



MEMORANDUM

To: GuidePost Clients
From: GuidePost Strategies
RE: The Energy Independence and Security Act of 2022
Date: September 22, 2022

OVERVIEW

On Wednesday, September 21, Senator Joe Manchin (D-WV) released the [full legislative text](#) of his long-awaited permitting reform plan, entitled the “Energy Independence and Security Act of 2022.” The Senate Energy and Natural Resources Committee released a summary of the plan, which is available [here](#).

The Energy Independence and Security Act reforms the current permitting regime by (among other things):

- Setting a two-year target for National Environmental Policy Act (NEPA) reviews for major energy and natural resource projects which require a full environmental impact statement and reviews from more than one federal agency and a one-year target for projects which require an environmental assessment.
- Designating a lead agency to coordinate project reviews and expanding the use of shared inter-agency environmental review documents and concurrent agency reviews.
- Requiring the President to designate and prioritize reviews for a list of strategically important energy and mineral projects.
- Amending the FAST-41 permitting law related to energy and natural resource projects.
- Specifying procedures for state certification of projects required to comply with water quality standards.
- Clarifying that the Federal Energy Regulatory Commission (FERC) has jurisdiction to regulate interstate hydrogen infrastructure under the Natural Gas Act.
- Requiring federal agencies to issue all approval and permits necessary for construction of the Mountain Valley Pipeline.

We have provided a full legislative summary of the bill below.

LEGISLATIVE SUMMARY

Subtitle A: Accelerating Agency Reviews

Authorizations and Reviews of Energy and Natural Resources Projects

Coordination of Required Reviews and Environmental Documents. Section 2, subsection (e) requires the lead agency¹ and each participating agency² for a project³ to apply the requirements of section 41005 of the FAST Act⁴ to the project.

Additionally, this subsection requires (“to the maximum extent practicable and consistent with Federal law, to achieve compliance with NEPA, and all Federal authorizations and reviews that are necessary for a project”) a project to rely on a single environmental document for each type of environmental document prepared under NEPA under the leadership of the lead agency. *This requirement may be waived* by a lead agency with respect to a project *if* -

- The project sponsor⁵ requests that agencies issue separate environmental documents;
- The obligations of a cooperating agency or participating agency under NEPA have already been satisfied with respect to the project; or
- The lead agency determines that reliance on a single environmental document would not facilitate timely completion of the environmental review process or authorization process for the project.

Modifications to Final Environmental Impact Statements. Section 2, subsection (f) authorizes the lead agency to modify a draft environmental impact statement (as required to be prepared under NEPA) in the form of attached errata sheets rather than rewriting the draft environmental impact statement provided that:

- The comments that the modification addresses are minor.

¹ The bill defines “lead agency” as “the Federal agency preparing, or assuming primary responsibility for, the authorization or review of the project; and if applicable, any State, local, or Tribal government entity serving as a joint lead agency for the project.”

² The bill defines “participating agency” as “an agency participating in an environmental review or authorization for a project.”

³ The bill defines “project” as “a project (1) proposed for the construction of infrastructure: (a) to produce, generate, store, or transport energy; (b) to capture, remove, transport, or store carbon dioxide; or (c) to mine, extract, beneficiate, or process minerals; and (2) that, if implemented as proposed by the project sponsor, would be subject to the requirements that: (a) an environmental document be prepared; and (b) the applicable agency issue an authorization of the activity.”

⁴ The requirements of section 41005 address interagency coordination and the use of concurrent reviews, adoption and use of existing documents, and development and analysis of alternatives.

⁵ The bill defines “project sponsor” as “an entity, including any private, public, or public-private entity, seeking an authorization for a project.”

- The modifications are minor factual corrections or an explanation of the reasons why the comments do not warrant additional response from the lead agency.
- The errata sheets -
 - Cite the sources, authorities, and reasons that support the position of the lead agency; and
 - If appropriate, indicate the circumstances that would trigger reappraisal or further response by the lead agency.

Coordination and Scheduling. Section 2, subsection (g) requires the lead agency for a project to - not later than 90 days after the date of publication of a notice of intent to prepare an environmental impact statement, or the initiation of an environmental assessment, as applicable - establish a plan for coordinating public and agency participation in, and comment regarding, the environmental review process and authorization decisions for the project or applicable category of projects. This coordination plan may be incorporated into a memorandum of understanding with the project sponsor, lead agency, and any other appropriate entity.

As part of a coordination plan for a project, this subsection requires the lead agency to establish and maintain a schedule for completion of the environmental review process and authorization decisions for the project. The bill sets forth various requirements and factors for consideration for the schedule. Schedules must be:

- Established not later than 90 days after publication of a notice of intent to prepare an environmental impact statement, or the initiation of an environmental assessment.
- Set consistent with completing:
 - The environmental review process within two years for projects that require an environmental impact statement or within one year for projects that require environmental assessments; and
 - Any other outstanding authorization required for project construction within 180 days of completing the environmental review process.

