

A Look at the Permitting Provisions in the Fiscal Responsibility Act

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May 31, 2023

On Wednesday, May 31, the House of Representatives voted 314-117, to send the Fiscal Responsibility Act (H.R. 3746; the “Act”) to the Senate. The permitting reform provisions tracked the deal announced by the White House and House Speaker Kevin McCarthy (R-CA) to lift the \$31.4 trillion ceiling through 2024 and place new limits on federal spending. While it is significant that permitting reform was included in the House-passed debt limit deal, the deal does not address many of the issues identified by project developers. Key members of Congress and officials within the administration maintain a desire to enact comprehensive, bipartisan permitting reforms. Notably, the debt limit deal did not include the types of permitting reforms needed to expedite the build out of transmission lines and leverage the Inflation Reduction Act’s funding and tax credits.

The majority of the permitting reforms in the debt limit deal were part of the House-approved provisions in H.R. 1 championed by Rep. Garrett Graves (R-LA). Division C (Title III) of Act includes portions of Rep. Graves’s the Building United States Infrastructure through Limited Delays and Efficient Reviews (BUILDER) Act (H.R. 1577) to reform the National Environmental Policy Act of 1969 (P.L. 91-190; NEPA) by including project threshold, interagency cooperation and review deadlines to catalyze project approval. Moreover, the Act expedites the completion of the Mountain Valley Pipeline (MVP), requires the drafting of an interregional transfer capability determination study and adds energy storage as a covered project under the Fixing America’s Surface Transportation (FAST) Act (P.L. 114-94).

Below, please find a section-by-section summary of the permitting provisions in the debt-limit compromise legislation.

Section-by-Section Summary

Sec. 321: The *BUILDER* Act

- **Threshold Determinations:** Reforms NEPA by establishing threshold determinations that do not require agencies to prepare environmental documents if (1) the effort is not a final agency action; (2) the effort is excluded under the agency’s or certain other agency’s categorical exclusions; (3) the preparation of the document would conflict with requirements of another provision of law; or (4) the effort is a nondiscretionary action under which an agency does not have authority to consider environmental factors when implementing the proposed action.
- **Environmental Impact Statement:** Requires agencies to issue an environmental impact statement (EIS) regarding a proposed agency action requiring an environmental document that has a reasonably foreseeable significant effort on the environment.
- **Environmental Assessment:** Tasks agencies with preparing environmental assessments (EAs) when a proposed agency action does not include a reasonably foreseeable significant effect on the quality of the human environment or if such significance is uncertain. However, agencies may circumvent the EA if it falls under the agency or certain other agency’s categorical exclusions.

