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Fiscal Responsibility Act of 2023: Implications for the Energy Sector

The Fiscal Responsibility Act of 2023 Streamlines Environmental Review Under the National Environmental Policy Act and Provides for Accelerated Permitting of Energy Storage Projects

SUMMARY

On June 3, 2023, President Biden signed the Fiscal Responsibility Act (“FRA”) into law. The FRA suspends the \$31.4 trillion debt ceiling until January 1, 2025, and provides, *inter alia*, for limits on discretionary spending over the next two years. The legislation also amends the procedures for environmental review under the National Environmental Policy Act of 1970 (“NEPA”) and allows for energy storage projects to be covered under Title 41 of the Fixing America’s Surface Transportation Act of 2015 (“FAST-41”) to improve the speed and efficiency of federal agency review of projects that are subject to NEPA review and eligible for FAST-41 permitting support.

DISCUSSION

A. AMENDMENTS TO NEPA

NEPA, which became law in 1970, requires federal agencies to evaluate the environmental effects of their proposed actions prior to approval. NEPA covers a wide range of agency actions including (i) making decisions on permit applications, (ii) adopting federal land management actions and (iii) constructing highways and other publicly owned facilities.¹ Federal agencies also provide opportunities for public review and comment on those evaluations. The current NEPA review process is generally perceived as resulting in delays in the permitting necessary to support expeditious energy project development, particularly the extent and scope of development required to meet green energy goals.

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The FRA streamlines NEPA by consolidating environmental review under a lead agency, summarized in a single document, with time limits applied to the review process. Much of the FRA, as it pertains to NEPA, codifies existing practice. Significant changes include (1) page and time limits for environmental review documents and (2) a reform of the substantive standards of NEPA review.

NEPA requires a review of the environmental effects of a broad range of federal agency actions affecting the environment including financing, credit support, land policies and permitting for all projects with private sponsors. Given NEPA's broad reach and effect on other federal programs, such as the Inflation Reduction Act, project sponsors should be aware of the following changes:

1. Streamlining the Process for NEPA Review

NEPA follows a hierarchy of environmental review: (1) Categorical Exclusions,² which are exclusions for projects that normally do not have a significant effect on the environment; (2) Environmental Assessments ("EA"),³ which determine whether or not a federal action has the potential to cause significant environmental effects and (3) Environmental Impact Statements ("EIS"),⁴ which are for projects determined to significantly affect the quality of the human environment.

The FRA requires that a "lead agency" be appointed when multiple agencies have jurisdiction to initiate NEPA review.⁵ Although lead agencies have long existed prior to the FRA, the FRA allows lead agencies to have explicit supervisory authority over participating agencies.⁶ This change makes the choice of a lead agency crucial for the NEPA review process. The lead agency designation will be determined by the extent of an agency's involvement and relative expertise with respect to the project or action.⁷ The lead agency's role will be to coordinate input from all participating agencies and to supervise the preparation of a single environmental review document.⁸ Further, the FRA now explicitly permits agencies to prescribe procedures allowing project sponsors to prepare an EA or an EIS under agency supervision and guidance.⁹

An EIS is required for "major Federal actions" that significantly affect the quality of the human environment. The FRA clarifies and limits agency actions subject to NEPA review by excluding certain actions from the scope of "major Federal actions." For example, the FRA excludes from the scope of a "major Federal action" (1) a non-federal action that receives minimal federal funding and (2) a project funded by a federal loan over which a federal agency does not exercise sufficient control and responsibility.¹⁰ Any extraterritorial action, in which the proposed project has no impact at all on the United States, is also excluded from NEPA review.¹¹

The FRA also limits the length of environmental review documents. The Council of Environmental Quality ("CEQ") analyzed the average length of EISs over the period 2013–2018 and found that the average length of final EISs was 661 pages.¹² Under the FRA, an EIS may be no longer than 150 pages (excluding citations and appendices), unless it qualifies for an "extraordinary complexity" exception—in which case it may be up to 300 pages.¹³ An EA may not be longer than 75 pages (excluding citations and appendices).¹⁴ Further,

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EAs and EISs must include a statement of purpose that briefly summarizes the underlying purpose and need of the agency action.¹⁵

2. Accelerating the Timeline for NEPA Review

The FRA imposes time limits for completing environmental reviews. The CEQ has reported that in the period 2010–2018, the average EIS completion time was 4.5 years from the notice of intent stage to the publication of a record of decision.¹⁶ An EIS must now be produced within two years and an EA within one year of the earlier of the date (1) a review is statutorily mandated, (2) the lead agency determines an environmental review to be required and (3) the lead agency notifies the applicant that its application to establish a right-of-way is complete.¹⁷

If an agency fails to meet the timelines set forth in the FRA, the project sponsor may petition for a court order that sets a schedule and deadline for the agency to act as soon as practicable, subject to a maximum limit of 90 days after the date of the court order.¹⁸

