



Insight

Permitting Reforms in the Fiscal Responsibility Act of 2023

DAN GOLDBECK | MAY 31, 2023

EXECUTIVE SUMMARY

- While the core aspects of the Fiscal Responsibility Act of 2023 are to extend the debt limit and adjust certain fiscal policies, the legislation’s provisions on permitting reforms are likely its most notable non-fiscal policy items.
- Given the constraints of the cross-partisan negotiation, the permitting policies included were far more restrained than previously expected, but those that did make it into the final bill provide some meaningful updates to the environmental review process.
- Beyond implementing some core process-based reforms, the bill also addresses a handful of other ancillary issues with the understanding that bipartisan discussions in the permitting policy area will continue going forward.

INTRODUCTION

This week, Congress is set to take up the [Fiscal Responsibility Act of 2023](#) (FRA), the legislative vehicle of the debt limit agreement between the Biden Administration and House Republican leadership. The core purpose of the bill, of course, is to raise the debt limit for roughly two years in order to avoid the [economic calamity](#) of defaulting on the nation’s debt payments. The American Action Forum (AAF) analyzed the legislation’s full fiscal impacts [here](#). Perhaps the most notable non-fiscal policy aspect of the bill comes in its reforms to certain federal permitting policies. While the FRA’s permitting reforms are relatively limited in scope, they do represent a meaningful first step in updating an often frustratingly arcane process that limits the deployment of federal infrastructure and energy projects.

WHAT’S IN IT?

The bill’s title regarding permitting contains the following sections:

TITLE III—PERMITTING REFORM

Sec. 321. Builder Act.

Sec. 322. Interregional Transfer Capability Determination Study.

Sec. 323. Permitting streamlining for energy storage.

Sec. 324. Expediting completion of the Mountain Valley Pipeline.

The primary section regarding the federal permitting process is Sec. 321, “Builder Act.” This section includes a partial version of the [“Building United States Infrastructure through Limited Delays and Efficient Reviews Act”](#)

(BUILDER Act). That bill, which largely draws inspiration from attempted [administrative reforms](#) under the Trump Administration, includes myriad changes to some of the roadblocks involved in the environmental review process established under the National Environmental Policy Act (NEPA). For instance, as noted in a [2020 report](#) from the Council on Environmental Quality (CEQ), the agency charged with coordinating the government’s NEPA implementation, certain NEPA documentation procedures can take roughly five years on average to complete. The following aspects of the BUILDER Act are included in the FRA:

- Consolidates the review process for multi-agency projects under the auspices of a single “lead agency” that maintains the proceedings in a single document stream to avoid duplicative and extraneous work.
- Establishes a two-year time limit on agency-produced “Environmental Impact Statements” and a one-year limit on “Environmental Assessments.”. Relevant stakeholders can challenge agency non-compliance with these deadlines in court.
- Expands the usage of “categorical exclusions” to exempt certain types of projects that “a Federal agency has determined normally does not significantly affect the quality of the human environment” from aspects of the review process.
- Directs CEQ to set up a “E-NEPA” electronic portal where the public can more easily access documents and data related to the NEPA review process.

WHAT’S NOT IN IT?

Given the FRA’s nature as a legislative deal, both parties have had to make some concessions. The main aspect of the original stand-alone BUILDER Act that did not make it into this bill was its provisions regarding “Judicial Review.” That section of the legislation would have set limits on when and how interested parties could litigate a given project’s NEPA proceedings in court. Beyond the aforementioned delays due to unnecessarily lengthy agency reviews, the “clock” on some projects can run even longer if it faces additional litigation. Limiting the amount of litigation and the potential additional delays therein is largely a Republican policy priority. Its exclusion from the deal likely represents their most notable concession in the negotiation of the FRA’s permitting provisions.

The main Democratic concession appears to be the lack of significant changes on the transmission build-out issue. Early [reporting](#) on the deal suggested that one of Democratic members’ key priorities was the inclusion of language from the “[Building Integrated Grids With Inter-Regional Energy Supply](#)” (BIG WIRES) Act that seeks to expand the national power transmission grid to connect more renewable sources to end-users across state lines. BIG WIRES provisions are absent from the FRA, but [reporting](#) suggests that the transmission issue will remain a significant part of broader, ongoing permitting reform discussions.

MISCELLANEOUS PROVISIONS

While the BUILDER Act provisions discussed above make up the bulk of the FRA’s permitting reform, the legislation also includes the following handful of other items:

- Gives at least nominal credence to the transmission issue by directing the Electrical Reliability Organization to conduct an “Interregional Transfer Capability Determination Study” over the next 18 months that would examine the implications of expanded cross-state transmission capacity.
- Includes “energy storage” projects under the [FAST-41 program](#), a previous law seeking to clarify and expedite the permitting process for certain classes of infrastructure projects.

- Establishes a formal expedited review process for the [Mountain Valley Pipeline](#).

CONCLUSION

Given the high stakes of a potential default, the obvious focus of the Fiscal Responsibility Act was to increase the debt limit. Additionally, the give-and-take of any cross-party deal naturally restrained its scope in any given direction. Nevertheless, the reforms included in the bill would have a measurable impact on some aspects of how agencies review projects under NEPA. One hopes that substantive discussions on this topic will continue and that those conducted under non-crisis circumstances will yield a more robust set of reforms.