
- Broadband
- Pipelines
- Manufacturing
- Semiconductors
- Artificial intelligence and machine learning
- High-performance computing and advanced computer hardware and software
- Quantum information science and technology
- Data storage and data management
- Cybersecurity
- Carbon capture
- Mining (added by 86 Fed. Reg. 1281 (Jan. 8, 2021) and vote of Permitting Council)

Covered Projects Requirements (cont.)

- **Typically:**
 - Likely to require a total investment of more than \$200,000,000
 - Must be subject to NEPA
 - Does not qualify for other abbreviated authorization or environmental review
- **Tribal Projects:**
 - Must be subject to NEPA
 - Sponsored by an Indian Tribe, Alaska Native Corporation, Native Hawaiian organization, the Department of Hawaiian Home Lands, or the Office of Hawaiian Affairs; and
 - Be located on land owned by or under the jurisdiction of the sponsor
- **Other Projects:**
 - Must be subject to NEPA
 - The “size and complexity of which, in the opinion of the Council, make the project likely to benefit from enhanced oversight and coordination”
 - Likely to require environmental authorization or review from two or more federal agencies or the preparation of an environmental impact statement under NEPA

FAST-41 Covered Project Benefits

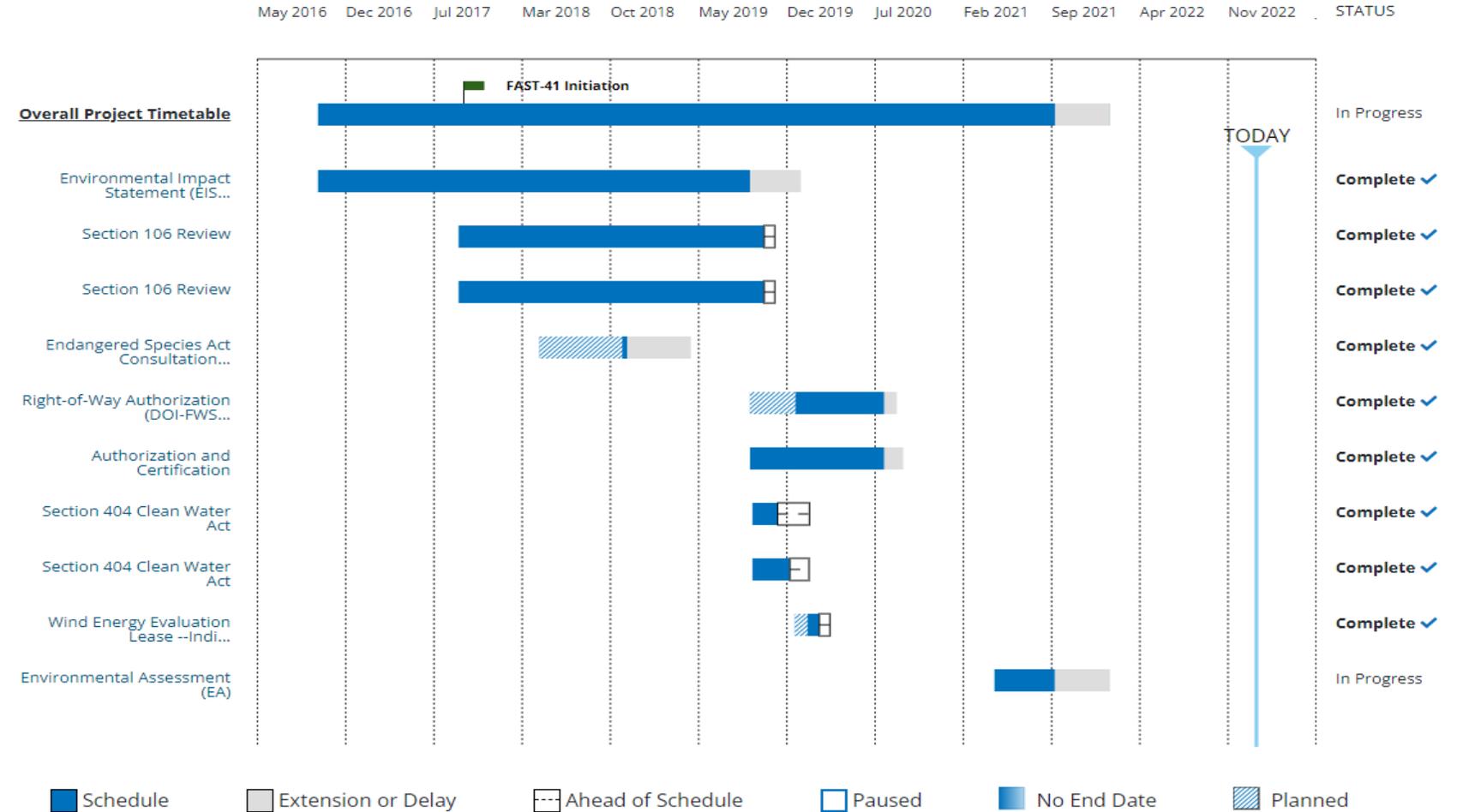
- **Designation of a lead agency** to coordinate the permitting and environmental review process. 42 U.S.C. § 4370m-2(a)(5).
- **Mandatory upfront coordination by all agencies** involved in the project's permitting process in which all agencies involved in permitting a project must identify the necessary permits and environmental reviews and set out a performance schedule for completion of the process. 42 U.S.C. § 4370m-1(c)(1)(C).
- The performance schedule will require that an agency issue its decision on an environmental review or authorization **no later than 180 days** after the agency receives all of the information it needs to make the decision. 42 U.S.C. § 4370m-1(c)(1)(C)(ii)(II)(bb).
- A **public timeline** of the project published on www.permits.performance.gov that shows the status of each step of the permitting process. 42 U.S.C. § 4370m-2(b).
 - If agencies miss their mark, they have to explain why publicly and explain steps they are taking to mitigate delays. 42 U.S.C. § 4370m-2(c)(1)(D)