A lead agency generally may lengthen or shorten a schedule established for a covered project for good cause.

In the case of a major project⁶, this subsection requires the lead agency to develop (“with the concurrence of each participating agency for the major project and in consultation with the project sponsor”) a schedule for the major project consistent with completing the environmental review process and any outstanding authorizations for project construction. If a participating Federal agency fails to meet a schedule or deadline, the participating Federal agency will be required to notify the Office of Management and Budget and the Secretary concerned⁷ regarding that failure.

⁶ The bill defines “major project” as “a project (1) for which multiple authorizations, reviews, or studies are required under a Federal law other than NEPA; and (2) with respect to which the head of the lead agency has determined that: (a) an environmental impact statement is required; or (b) an environmental assessment is required, and the project sponsor requests that the project be treated as a major project.”

⁷ The bill defines “Secretary concerned” as any of the following, as appropriate: (1) the Secretary of Agriculture, with respect to the Forest Services; (2) the Secretary of Energy; (3) the Secretary of the

The lead agency is also required to establish certain deadlines for comment during the environmental review process for a project, as specified in the bill.

Issue Identification and Resolution. Section 2, subsection (h) authorizes a participating agency, project sponsor, or the Governor of a State in which a project is located to request an issue resolution meeting to be conducted by the lead agency to resolve issues relating to a project that could:

- Delay final decision-making for any authorization for a project;
- Significantly delay completion of the environmental review process for a project; or
- Result in the denial of any authorization required for the project under applicable law.

The bill *requires* the lead agency to convene an issue resolution meeting not later than 30 days after the date of receipt of a request, but *authorizes* a lead agency to convene an issue resolution meeting at any time to resolve issues relating to an authorization or environmental review process for a project *without the request of a participating agency, project sponsor, or the governor of a State in which the project is located*. If issue resolution is not achieved by 30 days after the date of the initial meeting, the bill requires that the issue be elevated to the head of the lead agency.

If issue resolution for a *major project* is not achieved by 30 days after the date on which a leadership issue resolution meeting is convened, the bill requires that the head of the lead agency refer the matter to the Council on Environmental Quality (CEQ). If CEQ fails to resolve the issue, the bill requires that the issue be referred *directly to the President*.

Enhanced Technical Assistance from the Lead Agency. Section 2, subsection (i) authorizes a project sponsor, participating agency, or governor of a State in which a project is located to request that the lead federal agency provide technical assistance that could delay project reviews, including through additional staffing, enhanced coordination, and specialized assistance.

Judicial Review and Savings Clause. Section 2, subsection (j) provides that nothing in this subsection supersedes, amends, or modifies Federal environmental laws or agencies' obligations under those laws; nothing preempts public comment procedures; and nothing preempts any other provision of law or powers, jurisdictions, responsibilities, or authorities of Federal, State, or local government agencies, Indian Tribes, or project sponsors under the laws; or affects judicial reviewability of federal agency actions, except as provided under the next subsection (subsection k).

Efficiency of Claims. Section 2, subsection (k) sets standards and procedures for judicial review of projects, requiring that:

- A claim arising under Federal law seeking judicial review of an authorization issued or denied by a Federal agency for a project under this section be filed no later than 150 days after the authorization is final or the date of publication of a notice that the environmental document is final in accordance with NEPA (whichever is later), unless Federal law prescribes a shorter time frame.
- If a court vacates or remands a final federal agency action for a project not covered by this section, the court set a reasonable schedule and deadline, not to exceed 180 days, for the agency to act, unless a longer time period is necessary to comply with applicable law. Additionally, Federal agencies are required to take such actions as may be necessary to

Interior; (4) FERC; (5) the Secretary of the Army, with respect to the Corps of Engineers; and (6) the Secretary of Transportation, with respect to the Maritime Administration.

expeditiously address remanded actions in accordance with the schedule and deadline set by the court.

- Federal district courts and courts of appeals randomly assign judges for cases seeking judicial review of any authorization issued by a Federal agency for a project covered by this section to avoid the appearance of favoritism or bias.

Improving Transparency in Project Status. Section 2, subsection (l) requires the lead agency on a project to provide energy and mineral project information for the Federal Permitting Improvement Steering Council's (FPISC) public permitting dashboard to include the status, schedule, and progress of each major project under this section with respect to compliance with the applicable requirements of NEPA, any authorization, and any other Indian Tribe, State, or local agency authorization required for the project, including updating the dashboard to reflect changes resulting from litigation.