3. Reforming Substantive Review Standards Under NEPA

The FRA narrows the substantive basis for NEPA reviews by raising the threshold required for environmental review of certain federal agency actions. In the past, NEPA review required agencies to consider the “environmental impact of the proposed action.” Going forward, the FRA requires agencies (1) to address the only “reasonably foreseeable environmental effects of the proposed action” and (2) to review the environmental impacts of not adopting the proposed agency action, while limiting review to a “reasonable range of alternatives to the proposed agency action”¹⁹

4. E-NEPA Pilot

The FRA requires the CEQ to conduct a study on developing a NEPA permitting portal within one year to address delays in reviews and to improve public accessibility and transparency. The portal would be a centralized repository for data designed to allow for real time agency review, with responses accessible on mobile devices.²⁰

B. AMENDMENTS TO FAST-41

The FRA provides a framework for the federal permitting process that can accelerate the permitting timetable for FAST-41 covered projects. The FRA amends the FAST-41 Act by adding “energy storage projects” to the eighteen existing categories²¹ of eligible FAST-41 projects.²² As a result, energy storage projects are now eligible for FAST-41 expedited permitting.

Generally, FAST-41 is a voluntary process that supports sponsors in determining the full scope of required federal permitting by establishing and administering a comprehensive program under which project sponsors can seek assistance in obtaining coordinated oversight of the federal review process. States can voluntarily enroll in FAST-41 and adopt its requirements. The FAST-41 Act is administered by the Federal

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Permitting Improvement Steering Council, which interfaces with other agencies and publicly posts a federal permitting schedule that requires agencies to maintain timetables or consult with project sponsors on any proposed timetable changes. Permitting timetables may only be modified in compliance with FAST-41's consultation and public disclosure requirements to ensure accountability.

IMPLICATIONS

Sponsors should evaluate the status of their projects that are currently awaiting receipt of environmental or energy permits from federal agencies in light of these reforms that streamline the process of NEPA review. In particular, sponsors should weigh the implications of receiving federal funding for projects, given the new FRA-related exemptions from NEPA review for (1) non-federal actions that receive minimal federal funding and (2) projects funded by a federal loan over which a federal agency does not exercise sufficient control and responsibility.

Further, sponsors with proposed and pending projects in the energy storage sector—including, but not limited to, natural gas, hydrogen and batteries—should determine whether they qualify for the expedited review available under the FAST-41 Act. Overall, it remains important for sponsors to keep up-to-date with regulatory developments in the energy sector, particularly with the passage of the Inflation Reduction Act last year.

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ENDNOTES

- 1 “Using the NEPA process, agencies evaluate the environmental and related social and economic effects of their proposed actions. Agencies also provide opportunities for public review and comment on those evaluations.” See What Is the National Environmental Policy Act?, Environmental Protection Agency, *available at*: <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited June 4, 2023).
- 2 A federal action may be “categorically excluded” from a detailed environmental analysis when the federal action normally does not have a significant effect on the human environment. See National Environmental Policy Act Review Process, Environmental Protection Agency, *available at*: <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited June 4, 2023).
- 3 Each federal agency has adopted its own NEPA procedures for the preparation of EAs. Under the FRA, “an agency shall prepare an Environmental Assessment with respect to a proposed agency action that does not have a reasonably foreseeable significant effect on the quality of the human environment, or if the significance of the effect is unknown” See National Environmental Policy Act Review Process, Environmental Protection Agency, *available at*: <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited June 4, 2023).
- 4 Under the FRA, “an agency shall issue an environmental impact statement with respect to a proposed agency action requiring an environmental document that has a reasonably foreseeable significant effect on the quality of the human environment.” The regulatory requirements for an EIS are more detailed and rigorous than the requirements for an EA. See National Environmental Policy Act Review Process, Environmental Protection Agency, *available at*: <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited June 4, 2023).
- 5 NEPA § 107(a)(1)(A).
- 6 *Id.*
- 7 *Id.*
- 8 NEPA § 107(a)(2).
- 9 NEPA § 107(f).
- 10 NEPA § 111(10)(B)(i)(I), NEPA § 111(10)(B)(iii).
- 11 NEPA § 111(10)(B)(vi).
- 12 See Length of Environmental Impact Statements (2012-2018), Council on Environmental Quality *available at*: https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Report_2020-6-12.pdf.
- 13 NEPA § 107(e)(1).
- 14 NEPA § 107(e)(2).
- 15 NEPA § 107(d).
- 16 See Environmental Impact Statement Timelines (2010-2018), Council on Environmental Quality, *available at*: https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.
- 17 NEPA § 107(g)(1)(A).
- 18 NEPA § 107(g)(3).
- 19 NEPA § 102(C).
- 20 NEPA § 110(a).

ENDNOTES (CONTINUED)

- ²¹ FAST-41 Fact Sheet https://www.permits.performance.gov/sites/permits.dot.gov/files/2022-09/FPISC_090922.pdf
- ²² FAST Act § 41001(6)(A).

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