Sample Project Timetable

Permitting Timetable

The permitting timetable below displays data as reported by agencies. Dates for Environmental Review and Permitting processes (Actions) that are in 'Paused' or 'Planned' status are subject to change and are not indicative of a project's final schedule.

- For information about extensions, select an Action from the timetable below and select 'View Action Details' at the bottom of the page.



FAST-41 Covered Project Benefits (cont.)

- **Funding can be transferred to Federal, state, local government agencies, and Tribes** to support work related to federal environmental authorizations.
- **Limits the comment period on draft environmental impact statements to no more than 60 days** and other comment periods to no more than 45 days unless the project sponsor agrees to an extension or the lead agency extends the deadline for good cause. 42 U.S.C. § 4370m-4(d).
- If an environmental impact statement is required, **requires agencies to issue a record of decision within 90 days** after the final environmental impact statement is issued. 42 U.S.C. § 4370m-4(f).
- **A two-year statute of limitations for filing a lawsuit** to challenge covered projects running from the date of publication of the notice of final agency action on the authorization (reduced from six years for most NEPA challenges). 42 U.S.C. § 4370m-6(a).
- **Conflict resolution assistance** from the Executive Director with escalation to the Director of OMB in consultation with the Chairman of CEQ. 42 U.S.C. § 4370m-2(c)(2)(C)(ii).

Application Process

Home

- [BECOME A FAST-41 PROJECT](#)
- [The Permitting Council](#)
- [The FAST-41 Process](#)
- [Authorization Inventory](#)
- [FAST-41 Resources](#)
- [Reports & Publications](#)
- [FOIA Reading Room](#)
- [The Infrastructure Insider Blog](#)

Related Documents

- Agency Steering Council Member and CERPO
- FAST-41 Fact Sheet

Become a FAST-41 Covered Project

For additional information see the [FAST-41 Fact Sheet](#).

FAST-41 Initiation Notice

To become a covered project under FAST-41, project sponsors need to submit a **FAST-41 Initiation Notice** (FIN) with information described in the FAST Act. An online FIN submission tool is available to use to submit a FIN through the Permitting Dashboard.

- Use online FIN submission tool

Alternatively, interested project sponsors for new potential covered projects can submit the information by email.