Additionally, participating agencies are required to provide relevant information to the lead agency to comply with this subsection.

Accountability and Reporting for Major Projects. Section 2, subsection (m) requires each Secretary concerned to establish a performance accountability system and publish annually a report describing performance for each major project authorization and review conducted during the preceding year, including compliance with the schedules required under this section.

Programmatic Compliance. Section 2, subsection (n) requires the Secretary concern to allow for the use of programmatic approaches to conduct environmental reviews that eliminate repetitive discussions of the same issue, focus on the issues ripe for analysis at each level of review and are consistent with NEPA and other applicable laws. Additionally, the lead agency must ensure that transparency, accuracy, timeliness, coordination, and public comment requirements are set for these approaches.

Development of Categorical Exclusions. Section 2, subsection (o) requires that within 180 days of enactment, and at least every four years thereafter, each Secretary concerned, in consultation with the Chair of CEQ, to consult with other departments and agencies⁸ to identify existing NEPA categorical exclusions available to other agencies that, if applied to energy projects, would accelerate development of those projects. These departments would use existing NEPA implementing regulations to consider identified categorical exclusions and conduct a rulemaking process to adopt any new categorical exclusions.

Additions to Categorical Exclusions. Section 2, subsection (p) requires that within 180 days of enactment and again within five years, each Secretary concerned publish a report on existing NEPA categorical exclusions used by their department/agency and solicit input from project sponsors for additional categorical exclusions. Within 120 days of the solicitation, the Secretary concerned is required to publish a notice of proposed rulemaking to propose the adoption of any new categorical exclusions that meet the applicable criteria under NEPA and other regulations.

Prioritizing Energy Projects of Strategic National Importance

⁸ The agencies referred to are the Department of Agriculture; the Department of the Army; the Department of Commerce; the Department of Defense; the Department of Energy; the Department of the Interior; FERC; and any other Federal agency that has participated in an environmental review process for a project, as determined by the Chair of CEQ.

Designation of Projects. Section 3, subsection (b) requires the President to designate, within 90 days of enactment, *25 energy projects of strategic national importance for priority Federal review*, in consultation with the Secretary of Energy, Secretary of the Interior, Administration of the Environmental Protection Agency (EPA), and FERC.

Every 180 days thereafter for ten years, the President will be required to publish an updated list of at least 25 designated projects, which shall include each previously designated project until a final decision has been issued for each authorization for the project or the project sponsor withdraws its request authorization.

This subsection requires that the list of designated projects include a minimum number of critical minerals, fossil fuel (including biofuel), non-fossil fuel (including storage), electric transmission, carbon capture, and hydrogen projects, *unless the President does not receive a sufficient number of applications that meet the requirements for designated projects*. Specifically, subsection (b) requires that during the seven-year period beginning on the date of the President's publication of the list, *at least*:

- Four projects be projects for the mining, extraction, beneficiation, or processing of critical minerals;
- Six projects be for generating electricity or storing energy without the use of fossil fuels, or to manufacture clean energy equipment;
- Five be projects must be for production, processing, transport, or storage of fossil fuel products, or biofuels, including projects to export or import those products from certain nations⁹;
- Two be electric transmission projects or projects using grid-enhancing technology;
- Two be projects to capture, transport, or store carbon dioxide, which may include the utilization of captured or displaced carbon dioxide emissions; and
- One be a project to produce, transport, or store clean hydrogen, including projects to export or import those products from certain nations.

Selection and Priority Requirements. Section 3, subsection (c) establishes requirements for selecting designated projects of strategic national importance from applications submitted to federal permitting agencies. To qualify for designation, selected projects must be likely to require:

- An environmental assessment or impact statement under NEPA;
- Review by more than two federal or State agencies;
- Total project cost of more than \$250 million; and
- Sufficient financial support from the project sponsor to ensure completion.

In selecting designated projects, subsection (c) specifies that the President shall prioritize projects that:

⁹ Section 3, subsection (c)(3)(A) lists one of the criteria for project prioritization as significantly advancing the objective of increasing energy trade between the United States and (1) nations that are signatories to free trade agreements with the U.S. that cover the trade of energy products; (2) members of NATO; (3) members of the OECD; (4) nations with a transmission system operator that is included in the European Network of Transmission System Operators for Electricity, including as an observer member; or (5) any other country designated as an ally or partner nation by the President for purposes of this section.

- Reduce energy prices;
- Reduce greenhouse gas emissions;
- Improve electric reliability;
- Advance emerging technologies;
- Improve domestic energy supply chains;
- Increase energy trade with U.S. allies and trading partners;
- Reduce U.S. reliance on supply chains of foreign entities of concern;
- Minimize impacts to communities; and
- Create jobs that pay prevailing wage rates.

