

US Congress Reforms Environmental Permitting

by: Kenneth J. Warren / *The Legal Intelligencer*

On June 1, Congress enacted the Fiscal Responsibility Act of 2023 (FRA). A casual observer would not expect fiscal legislation temporarily suspending the debt limit and restricting future discretionary spending to address environmental law. Yet 27 pages of a 99-page bill are devoted to environmental and associated issues.

Just as the Inflation Reduction Act included many climate-related provisions that were unrelated to inflation reduction, the FRA addressed environmental permitting requirements that are unrelated to the debt ceiling or governmental spending. These changes were possible due to an unusual alliance of pro-fossil interests seeking to expedite approvals of oil and gas pipelines and energy facilities, and renewable energy advocates concerned about delays caused by review of energy projects they favor. As with many political compromises, however, the result did not leave everyone satisfied nor overcome many obstacles slowing deployment of renewable energy.

Title III of the FRA is broadly captioned permitting reform. Its provisions, however, primarily target the environmental review process specified in the National Environmental Policy Act (NEPA), a groundbreaking federal environmental statute enacted in 1969 to require agencies planning major federal actions significantly affecting the quality of the human environment to consider the environmental impacts of their actions. NEPA requires federal agencies planning projects having significant environmental effects to prepare an environmental impact statement (EIS). Major federal actions include projects requiring permits or approvals from a federal agency and projects implemented by the federal agency. If the agency anticipates that the environmental effects will not be significant or is unsure of the effects, it may conduct an environmental assessment (EA). The EA results either in a finding of no significant impact (FONSI) or a determination that an EIS must be conducted.

Preparing an EIS in compliance with the Council of Environmental Quality's (CEQ's) NEPA regulations can be arduous and time-consuming. NEPA regulations require agencies to examine the direct, indirect, and cumulative environmental impacts that may result from their proposed projects. They must also examine environmental effects of reasonable alternatives to their projects. For large or

complex projects, the NEPA process often takes many years to complete, and the results may then be subject to judicial challenge.

Streamlining NEPA

To shorten the review process, the FRA amends NEPA to include time-saving provisions, some of which are already contained in the CEQ regulations. An agency must perform an EIS only when the agency action has a “reasonably foreseeable significant effect on the quality of the human environment.” The agency need consider only “a reasonable range of alternatives” to the proposed agency action that are “technically and economically feasible, and meet the purpose and need of the proposal.”

Where multiple federal agencies are involved with a project, the FRA instructs them to designate a lead agency with responsibility to supervise preparation of the EIS or EA and ensure the scientific integrity of the analysis and reliability of the data utilized. The federal agencies may appoint state, tribal or local agencies as joint lead agencies sharing a supervisory role over the NEPA process. The lead agency may also designate other federal, state, tribal or local agencies with jurisdiction or special expertise as cooperating agencies, presenting opportunities for time-saving intergovernmental coordination.

The FRA expands two existing tools to reduce the burden of the NEPA process. First, a federal agency may adopt categorical exclusions for each category of actions that it has determined normally does not affect the quality of the human environment. Absent extraordinary circumstances, an agency is not required to perform an EA or EIS for a proposed project that is categorically exempt. Although each agency develops its own list of categorical exclusions, the FRA allows the agency to adopt the categorical exclusions listed in another agency’s NEPA procedures.

Second, a federal agency may consolidate its review of a policy, program, plan or group of related activities by conducting a programmatic assessment. The agency may rely upon the results of a programmatic assessment in a subsequent environmental document for a particular project. The business roundtable has recommended selecting and performing programmatic assessments of zones for constructing renewable energy projects.

The FRA also specifies time-limits for completing the environmental review and limits the maximum length of the EIS report. The lead agency must establish a schedule to ensure that the EIS is completed within two years, or the EA is completed within one year, subject to limited permissible extensions of time. If the time limitations are not met, courts may mandate completion within 90 days.

An EIS report, not including citations and appendices, cannot ordinarily exceed 150 pages, or 300 pages for a proposed agency action of extraordinary complexity. Environmental assessments are limited to 75 pages, plus citations and appendices. In addition, a private sponsor of a project subject to NEPA may prepare the EIS or EA, subject to the lead agency's independent evaluation.

Recognizing the potential for technological efficiencies, Congress appropriated \$500,000 to CEQ to study use of online and digital technologies to expedite environmental reviews and improve public accessibility and transparency. Electronic submissions and cloud-based tools for enhancing interagency coordination will be explored.

The Mountain Valley Pipeline

The Mountain Valley Pipeline is designed to transport natural gas from West Virginia to serve markets in the Northeast, Mid-Atlantic, and Southeast regions. The FRA grants all authorizations, permits and other approvals required by federal law that are necessary for its construction and initial operation. The FRA also deprives all courts of jurisdiction to review any agency action granting approvals to the construction and initial operation of the project at full capacity. The U.S. Court of Appeals for the District of Columbia Circuit is granted original and exclusive jurisdiction over any claim challenging the validity of this provision or alleging that an action is beyond the scope of authority conferred by this provision.

The Limited Effect of Permitting Reform

The FRA does not remove the major obstacles to deployment of renewable energy, such as inadequate electric transmission lines, local zoning and land use restrictions. Instead, it addresses electric transmission only by instructing the Electric Reliability Organization in consultation with utilities to conduct a study of total transfer capability between transmission planning regions. After reviewing the study and seeking public comment, the Federal Energy Regulatory Commission will submit a report and recommendations to Congress. The FRA also streamlines

permits for energy storage by including energy storage in the Fixing America's Surface Transportation Act (FAST), which expedites review of large infrastructure projects. The FRA likewise does not resolve differences between the Trump administration and Biden administration regulations regarding the scope of NEPA review. Cumulative and indirect effects of a proposed agency action, factors largely eliminated from review in the Trump administration's NEPA rules but restored by the Biden administration in its Phase I NEPA rule, are unmentioned. Likewise, whether climate change and environmental justice considerations are part of a NEPA review is likewise unaddressed in the FRA. Current NEPA guidance from CEQ and the anticipated Phase 2 NEPA rule from the Biden administration require consideration of these factors. Although CEQ does not envision significant delay in the NEPA review process resulting from inclusion of climate change and environmental justice issues, avoiding delay will depend on the willingness of an agency or project sponsor early in the planning process to quantify anticipated greenhouse gas emissions and to consult with the community.

NEPA reform provisions of the FRA will assist the Biden administration's efforts to speed the implementation of renewable energy projects and infrastructure projects. But unless Congress takes additional, forceful steps to reduce or eliminate remaining obstacles, the pace of these projects will be much slower than the administration desires and the nation needs. The approval of the Mountain Valley Pipeline demonstrates the ability of Congress to eliminate barriers encountered by a fossil fuel project. The build out of renewable energy infrastructure may require the creative use of similar methods while preserving essential environmental reviews and community involvement.

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