- Instructions for submission by email

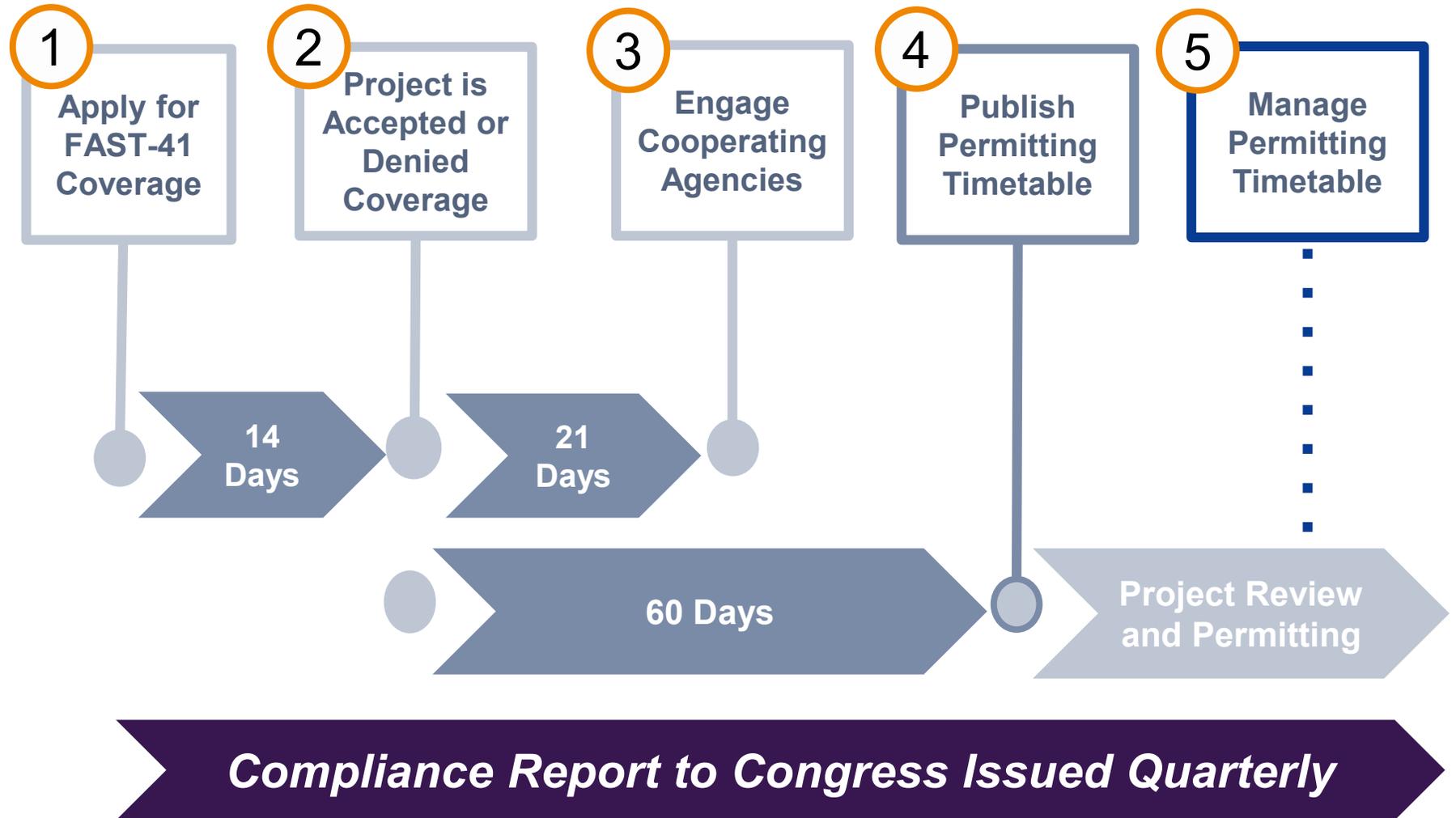
Last updated: Wednesday, January 26, 2022

How to become a FAST-41 project?