Reviews of Designated Projects. Section 3, subsection (d) requires the President to direct federal agencies, through executive order, to prioritize the completion of environmental reviews and authorizations for designated projects, including reviews or authorizations remanded or vacated by court. The subsection also requires that the President seek to complete environmental impact statements for designated projects within two years, environmental assessments within one year, and all required authorizations for construction within 180 days of completion of the environmental review.

NEPA. Section 3, subsection (e) clarifies that the selection of projects for designation is an administrative action that does not require review under NEPA.

Report. Section 3, subsection (f) requires that the President submit a quarterly report to Congress on the status of reviews for designated projects.

Funding. Section 3, subsection (g) directs that \$250 million in funding previously appropriated in the Inflation Reduction Act to the FPISC Environmental Review Improvement Fund be used to improve and accelerate reviews for designated projects. Additionally, subsection (g) prohibits amounts over \$1,500,000 from being allocated to support the review of a single designated project within a given fiscal year.

The Federal Permitting Improvement Steering Council and Improving Reviews

Covered Projects. Section 4, subsection (a) includes critical mineral mining and processing projects in the statutory list of projects eligible for the FPISC permitting process transparency and streamlining programs. The subsection also further reduces the FPISC eligibility threshold for energy projects from \$200 million minimum project cost to \$50 million.

Transparency. Section 4, subsection (b) requires that the Department of Interior offshore 5-year oil and gas leasing program be tracked as a covered project by FPISC.

Subtitle B: Modernizing Permitting Laws

State Certification Under the Clean Water Act

This section amends Section 401 of the Clean Water Act to clarify that the scope of review for certification requests under this section is limited to federal, State, and Tribal water quality requirements affected by the activity being federally licensed or permitting. Additionally, this section:

- Clarifies that certain certifying agencies must take one of four final actions within one year of receiving a certification request: grant; grant with conditions; deny; or waive certification.

- Allows applicants to request pre-filing meetings with certifying agencies to exchange information concerning a forthcoming certification request;
- Requires State and Tribal certifying agencies to publish clear requirements for water quality certification applications, or else default to federal requirements;
- Requires applicants to include in certification requests relevant information on potential water quality impacts;
- Requires certifying agencies to notify applicants of the timeline for review, not to exceed one year, within 35 days of receiving a certification request;
- Prohibits certifying agencies from requesting project applications withdraw applications to pause or restart the certification clock; and
- Requires the Administrator of the EPA to notify other States and Tribes of potential water quality impacts from a project being certified by a different State or Tribe.

Transmission

Electricity Supply. Section 2, subsection (a) amends Section 202(a) of the Federal Power Act (FPA) to clarify that FERC has the authority to promote and encourage the construction or modification of electricity transmission facilities within and between regions of the country to ensure an abundant supply of electric energy domestically.

Ordering Construction of Additional Facilities. Section 2, subsection (b) amends Section 202(b) of the FPA to allow FERC, upon application by a state or utility, to direct the construction of transmission determined to be in the national interest.

Designation of National Interest Facilities. Section 2, subsection (c) amends Section 216 of the FPA to authorize the Secretary of Energy, on application by FERC, to designate an electric transmission facility to be necessary in the national interest, conditioned upon completion of any required environmental review by the appropriate lead agency, as applicable. This subsection also requires the Secretary to make the determination after opportunity for a hearing and after consideration of relevant factors.

Construction Permit. Section 2, subsection (d) allows FERC, after notice and hearing opportunity, to issue a construction permit for a project conditionally determined by the Secretary to be in the national interest if FERC also finds the project satisfies a list of relevant considerations.

Rights-of-Way. Section 2, subsection (e) allows eminent domain to be exercised on State land.

Cost Allocation. Section 2, subsection (f) directs FERC to allocate the costs of projects the Commission determines to meet certain criteria under this subsection in accordance with FERC's cost allocation principles and roughly commensurate with the estimated project benefits.

Coordination of Federal Authorizations for Transmission Facilities. Section 2, subsection (g) clarifies that FERC is the lead agency for environmental reviews under this section except where approvals are issued by the Secretary of Interior.

Transmission Infrastructure Investment. Section 2, subsection (h) amends Section 219 of the FPA to authorize FERC to approve for cost recovery payments to jurisdictions impacted by a project under this section.

Definition of Natural Gas Under the Natural Gas Act

Section 3 clarifies that FERC has jurisdiction to regulate interstate hydrogen infrastructure under the National Gas Act in addition to interstate natural gas infrastructure currently regulated under the Natural Gas Act.

Authorization of the Mountain Valley Pipeline

Section 4 requires federal agencies to issue all approval and permits necessary for the construction and timely completion of the Mountain Valley Pipeline.