- **Timely and Unified Federal Reviews:**

- **Lead Agency:** Should more than one federal agency be involved in a project, the agencies must determine a lead agency based on (1) the magnitude of the agency's involvement; (2) the project approval authority; (3) the expertise regarding the project's environmental impacts; (4) the duration of the agency's involvement; and (5) the sequence of the agency's involvement. Where appropriate, federal agencies may appoint state, local or tribal agencies as joint lead agencies. The Act directs lead agencies to (1) supervise the preparation of an environmental document; (2) request the participation of cooperating agencies; (3) consider analyses or proposed created by cooperating agencies; (4) develop a schedule regarding the project's environmental reviews, permitting or authorization requirements; (5) notify agencies responsible for issuing reviews, permitting or authorization requirements if the actions are not completed within the established schedule; and (6) meet cooperating agencies that request meetings. Lead agencies are enabled to designate, federal, state, local or tribal agencies with environmental impact jurisdiction as cooperating agencies. Any federal, state, local or tribal agency affected by a lack of designation as a cooperating agency may submit requests for such designations to the lead agency.
- **Council Designation:** If agencies cannot agree on a lead agency within 45 days, the language tasks the Council on Environmental Quality (CEQ) with overseeing a process to determine a lead agency. Directs the lead and cooperating agencies to evaluate proposals in a single document and allow public comment for notices of intent to prepare an EIS.
- **Page Limits:** Limits each EIS to 150 pages, with the exception for actions of extraordinary complexity, which may not exceed 300 pages. Similarly, EAs are limited to 75 pages.
- **Deadlines:** Lead agencies are additionally tasked with outlining procedures to allow a project sponsor to draft an EA or EIS. The language stipulates that each EIS is due within two years after—and EAs within one year after—the sooner of (1) the date the agency determines the EIS or EA is required; (2) the date the agency notifies the application that the application to establish a right-of-way is complete; or (3) the date the agency issues a notice of intent to prepare the EIS or EA. Should the lead agency determine that established deadlines cannot be met, it may extend the deadline in consultation with the applicant.
- **Petition to Court:** Allows project sponsors to obtain a review of alleged failures by an agency regarding applicable deadlines by filing a written petition. If a court of component jurisdiction finds that an agency failed to act, the court must set a deadline for the agency to act within 90 days from when the order is issued unless a longer timeline is determined to be necessary.
- **Report:** Requires the head of each lead agency to submit a report to Congress detailing each EA and EIS that such agency failed to complete within the established timeline, along with an explanation for such failures. Each report must identify the entities responsible for such assessments or EIS; the dates on which (1) the agency notified the applicant regarding right-of-way for the major federal action; (2) the lead agency began scoping for the major federal action; or (3) the lead agency issued a notice of intent to prepare the EA or EIS; and when such EA or EIS is expected to be completed.
- **Programmatic Environmental Document:** When preparing a programmatic environmental document, allows agencies to utilize analyses included in the programmatic environmental document in subsequent environmental documents within five years and without review of the analyses unless there are substantial new circumstances and after five years with agency review.
- **Adoption of Categorical Exclusions:** Allows agencies to adopt a categorical exclusion listed in other agencies' NEPA procedures. The agency must identify the categorical exclusion listed in another agency's NEPA procedures that is relevant to the proposed action; consult with the agency that established the categorical

exclusion to ensure the adoption is appropriate; identify the use of the categorical exclusion to the public; and document the adoption of the categorical exclusion.

- **Permitting Portal Study:** Appropriates \$500,000 to CEQ to conduct a study and submit a report to Congress within one year of enactment on the potential for online and digital technologies to expedite permitting reviews.

Sec. 322: Interregional Transfer Capability Determination Study

- Requires the North American Electric Reliability Corporation (NERC) to, in coordination with regional operators, draft a study regarding total transfer capability between neighboring transmission planning regions and recommendations to bolster reliability and meet and maintain total transfer capability. The study must be submitted to the Federal Energy Regulatory Commission (FERC) within 18 months of enactment, and it must be published in the *Federal Register* to solicit public comments. Within one year after the public comment period has concluded, FERC must submit a report outlining its conclusions.

Sec. 323: Permitting Streamlining for Energy Storage

- Amends section 41001(6)(A) of the FAST Act to add energy storage to the list of covered projects eligible for streamlined permitting.

Sec. 324: Expediting Completion of the Mountain Valley Pipeline

- **Congressional Findings/Declaration:** Mandates the expedited completion of the MVP. The legislation declares that the completion of the project is in the national interest and cites that it will serve demonstrated natural gas demand, increase the reliability and availability of natural gas, increase markets for natural gas will reduce carbon emissions and facilitate the energy transition.
- **Approval, Ratification and Maintenance of Existing Authorizations:** Ratifies and approves all authorizations, permits, verifications, extensions and any other approvals or orders necessary for the construction and initial operation of the pipeline and directs all applicable agencies and commissions to continue to maintain such authorizations and permits.
- **Expedited Approval:** The bill directs the Secretary of the Army to issue all necessary permits and verifications for the project's construction within 21 days of enactment.
- **Judicial Review:** Provides that no court has jurisdiction to review any actions taken by the Secretaries of the Army, Agriculture and the Interior, FERC, or any state agencies to grant an authorization, permit or any other approval necessary for the construction and initial operation of the MVP.

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