- To join this voluntary program, interested project sponsors for potential covered projects should submit the following information by email or [online form](#) required under FAST-41:
 - Project Information: Title, Sector, Type, Location
 - Project Sponsor Name and Contact Information
 - Statement of the purposes and objectives of the project
 - Concise description including general location and/or a summary of geospatial information, if available, and the locations, if any, of environmental, cultural, and historic resources
 - Statement regarding the technical and financial ability of the project sponsor to construct the proposed project
 - Statement of any Federal Financing, environmental reviews, and authorizations anticipated to be required; and
 - Assessment that the project meets the definition of a covered project as defined in 42 U.S.C. §4370m(6)(A) and a statement of reasons supporting the assessment.
- The FIN should be emailed to both FAST.FortyOne@fpisc.gov and the appropriate facilitating agency.
- Open for pre-application consultations or any questions



From Application to Permitting Timetable

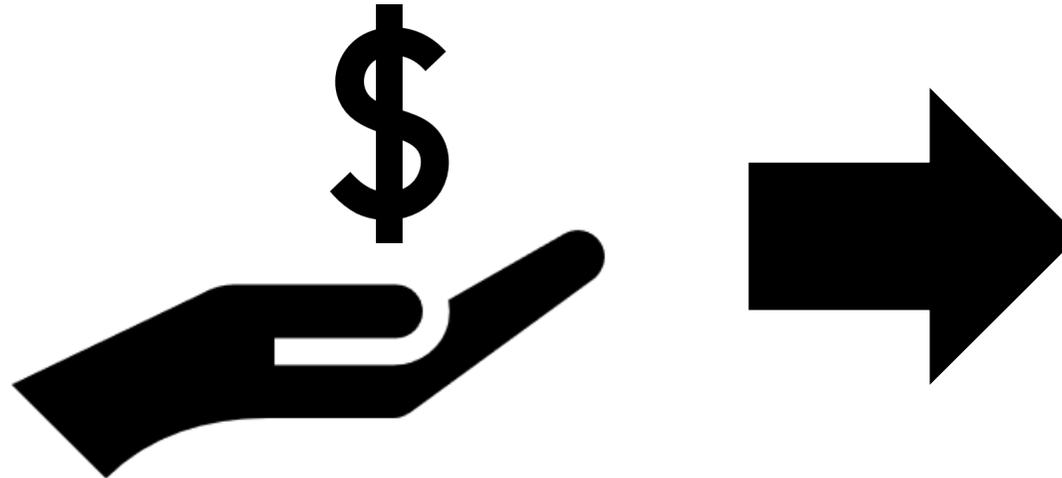




Funding to Support FAST-41 Projects

Environmental Review Improvement Fund (ERIF)

The Executive Director may transfer funds to facilitate timely and efficient environmental reviews and authorizations for FAST-41 covered projects.



Who's Eligible?

- Federal agencies
- Tribal Governments
- State agencies
- Local governments

Example: Offshore Wind Project

- Offshore Wind project located 35 miles east of Montauk Point
- Began FAST-41 coverage in 2018
- Completed Environmental Permitting on 1/18/22
- Will generate 132 megawatts of offshore wind energy, enough to power 70,000 homes in Long Island, NY.
- Lead agency: Department of the Interior, Bureau of Ocean Energy Management

South Fork Wind Farm and South Fork Export Cable

PERMITTING DASHBOARD PROJECT POSTING DATE: AUGUST 30, 2018

PROJECT WEBSITE: South Fork Wind Farm - Deepwater Wind

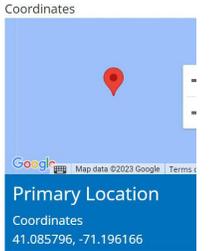
All dates below are specific to the schedule of the Environmental Review and Permitting processes for this project.



ENVIRONMENTAL REVIEW AND PERMITTING STATUS
COMPLETE



COMPLETION DATE OF ENVIRONMENTAL REVIEW AND PERMITTING
01/18/2022



ENVIRONMENTAL REVIEW AND PERMITTING



SECTOR
Renewable Energy



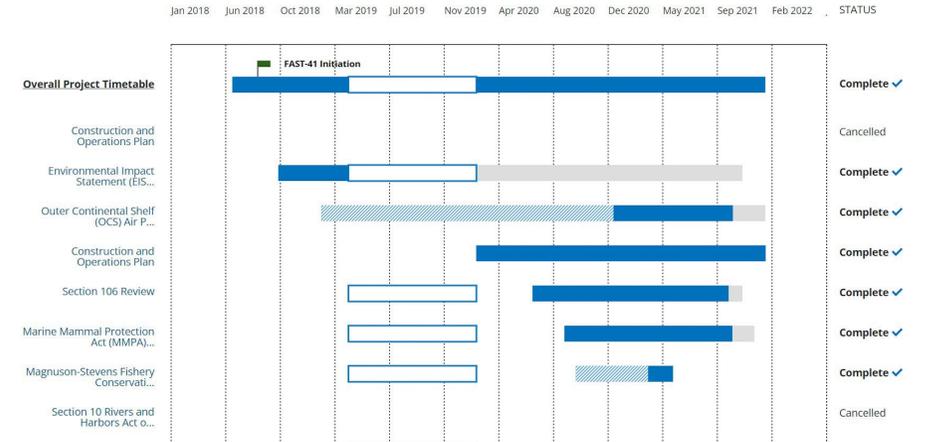
CATEGORY
Project Category FAST-41



LEAD AGENCY
Department of the Interior,

Lead Agency Information

POC Name: Mary Boatman
POC Title:
Environmental Protection Special
POC Email:



Statute of Limitations

§4370m-6. Litigation, judicial review, and savings provision

(a) Limitations on claims

(1) In general

Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of any authorization issued by a Federal agency for a covered project shall be barred unless-

- (A) the claim is filed not later than 2 years after the date of publication in the Federal Register of notice of final agency action on the authorization, unless a shorter time is specified in the Federal law under which judicial review is allowed; and
- (B) in the case of an action pertaining to an environmental review conducted under NEPA-
 - (i) the claim is filed by a party that submitted a comment during the environmental review; and
 - (ii) any commenter filed a sufficiently detailed comment so as to put the lead agency on notice of the issue on which the party seeks judicial review, or the lead agency did not provide a reasonable opportunity for such a comment on that issue.

(2) New information

(A) In general

The head of a lead agency or participating agency shall consider new information received after the close of a comment period if the information satisfies the requirements under regulations implementing NEPA.

(B) Separate action

If Federal law requires the preparation of a supplemental environmental impact statement or other supplemental environmental document, the preparation of such document shall be considered a separate final agency action and the deadline for filing a claim for judicial review of the agency action shall be 2 years after the date on which a notice announcing the final agency action is published in the Federal Register, unless a shorter time is specified in the Federal law under which judicial review is allowed.

National Security & Permitting

- **Sen. Joe Manchin (D-WV):** Regarding his Energy Independence and Security Act of 2022, “These federal permitting reforms for energy and minerals projects would allow for the increased American energy production provided for by the *Inflation Reduction Act* to get to the domestic and international markets that need them most - whether that be by pipeline or transmission line - providing relief at the pump and on energy bills while bolstering our national and international energy security.” *Senate Energy & Commerce Committee Press Release (Sept. 21, 2022)*.
- **Rep. Debbie Dingell (D-MI-6):** “For me, I look at permitting reform as a tool to combat climate change, strengthen our economy and protect our national security, but we must bring everyone to the table to do this right.” *Arkansas Democrat Gazette (Feb. 9, 2023)*.
- **S. 3451, Hagerty-Portman-King bill** in the 117th Congress added national security-related sectors to FAST-41, including semiconductors, artificial intelligence and machine learning, high-performance computing, and advanced computer hardware and software, quantum information science and technology, data storage and data management, and cybersecurity. *Enacted Aug. 16, 2022 as Pub. Law No. 117-173*.

Legislation To Date

[S. 20 / H.R. 98](#), Federal Land Freedom Act of 2023

[H.R. 186](#), Water Supply Permitting Coordination Act

[S. 64](#), Water Rights Protection Act of 2023

[H.R. 165](#), New Source Review Permitting Improvement Act

[S. 23](#), Promoting Cross-Border Energy Infrastructure Act

[H.R. 178](#), Public Land Renewable Energy Development Act of 2023

[H.R. 209](#), To improve permitting process for mining on federal land

[S. 19](#), FRESH Act

[H.R. 923/ S. 319](#): To prohibit the President from issuing moratoria on leasing and permitting energy and minerals on certain federal land

H.R. XX, to amend the Solid Waste Disposal Act

H.R. XX, Flexible air permitting

H.R. XX, Promoting Interagency Coordination for Review of Natural Gas Pipelines Act

Key Members of Congress

| Senate | House |
|---|--|
| <p>Sen. Joe Manchin (D-WV) (ENR Chair) Sen. Tom Carper (D-DE) (EPW Chair) Sen. Gary Peters (D-MI) (HSGAC Chair) Sen. Kyrsten Sinema (I-AZ) Sen. Angus King (I-ME) Sen. Brian Schatz (D-HI)</p> | <p>Rep. Bruce Westerman (R-AR) (HNRC Chair) Rep. Cathy McMorris Rodgers (R-WA) (E&C Chair) Rep. Bill Johnson (R-OH) (E&C Subcom. Environment, Manufacturing & Critical Resources Chair) Rep. Pete Stauber (R-MN) (HNRC Subcom. On Energy & Mineral Resources Chair)</p> |
| <p>Sen. Shelly Moore Capito (R-WV) (EPW RM) Sen. John Barrasso (R-WY) (ENR RM) Sen. Dan Sullivan (R-AK) Sen. Bill Hagerty (R-TN)</p> | <p>Rep. Frank Pallone (D-NJ) (RM E&C) Rep. Raul Grijalva (D-AZ) (RM HNRC) Rep. Josh Gottheimer (D-NJ) (Problem Solvers Chair)</p> |

Concept to Completion: Timeline Remains 7-10 Years Over Last Decade

- Given lengthy timelines, project developers and TPI members are hesitant to invest. They know that projects initiated today will not be able to commence operations and realize their investment cost recovery for 7 to 10 years at the earliest. As this summary timeline demonstrates, our nation's permitting system does not solve problems, it creates them.
- To illustrate the problem, for major infrastructure projects, it takes:
 - 2 to 3 years of project design, engineering, permitting, planning, and financing
 - 2 to 4 years of formal permitting process submission and review – a timeline that pushes orders for equipment, steel, concrete, and labor contracts years into the future
 - 2 to 3 years of construction – this assumes permitting approvals are granted and supply chain orders are aligned

**Statutory
Reform
Essential:
transparency
and
predictability
tools only one
piece of
permitting
puzzle**

- Proposed wind and solar energy projects on federal lands continue to face constantly evolving rules governing species and wetlands protections.
- New formal or informal policies that require applicant frontload biological, cultural, and historical survey requirements prior to formally starting the review process —pushing the official starting point even further into the future.
- For example, a \$3 billion investment in a clean energy transmission line that began the permitting process more than a decade ago. The project endured seven years of review and was finally deemed “complete” by the federal government four years ago.
 - However, it is now entangled in court proceedings because one hand did not know what the other was doing within the same federal agency.
- Several hydropower permits and operating authorizations have also been challenged in court, citing conflicting statutory and regulatory requirements among as many as 10 federal agencies.

Biden Support for Manchin Bill

DECEMBER 15, 2022

Statement from President Joe Biden on Senator Joe Manchin's Permitting Reform Proposal



▶ BRIEFING ROOM ▶

STATEMENTS AND RELEASES

Earlier this year, the Congress passed the Inflation Reduction Act to help bring down every day costs – including costs for energy. Already we are seeing inflation come down, and that is a step in the right direction. But the work is far from done.

I support Senator Manchin's permitting reform proposal as a way to cut Americans' energy bills, promote US energy security, and boost our ability to get energy projects built and connected to the grid. Today, far too many projects face delays – keeping us from generating critical, cost-saving energy needed by families and businesses across America. That's an impediment to our economic growth, for creating new jobs, and for lessening our reliance on foreign imports.

Permit U.S. to Build Coalition

Membership: Members will include trade associations and companies that support infrastructure permitting reform.

Activities: Gibson Dunn will work with Coalition members to understand their specific interests in improving the infrastructure permitting system and develop legislative proposals that would advance those interests—and, importantly, do not conflict with other Coalition-member interests. After developing those priorities, the Coalition will:

- Educate members of Congress and staff on the need for infrastructure permitting reform
- Bring Republicans, Democrats, and Independents together to create compromise proposals that could gain enough support to become law
- Advocate before Congress and the administration through letters, testimony, and meetings
- Offer feedback and legislative drafting support to congressional staff
- Support administration-led efforts to improve the permitting process
- Keep Coalition members apprised on progress and ways to support the permitting improvement effort through regular meetings, speaker events, and email alerts
- Support Coalition members who want to advocate for permitting reform before Congress or the administration

To Join: Please contact Amanda Neely at ANeely@gibsondunn.com or 202-777-9566.